OBITER

Published by the Faculty of Law
Nelson Mandela University
Uitgegee deur die Fakulteit Regte
Nelson Mandela Universiteit
Port Elizabeth

Obiter is a peer-reviewed journal and is approved by the Department of Education for SAPSE purposes.

ISSN 1682-5853

O B I T E R

2024 Vol 45 4

O B I T E R
2024 Vol 45 4

Should Human-Rights Treaties Define the International Crime of Forced Marriage?

Julian Rebecca Okeyo
LLB PGCE LLM
Research Assistant, IRPQP, Rhodes University
Makhanda, South Africa
https://orcid.org/0009-0008-7487-9085

Emma Charlene Lubaale
LLB LLM LLD
Research Associate, Faculty of Law
Rhodes University, Makhanda, South Africa
University of Greenwich, School of Law and Criminology, United Kingdom
https://orcid.org/0000-0001-8006-2946

SUMMARY

Forced marriage is an offence not listed as a crime in international criminal law (ICL) statutes. However, various international criminal courts have continued to prosecute individuals for, and convict them of, committing the offence of forced marriage. This raises an unanswered question regarding the principle of legality. This principle is at the centre of criminal justice and critical to the realisation of the accused's right to a fair trial. Article 22 of the Rome Statute embraces the principle of legality by stating that an accused cannot be charged with an act or omission that did not constitute an offence at the time it was committed. Where sexual and gender-based crimes are not proscribed, those accused cannot be charged, which infringes on the rights of women to access justice. Conversely, on account of the principle of legality, if perpetrators are charged and prosecuted when no such crime is proscribed under ICL statutes, the fair-trial rights of the accused are violated as the principle of legality is undermined. It is, however, notable that there are provisions in international human-rights instruments (including article 23(3) of the International Covenant on Civil and Political Rights, and article 16(2) of the Universal Declaration of Human Rights) that prohibit forced marriage. Moreover, in terms of article 21 of the Rome Statute, applicable law before the International Criminal Court (ICC) includes "where appropriate, applicable treaties and the principles and rules of international law". This article assesses whether there is room for recourse to be had to international human-rights law treaties to give meaning to the crime of other inhumane acts for purposes of prosecuting the crime of forced marriage, and what the implications are for the principle of legality.

Keywords: Forced Marriage, Fair Trial, International Criminal Law, International Human Rights Law, Legality

1 INTRODUCTION

Forced marriage has been pervasive in armed conflict, both historically and in present times.[1] As a crime, forced marriage contains three elements: first, force, threat of force or coercion; secondly, a conjugal association; and thirdly, severe suffering, or mental or psychological injury to the victim.[2] It is a particular form of gender-based crime (GBC) that disproportionately affects women and girls.[3] The olden-day Greeks abducted women, turning them into concubines and wives.[4] In modern-day contemporary armed conflicts, rebel soldiers and cadres abduct young girls and women from their communities, turning them into bush wives against their will.[5] Women continue to be denied rights relating to marital choice and sexuality.[6] Despite frequent occurrences of forced marriage in armed conflicts, forced marriage has not been explicitly listed as a crime in the statutes of international criminal tribunals and courts.[7]

It was only after the establishment of the Special Court for Sierra Leone (SCSL)[8] that forced marriage was recognised and prosecuted as a crime against humanity – in the *Prosecutor v Brima, Kamara & Kanu* (*AFRC*)[9] appeals judgment. Later, as a result of the *AFRC* appeals judgment, the SCSL, the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the International Criminal Court (ICC) delivered contrasting judgments, prosecuting forced marriage as a crime against humanity, sexual slavery or

---

1 Krystalli "Deconstructing the 2012 Human Security Report: Examining Narratives on Wartime Sexual Violence" 2014 69(4) *International Journal: Canada's Journal of Global Policy Analysis* 574 584; Gill and Anitha *Forced Marriage: Introducing a Social Justice and Human Rights Perspective* (2011) 35.

2 Jalloh (ed) *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (2014) 211.

3 See Lindsay ("Lysistrata, Women and War: International Law's Treatment of Women in Conflict and Post-Conflict Situations" 2005 12 *Texas Wesleyan Law Review* 345 354–355, 357), who refers to the traditional reasoning that "it is bad for (male) morale to see women getting killed on the battlefield", which "hint[s] at another, more paternalistic justification, which tacitly legitimizes the masculinization of combat – and other military – forces."

4 Homer *The Iliad* (700 to 750 BC) and Higgins *The Iliad and What It Can Still Tell Us About War* (30 January 2010) https://www.theguardian.com/books/2010/jan/30/iliad-war-charlotte-higgins (accessed 2022-10-12).

5 Haenen "The Parameters of Enslavement and the Act of Forced Marriage" 2013 13 *International Criminal Law Review* 895 895.

6 Thiara, Condon and Schröttle (eds) *Violence Against Women and Ethnicity: Commonalities and Differences Across Europe* (2011) 244.

7 *Law on the Establishment of the Extraordinary Chambers* NS/RKM/1004/006 (as amended 27 October 2004); *Statute of the Special Court for Sierra Leone* (*SCSL*) 2178 UNTS 138 UN Doc S/2002/246 (16 January 2002) (SCSL Statute); and UNGA *Rome Statute of the International Criminal Court* (*ICC*) 2187 UNTS 90 (17 July 1998) (last amended 2010) (Rome Statute) art 7.

8 SCSL Statute.

9 SCSL Appeals Chamber Case No SCSL-2004-16-A (22 February 2008) (*AFRC* case) par 199–203.

enslavement crimes.[10] Forced marriage was adjudicated under the Rome Statute (governing the ICC) as an inhumane act under crimes against humanity in *Prosecutor v Dominic Ongwen* (*Ongwen*)[11] and *Prosecutor v Al Hassan Ag Abdoul Ag Mohammed*,[12] and as a sexual-slavery or conjugal-slavery crime in *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*.[13] Apart from the *AFRC* appeals case, forced marriage was also prosecuted by the SCSL in *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (*RUF*)[14] as an inhumane act under crimes against humanity. In both the *AFRC* trial judgment case and *Prosecutor v Charles Ghankay Taylor*,[15] forced marriage was considered a sexual-slavery crime under the SCSL Statute. In the ECCC, forced marriage was prosecuted as an inhumane act that was a crime against humanity in *Prosecutor v Nuon Chea and Khieu Samphan*[16] under the ECCC Statute.[17] However, these contrasting judgments bring to the fore the question of adherence to the principle of legality because forced marriage is not codified under the international criminal law (ICL) statutes, including the ECCC, the SCSL and the Rome Statute establishing the ICC.

When prosecuting an uncodified crime such as forced marriage, the issue arises as to whether international courts and tribunals comply with the principle of legality when they use human-rights instruments to hold individuals criminally responsible for forced marriage, since the crime of forced marriage is not defined or listed as a crime in any ICL statute. This article seeks to resolve this issue. It does so by unpacking the principle of legality and then examining the cases where courts have relied on international human-rights law (IHRL) to define forced marriage. After examining these cases, the article assesses whether such an approach is in line with the principle of legality. The article is divided as follows. After this introduction follows a discussion on the principle of legality. The third section argues that categorising forced marriage as an inhumane act under ICL undermines the principle of legality. The fourth section unpacks the right to freedom from forced marriage under IHRL. The fifth section examines cases from the ECCC, the International Criminal Tribunal for the former Yugoslavia (ICTY), the ICC and the SCSL, in which recourse was had to IHRL to define forced marriage as a crime. This discussion is followed by an assessment of such case law in section six in relation to its adherence to the legality principle. The seventh section engages with the implication of this posture for an accused's right to a fair trial, and the last section is the conclusion, which highlights the salient features of the discussion.

---

10 See footnotes below.

11 Trial Judgment ICC-02/04-01/15-1762 ICC (4 February 2021).

12 Case Information Sheet ICC-01/12-01/18 ICC (February 2022).

13 Decision on the Confirmation of Charges ICC-01/04-01/07 ICC (30 September 2008) par 431; *Prosecutor v Katanga and Chui* ICC-01/04-01/07 OA 8 ICC (25 September 2009).

14 Appeal Judgment Case No SCSL-04-15-A (26 October 2009).

15 Judgment Summary Case No SCSL-03-1-T SCSL (26 April 2012).

16 Judgment Case 002/02, 002/19-09-2007/ECCC/TC (16 November 2018); *Prosecutor v Chea and Samphan Khieu* Samphan's Closing Brief 002/02 Case No 002/19-09-2007/ECCC/TC (25 March 2019); *Prosecutor v Chea and Samphan* Closing Order Indictment Case No 002/19-09-2007/ECCC/OCIJ (15 September 2010).

17 ECCC Statute.

2 UNDERSTANDING THE *NULLUM CRIMEN SINE LEGE* PRINCIPLE OF LEGALITY

Insofar as the prosecution of international crimes is concerned, the *nullum crimen sine lege* principle came to the fore during the World War II Tokyo and Nuremberg tribunals.[18] The accused at the Tokyo and Nuremberg tribunals raised objections to being prosecuted for the crime of waging aggressive war notwithstanding that aggressive war was not considered a crime at the time of its commission.[19] The Nuremberg International Military Tribunal (IMT) objected to the defendants' claim and merely stated: "the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice."[20] This meant that the Nuremberg and Tokyo tribunals were not bound by the *nullum crimen sine lege* doctrine at the time of the judicial proceedings against World-War-II accused.

Over the years, the principle of legality has developed and become entrenched in international law, becoming a fundamental element underpinning ICL and a central theme in the Rome Statute establishing the ICC.[21] This principle finds application in ICL under article 22 of the Rome Statute,[22] which reads:

> "1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
> 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."

Various IHRL instruments entrench this principle in definite terms; these include the Universal Declaration of Human Rights (UDHR),[23] the International Covenant on Civil and Political Rights (ICCPR),[24] the UN Convention on the Rights of the Child (UNCRC),[25] the European Convention on Human Rights (ECHR),[26] the African Charter on Human and Peoples' Rights (ACHPR),[27] the revised Arab Charter on Human Rights (ArCHR)[28]

---

18 Mokhtar "*Nullum Crimen, Nulla Poena Sine Lege*: Aspects and Prospects" 2005 26 *Statute Law Review* 41 52–52.

19 *IMT Nuremberg* Trial Vol 1 298–301 (Frick), 304–07 (Funk), 310–15 (Dönitz), 327–30 (Seyss-Inquart), IMTFE Tokyo Records (12 November 1948) Vol 22 48437–48439.

20 Acquaviva "Doubts About *Nullum Crimen* and Superior Orders: Language Discrepancies in the Nuremberg Judgment and Their Significance" in Bergsmo, Wui Ling and Ping (eds) *Historical Origins of International Criminal Law* (2014) 602.

21 Art 22 of the Rome Statute.

22 Art 22(2) of the Rome Statute.

23 UNGA *Universal Declaration of Human Rights* (10 December 1948) art 11(2).

24 UNGA *International Covenant on Civil and Political Rights* 999 UNTS 17 (1966). Adopted: 16/12/1966; EIF: 23/03/1976 art 15.

25 UNGA *Convention on the Rights of the Child* 1577 UNTS 3 (1989). Adopted: 20/11/1989; EIF: 02/09/1990 art 40(2)(a).

26 Council of Europe *European Convention for the Protection of Human Rights and Fundamental Freedoms* (4 November 1950) art 7(1) and (2).

27 Organisation of African Unity *African Charter on Human and Peoples' Rights* CAB/LEG/67/3 rev 5, 21 ILM 58 (1982). Adopted: 27/06/1981; EIF: 21/10/1986 (Banjul Charter) art 7(2) and 9.

and the American Convention on Human Rights.[29] The Latin expression for the principle of legality is *nullum crimen nulla poena sine lege.*[30] This principle emphasises that an individual should not be punished for conduct that lacks a clear legal definition as a crime.[31] This simply means that a defendant cannot be "prosecuted for acts that were not explicitly prohibited by law at the time they occurred".[32]

Moreover, as can be seen from its entrenchment in article 22 of the Rome Statute, the principle prohibits the interpretation of existing crimes in a manner that extends them by analogy. One can therefore glean that the principle of legality serves to protect the accused from arbitrary prosecutions that lead to unfair trials.[33] If an accused knows that their conduct is prohibited by the law, then the accused can anticipate being punished by the same law that they violate.[34] Therefore, "a chamber should construe a provision in a manner that favours respect for the principle of legality, to the extent this is possible."[35] It has been argued that "the principle of legality imposes on criminal judges a duty of interpretative restraint and significantly limits the scope for dynamic interpretation to the detriment of an accused."[36]

It is thus abundantly clear that the law needs to be clearly defined, accessible and foreseeable. Moreover, eventual shortcomings in codified provisions of an ICL statute cannot be fixed by judges on the bench. This is not the court's responsibility. Any attempt by courts or tribunals to include crimes that drafters of ICL statutes did not initially envisage may breach the principle of legality. For purposes of the discussions in this article, an issue that is yet to be resolved is whether having recourse to IHRL to give meaning to crimes under the Rome Statute is in line with the principle of legality. The starting point to such a quest is understanding what forced marriage looks like in terms of IHRL and the nature of obligations that IHRL imposes.

3 FORCED MARRIAGE AS AN INHUMANE ACT UNDER CRIMES AGAINST HUMANITY

The crime "inhumane acts" under article 7 of the Rome Statute encompasses acts that inflict severe suffering or serious injury on a victim.[37]

---

28 League of Arab States *Arab Charter on Human Rights* 12 Int'l Hum. Rts. Rep. 893 (2005). Adopted: 22/05/2004; EIF: 15/03/,2008 art 15.

29 Organization of American States *American Convention on Human Rights, "Pact of San Jose", Costa Rica*. Adopted: 22/11/1969; EIF: 18/07/1978 art 9.

30 "No crime without the law." See Stahn *A Critical Introduction to International Criminal Law* (2019) 10.

31 Art 22 of the Rome Statute.

32 Paust "It's No Defense: *Nullem Crimen*, International Crime and the Gingerbread Man" 1997 60 *Albany Law Review* 657.

33 Cassese *International Criminal Law* (2003) 147 and Stahn *A Critical Introduction to International Criminal Law* 11–12.

34 Cassese *International Criminal Law* 147–149.

35 Schabas *The International Criminal Court: A Commentary on the Rome Statute* (2010) 407.

36 Grabert *Dynamic Interpretation in International Criminal Law: Striking a Balance Between Stability and Change* (2015) 12.

37 Art 7(1)(k) of the Rome Statute.

Certain characteristics of forced marriage align with the elements of inhumane acts owing to its nature. Forced marriage features severity, duration, and intent to inflict suffering in common with an inhumane act.[38] It also involves physical or psychological violence, confinement and deprivation of liberty for a prolonged period.[39] This intentional act inflicts great suffering, both physical and mental, on the victim.[40] The victim's autonomy and dignity are severely compromised, amounting to lasting mental and emotional harm.[41] These elements mirror the suffering inflicted through acts deemed inhumane under the Rome Statute.[42] The *AFRC* appeals judgment categorised forced marriage as "other inhumane acts".[43] In reaching this decision, the court focused on the non-consensual harm of forced marriage that "resulted in great suffering, or serious physical or mental injury on the part of the victim".[44] This approach taken by the *AFRC* Appeals Chamber was affirmed by the ICC Pre-Trial Chamber in *Ongwen*.[45] The ICC Pre-Trial Chamber stated that forced marriage amounted to "other inhumane acts" because an inhumane act must "intentionally cause great suffering, or serious injury to body or to mental or physical health".[46]

Moreover, mirroring the elements of "inhumane acts", forced marriage also violates a range of fundamental human rights. These include the right to marry freely,[47] the right to freedom from torture and cruel, inhuman or degrading treatment,[48] and the right to security of the person.[49] Although forced marriage undeniably constitutes an inhumane act, forced marriage has elements broader than those captured by other inhumane acts. The SCSL Appeals Chamber elaborated on the elements of forced marriage, which involves:

> "a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim.
>
> Second, (…) forced marriage implies a relationship of exclusivity between the 'husband' and 'wife', which could lead to disciplinary consequences for breach of this exclusive arrangement."[50]

Therefore, the crime of forced marriage contains three elements: first, force, threat of force or coercion; secondly, a conjugal association; and thirdly, severe suffering, or mental or psychological injury to the victim.[51] The

---

38 *Ibid*.
39 *AFRC* Appeals Chamber par 195.
40 *Ibid*.
41 *Ibid*.
42 Art 7(1)(k) of the Rome Statute.
43 *AFRC* Appeals Chamber par 202.
44 *AFRC* Appeals Chamber par 195.
45 *Ongwen* Decision on the Confirmation of Charges ICC (23 March 2016) par 88, 89–92.
46 *Ibid*.
47 Art 16 of the UDHR.
48 Art 7 of the ICCPR.
49 Art 3 of the ECHR.
50 *AFRC* Appeals Chamber par 195.
51 Jalloh *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* 211.

elements of forced marriage highlight that forced marriage is not merely about inflicting suffering, but comprises an entire surrounding coercive system.

In addition, the principle of legality (*nullum crimen sine lege*) is no doubt crucial in ICL.[52] However, international courts and tribunals have a responsibility to interpret the law in a way that is both effective and respects the principle.[53] While the "inhumane acts" provision is broad, courts simply focus on acts that inflict severe suffering or serious injury, which forced marriage causes.[54] The *AFRC* Appeals Chamber emphasised that forced marriage definitely causes severe suffering or serious injury, which constitutes an inhumane act.[55] Furthermore, it could be deduced that the notion of physical or mental suffering is seemingly wide enough to cover a wide range of atrocious conduct committed during armed conflict, including forced marriage.

It must, however, be recalled that the principle of legality entails, among other things, precision.[56] Vagueness, omnibus or catch-all provisions can generally be said to fall foul of the principle of legality. In the words of Galand, the principle of legality demands "clarity, precision, certainty and specificity".[57] While the crime "other inhumane acts" is very broad, covering everything involving suffering, including forced marriage, such wideness and vagueness goes against the principle of legality, which demands specificity and certainty. Therefore, recognising forced marriage as an act analogous to inhumane acts undermines the *nullum crimen sine lege* principle. Compliance with this principle also ensures legal clarity concerning the prosecution of serious violations of human dignity under ICL.

4 FORCED MARRIAGE UNDER INTERNATIONAL-HUMAN-RIGHTS LAW

Various human-rights treaties guarantee the right to freedom from forced marriage. For example, article 23(3) of the ICCPR provides that no marriage shall be entered into without the free and full consent of the intending spouses. These same principles are enshrined in the UDHR,[58] the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[59] and the International Covenant on Economic, Social and

52 Art 22 of the Rome Statute.

53 *Prosecutor v Sam Hinga Norman* Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) Case No 2004-14-AR72(E) SCSL Appeals Chamber (21 May 2004) par 2.

54 *AFRC* Appeals Chamber par 195; *Ongwen* Decision on the Confirmation of Charges ICC (23 March 2016) par 88, 89–92; *Prosecutor v Chea and Samphan* Closing Order Indictment ECCC (15 September 2010) par 1443.

55 *AFRC* Appeals Chamber par 195–203.

56 Grabert *Dynamic Interpretation in International Criminal Law: Striking a Balance Between Stability and Change* 11.

57 Galand "Article 13(b) vs Principle of Legality" in Galand *UN Security Council Referrals to the International Criminal Court*: Vol 5 (2019) 110.

58 Art 16(2) of the UDHR.

59 UNGA *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) 1249 UNTS 13. Adopted: 18/12/1979; EIF: 1/09/1981 art 5(1), 6(a), 7 and 16.

Cultural Rights (ICESCR).[60] Article 1(1) of the 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage goes further than the ICCPR, by stating:

> "[N]o marriage shall be legally entered into without the free and full consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnise the marriage and of witnesses as prescribed by law."[61]

Also relevant are regional treaties that forbid forced marriages, including article 18(3) of the ACHPR (Banjul Charter) and articles 32 and 37 of the Istanbul Convention.[62]

All such principles, entrenched in these human-rights treaties and conventions, highlight: first, that forced marriage is a union between individuals,[63] in which one party has not given consent to marry; and secondly, that forced marriage involves elements of coercion.[64] It should be noted that forced marriage in human-rights law is an unacceptable practice and a violation of human rights, hence the need for human-rights instruments calling on states to forbid the practice of forced marriage. However, human-rights treaties do not establish individual criminal responsibility for forced marriage. Justice Sebutinde pointed this out in the *AFRC* case by stating:

> "From the opinion of both Experts, it is clear that in understanding and characterising the phenomenon of 'forced marriage' in the Sierra Leone conflict, a clear distinction should be drawn between traditional or religious marital unions involving minors (early or arranged marriages), during times of peace; and the forceful abduction and holding in captivity of women and girls ('bush wives') against their will, for purposes of sexual gratification of their 'bush husbands' and for gender-specific forms of labour including cooking, cleaning, washing clothes (conjugal duties). In my view, while the former [early or arranged marriages] is proscribed as a violation of human rights under international human rights instruments of treaties like CEDAW, it is not recognised as a crime in International Humanitarian law. The latter conduct [bush wives] on the other hand, is clearly criminal in nature and is liable to attract prosecution."[65]

Therefore, forced marriage cannot be prosecuted as a crime that violates "human-rights law". Despite the assertion that forced marriage is merely "prohibited" in IHRL, international courts and tribunals have continuously danced between IHRL and ICL, continuously forgetting that these are two distinct areas of law. IHRL and ICL function together in international law but

---

60 UNGA *International Covenant on Economic, Social and Cultural Rights* (ICESCR) 993 UNTS 3. Adopted: 16/12/1966; EIF: 03/01/1976 art 10.

61 UNGA *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* 521 UNTS 231. Adopted: 07/11/1962; EIF: 09/12/1964 art 1(1).

62 Council of Europe *Convention on Preventing and Combating Violence Against Women and Domestic Violence* (Istanbul Convention) (11 May 2011).

63 Chantler "Recognition of and Intervention in Forced Marriage as a Form of Violence and Abuse" 2012 13 *Trauma, Violence & Abuse* 176 176.

64 *Ibid.*

65 *AFRC* Trial Judgment Separate Concurring Opinion of the Hon Justice Julia Sebutinde Appended to Judgment Pursuant to Rule 88(C) par 12.

are not synonymous. There have been historical examples where prohibited acts in human rights evolve into ICL crimes.

Torture, once a common practice used by governments to extract information from criminals,[66] was prohibited by customary international law after World War II.[67] The Convention Against Torture, adopted in 1984,[68] further solidified the prohibition against torture and established a legal mechanism to prevent torture, investigate allegations, and prosecute those responsible.[69] This conduct is further criminalised under various ICL statutes.[70] Similarly, the concept of genocide emerged in response to crimes committed during World War II.[71] The Genocide Convention[72] defined genocide as a specific crime against humanity and formulated a regulatory framework holding individuals accountable.[73] Nonetheless, in recent years, with international tribunals adjudicating torture and genocide, these crimes have solidly become crimes under ICL, even being added to the Rome Statute.[74] However, where an act is not stipulated as a criminal offence, according to the principle of legality, the courts have no latitude to create a new offence simply because an act is proscribed in human-rights law.

In the absence of an explicit codification of the crime of forced marriage, various international courts and tribunals have had recourse to IHRL, giving meaningful content to "other inhumane acts" by incorporating forced marriage. Again, this extended interpretation brings sharply into focus the principle of legality. It must be noted that inhumane acts find their roots in human-rights law; thus, it makes sense for courts to have recourse to human-rights treaties. Moreover, the Rome Statute allows the ICC to refer to human-rights treaties in interpreting the Rome Statute.[75] However, it must be asked whether courts may, under article 22 of the Rome Statute, simply

---

66 Bassiouni *Crimes Against Humanity: Historical Evolution and Contemporary Application* (2011) 411–412, 419; Hope "Torture" 2004 53 *International and Comparative Law Quarterly* 807 809–810, 823; see also Strauss "Torture" 2003 48 *New York Law School Law Review* 201 252 fn 183.

67 Bassiouni *Crimes Against Humanity* 421–422. See also Simon "Iconography of Torture: Going Beyond the Tortuous Torture Debate" 2014 43 *Journal of International Law and Policy* 45 86; Grodin and Annas "Physicians and Torture: Lessons from the Nazi Doctors" 2007 89 *International Review of the Red Cross* 635 636, 651–654 and Hoffman "Nazi War Crimes and Criminals" 1946 23 *Dicta* 30 30–31.

68 UNGA *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* UN Doc A/39/51 (1984) draft reprinted in 23 ILM 1027 (1985), with final changes in 24 ILM 1027. Adopted: 10/12/1984; EIF: 26/06/1987. The Convention defines torture and obligates states to prevent it, investigate allegations, and prosecute those responsible.

69 *Ibid*.

70 ECCC Statute art 3, 5 and 6; Rome Statute art 7(1)(f) and 8(2)(a)(ii); SCSL Statute art 2(f).

71 Lewis "The Namibian Holocaust: Genocide Ignored, History Repeated, Yet Reparations Denied" 2017 29 *Florida Journal of International Law* 133 134 and 136. Crimes committed during the World War II Holocaust tragedy highlighted the need for legal measures against genocide to prevent such atrocities from taking place (Alston "International Legal Responses to the Holocaust and Genocide After Nuremberg" 1988 8 *Boston College Third World Law* 47 51 53–56).

72 UNGA *Convention on the Prevention and Punishment of the Crime of Genocide* 78 UNTS 277. Adopted: 09/12/1948; EIF: 12/01/1951.

73 *Ibid*.

74 Art 6 and 7(f) of the Rome Statute.

75 Art 21(1) of the Rome Statute.

bypass the principle of legality, which, as consistently noted, informs the accused's right to a fair trial. The next part discusses how courts have ignored the principle of legality by using IHRL to ascribe definitions to the crime of forced marriage, allowing it to pass the *nullum crimen sine lege* test by classifying it as a crime against humanity.

5 USING IHRL TREATIES TO DEFINE CRIMES UNDER ICL STATUTES

There are a number of cases where courts have relied on IHRL instruments to interpret forced marriage as being other inhumane acts, sexual slavery or enslavement. For instance, the case of *Prosecutor v Dominic Ongwen*[76] recognised forced marriage as a separate crime against humanity. Ongwen, a former commander of the Sinia Brigade within the Ugandan rebel group, the Lord's Resistance Army (LRA), abducted civilian women and girls between the ages of 7 and 20 years, forcing them to marry LRA fighters.[77] When women and girls were abducted, they felt obliged to accept the LRA soldier's request to stay in his household as "wives".[78] Sometimes, women would be raped at gunpoint by rebel LRA soldiers.[79] Moreover, "wives" were forced to cook, collect food, fetch water, fetch and chop wood, cut grass for bedding, and do the washing.[80] Ongwen ordered, oversaw, controlled, coordinated and directly participated in the illegal acts of forced marriage.[81] When adjudicating the case, the ICC Pre-Trial Chamber based the inclusion of forced marriage in the crime of inhumane acts on the UDHR, General Comment 28 of the Committee on the Elimination of Discrimination Against Women (CEDAW Committee), CEDAW, the Protocol to the ACHPR on the Rights of Women in Africa (better known as the Maputo Protocol), the ECHR, the UIDHR,[82] ArCHR and the Report of the United Nations High Commissioner of Human Rights,[83] all of which expressly provide that marriage should be entered into with consent. Moreover, the ICC maintained that forced marriage caused harm such as forcing the victim against her will to enter into a conjugal union as well as creating social stigma.[84] The harm was mental trauma in depriving the victim of the will to choose their own spouse as well as an attack on the victim's dignity.[85] Therefore, according to the ICC, forced marriages constituted inhumane acts in terms of article 7(1)(k) of the Rome Statute.[86]

---

76 *Ongwen* Public Redacted Trial Judgment (4 February 2021).

77 *Ongwen* Trial Judgment par 187, 417, 418, 2094, 2138, 2149, 2151, 2211, 2212, 2263.

78 *Ongwen* Trial Judgment par 2218, 2235, 3031.

79 *Ongwen* Trial Judgment par 2046, 2058.

80 *Ongwen* Decision on the Confirmation of Charges par 92.

81 *Ongwen* Decision on the Confirmation of Charges par 4 and 34.

82 Islamic Council *Universal Islamic Declaration of Human Rights*. Adopted: 12/04/1980 EIF: 19/09/1981/*21 Dhul Qaidah 1401* art 19(i).

83 Human Rights Council, *Report of the United Nations High Commissioner of Human Rights* on Child, early and forced marriage in humanitarian settings A/HRC/41/19 EIF: 29/04/2019 par 4.

84 *Ongwen* Trial Judgment par 2748.

85 *Ibid*.

86 *Ongwen* Trial Judgment par 3021; Rome Statute art 7(1)(k).

Forced marriage was also in focus in *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (*Katanga and Chui*).[87] Katanga and Chui were former Congolese militia leaders – Katanga of the Force Patriotique de l'Ituri (FRPI) and Chui of the Front des Nationalistes et Intégrationnistes (FNI).[88] Katanga and Chui commanded the FRPI and the FNI to abduct, sexually enslave, and physically abuse women in Ituri, the Eastern side of the Democratic Republic of Congo (DRC).[89] The ICC Pre-Trial Chamber referred to IHRL instruments such as the Supplementary Convention on the Abolition of Slavery and Institutions and Practices Similar to Slavery of 1956,[90] which describes giving a woman in marriage on payment as a practice similar to slavery.[91] The Pre-Trial Chamber maintained that sexual slavery involves similar situations where "women and girls were forced into marriage, domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors."[92] Therefore, the Pre-Trial Chamber concluded that forced marriage acts committed by Katanga and Chui were akin to sexual slavery.[93] It seemed that the ICC in *Katanga and Chui* declined to consider forced marriage as a separate crime on its own grounds.

The SCSL dealt with similar issues to the ICC in *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu* (*AFRC*).[94] Alex Tamba Brima, Ibrahim Bazzy Kamara and Santigie Borbor Kanu were senior members of the Armed Forces Revolutionary Council's (AFRC) Supreme Council (the highest decision-making body of the AFRC) during the Sierra Leonian Civil War.[95] The AFRC then joined forces with the Revolutionary United Front (RUF) from 1997 to 1999.[96] Under Brima, Kamara and Kanu's leadership, women and girls throughout Sierra Leone were continuously abducted by the RUF/AFRC rebels, kept in camps to be forcibly married, sexually enslaved and raped.[97] These abducted women and girls were assigned to rebels and rebel commanders as "wives" and became known as "bush wives".[98] The bush wives were expected to submit to their husbands by satisfying the rebel "husbands" sexually, carrying out forced labour during their captivity including cooking, cleaning, washing clothes, bearing children and carrying ammunition and looted items.[99] There were no official

87 Case No ICC-01/04-01/07 OA 8 (25 September 2009).

88 *Katanga and Chui* Decision on the Confirmation of Charges ICC 30 September 2008 par 7 and 10. Katanga oversaw the Force Patriotique de l'Ituri (FRPI) and Chui oversaw the Front des Nationalistes et Intégrationnistes (FNI) led by Thomas Lubanga.

89 *Katanga and Chui* Decision on the Confirmation of Charges par 25–29; *Prosecutor v Katanga* Case Information Sheet ICC (July 2021).

90 UN Economic and Social Council *Supplementary Convention on the Abolition of Slavery and Institutions and Practices Similar to Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*. Adopted: 07/09/1956; EIF: 30/04/1957.

91 *Katanga and Chui* Decision on the Confirmation of Charges par 430.

92 *Katanga and Chui* Decision on the Confirmation of Charges par 431.

93 *Katanga and Chui* Decision on the Confirmation of Charges par 25–28, 431 and 434–435.

94 *AFRC* Trial Judgment (20 June 2007) and *AFRC* Appeals Judgment (22 February 2008).

95 *AFRC* Trial Judgment par 11–13.

96 *Ibid*.

97 Human Rights Watch *We'll Kill You If You Cry* (January 2003) 42–43; Samura *Cry Freetown* (2000) Sierra Leone.

98 *AFRC* Trial Judgment par 12.

99 Human Rights Watch *We'll Kill You If You Cry* 43.

ceremonies for women to get married to rebels. These women and girls were simply bestowed the title "wife". Rebels also frequently changed their bush wives when they got bored or when the wives got ill and were unable to perform their tasks.[100] Justice Julia Sebutinde in her separate concurring opinion referred to IHRL instruments including the UDHR, CEDAW and the Maputo Protocol to establish forced marriage as prohibited conduct that falls under the purview of other inhumane acts.[101] She stated that forced marriage, involving the abduction and detention of women and girls and their use for sexual and other purposes, is a violation of IHRL instruments.[102] However, Justice Sebutinde strongly maintained that forced marriage is not recognised as a crime under ICL statutes.[103] Her approach to forced marriage was different to that of the *AFRC* Trial Chamber, which prosecuted forced marriage as sexual slavery.[104]

In all of the above discussion, it flows logically for the ICC and SCSL to use human-rights treaties to draw the conclusion that forced marriage is either a sexual-slavery crime or an inhumane act. In international law, IHRL is the only area of law that explicitly prohibits forced marriage – unlike domestic jurisdictions, which use their own criminal laws to prosecute forced marriages. This is the reason that Justice Sebutinde in *AFRC* asserted that human-rights law only prohibits forced marriage but does not assign criminal responsibility for forced marriage.

6 ANALYSIS OF CASE LAW IN WHICH RECOURSE HAS BEEN HAD TO IHRL

It seems that, rather than using ICL statutes in and of themselves, or applying their minds to the *actus rea* and *mens rea* elements of sexual slavery and other inhumane acts, courts and tribunals have turned to IHRL instruments to conclude that forced marriage is a crime against humanity or a sexual-slavery crime. However, relying on human-rights treaties that are often not precise, and can be too broad or narrow, to interpret criminal acts such as sexual slavery and other inhumane acts violates the prohibition against extending crimes by analogy.

As discussed above, IHRL can only prohibit illegal conduct but does not assign criminal liability. IHRL and ICL are two distinct areas of law; they function together but are not synonymous. Prohibited acts in human rights may indeed end up being recognised as criminal conduct in criminal law but in the absence of a criminalising law, human-rights violations remain merely prohibitions and not a basis for individual criminal responsibility. Thus, by using IHRL treaties, which are far from precise, as a method to interpret

---

100 *Ibid*.

101 *Ongwen* Public Redacted Trial Judgment par 2748; *AFRC* Trial Judgment Case No SCSL-04-16-T Separate Concurring Opinion of the Hon Justice Julia Sebutinde Appended to Judgment Pursuant to Rule 88(C) par 12.

102 See *AFRC* Trial Judgment Separate Concurring Opinion of the Hon Justice Julia Sebutinde Appended to Judgment Pursuant to Rule 88(C) par 12.

103 *Ibid.*

104 *AFRC* Trial Judgment par 713.

conduct as criminal, courts are inadvertently violating the *nullum crimen sine lege scripta* principle.

Suffice it to note that the crimes featured under article 7 of the Rome Statute, including other inhumane acts, have been forbidden and such prohibition is embodied in the UDHR and the ICCPR. It would therefore seemingly make sense for recourse to be had to IHRL treaties to give meaningful content to these crimes. The link between human-rights violations and these crimes can be traced back to World War II. Before and during World War II, certain human-rights violations were committed against the civilian population on a widespread or systematic basis. As a result, the category "other inhumane acts" was created.[105] After World War II, the drafters of the Nuremberg Charter[106] agreed to include this category in article 6 of the Nuremberg Charter.[107] This was the first international document to criminalise certain human-rights violations of World War II; "other inhumane acts" was included as a residual category to catch all new international crimes committed during and after World War II.[108] Schabas notes that the crimes listed under crimes against humanity, including other inhumane acts, might be:

> "an implementation of human rights norms within international criminal law. Just as human rights law addresses atrocities and other violations perpetrated by a State against its own population, crimes against humanity are focused on prosecuting the individuals who commit such violations."[109]

Undoubtedly, conduct prohibited in IHRL instruments solidifies proscribed conduct under ICL statutes. In fact, general principles of human rights have heavily informed the Rome Statute and its Elements of Crimes document insofar as these crimes are concerned. Be that as it may, to rely on IHRL instruments is to fill in careless gaps left in ICL statutes and, by implication, to extend existing crimes by analogy.

It may be argued, in response, that article 21 of the Rome Statute gives the ICC latitude to have recourse to IHRL treaties to give meaningful content to existing crimes. To circumvent the issue of legality, the ICC has seemingly used IHRL treaties to find sufficient evidence to place forced marriages under crimes against humanity. Article 21(1) of the Rome Statute provides:

> "The Court shall apply:
>
> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
>
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict."

---

105 Bassiouni *Crimes Against Humanity in International Criminal Law* 32 and 95.

106 United Kingdom of Great Britain and Northern Ireland, United States of America, France and Union of Soviet Socialist Republics *Charter of the International Military Tribunal: Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* (8 August 1945) (Nuremberg Charter).

107 Art 6(c) of the Nuremberg Charter.

108 *Ibid*. Bassiouni *Crimes Against Humanity: Historical Evolution and Contemporary Application* 213–214.

109 Schabas *The International Criminal Court: A Commentary on the Rome Statute* 139.

This highlights that ICL has a hierarchy, and that the first point of reference for the ICC insofar as crimes under the ICC jurisdiction is concerned is articles 5, 6, 7 and 8 of the Rome Statute, which categorise crimes within the court's jurisdiction. The second point of reference in terms of article 21(1)(b), "where appropriate", is treaties, which in this instance include IHRL treaties. Emphasis here is to be placed on the term "where appropriate". Thus, reference to other sources outside the Rome Statute can only be made "where appropriate". If referring to IHRL treaties to define crimes not listed under the Rome Statute would amount to extending crimes by analogy, it is hard to argue that doing so is "appropriate" because such action has the effect of undermining the accused person's right to a fair trial, which is a fundamental human right of accused persons, and is entrenched in strong terms under human-rights law. Emphasis here is also to be placed on article 21(3), which stipulates:

> "The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."[110]

Extending the definition of crimes under the Rome Statute through reference to other treaties is hardly consistent with internationally recognised human rights. In the case of *Ongwen*, which is discussed in detail in the next section, for the ICC to use IHRL treaties such as CEDAW to find suitable elements to classify forced marriages as "other inhumane acts", by itself can be construed as undermining the *nullum crime sine lege scripta* principle and can in no way be said to be consistent with internationally recognised human rights. As consistently underscored, IHRL does not create individual criminal responsibility for crimes; so, for a court to use treaties such as CEDAW or the UDHR in *Ongwen* to interpret forced marriages as other inhumane acts runs the risk of extending crimes by analogy.

From article 21(1)(b), one gathers that recourse to treaties, including IHRL treaties is envisaged. It may be argued that such application allows courts to have recourse to IHRL treaties to define crimes under the Rome Statute. While this may be a logical view, article 21(1)(b) has to be applied in light of article 22 of the Rome Statute, which mandates the ICC to interpret crimes in the Rome Statute strictly and not to extend them by analogy. Thus, IHRL treaties are applicable to the extent that their application does not transgress the legality principle as buttressed in article 22. It may not have been the intention of the drafters of the Rome Statute to have IHRL treaties applied in a manner that extends crimes by analogy or defies the requirement of a strict interpretation of crimes. If the opposite were true (and crimes were allowed to be extended using other instruments such as treaties), what then would be the essence of having a provision that guards against extending existing crimes by analogy?

Undoubtedly, and as consistently noted, there have been decisions where tribunals and the ICC have deliberately defined other inhumane acts using

[110] Art 21(3) of the Rome Statute.

IHRL treaties. In *Prosecutor v Kupreškić*,[111] the ICTY stated that IHRL treaties can be used to define specifically what amounts to "other inhumane acts".[112] The ICTY Trial Chamber found that treaties such as the UDHR, the ICCPR, the ECHR, the Inter-American Convention on Human Rights and the 1984 Convention Against Torture can be used to interpret prohibited acts in human-rights law that amount to other inhumane acts.[113] When reviewing these treaties, the ICTY recognised that:

> "drawing upon the various provisions of these texts, it is possible to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity."[114]

According to the ICC in *Katanga and Chui*, the Pre-Trial Chamber endorsed the approach of relying on external sources such as IHRL treaties to clarify the definitions of prohibited acts under other inhumane acts.[115] The Pre-Trial Chamber stated:

> "In the view of the Chamber, in accordance with article 7(l)(k) of the Statute and the principle of *nullum crimen sine lege* pursuant to article 22 of the Statute, inhumane acts are to be considered as serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law, which are of a similar nature and gravity to the acts referred to in article 7(1) of the Statute."[116]

In summary, the *Katanga and Chui* Pre-Trial Chamber considered other inhumane acts to be serious violations of IHRL norms. It is submitted that this approach is problematic, simply because the field of law that the courts are dealing with – criminal law – is an area subject to strict procedural guarantees such as the principle of legality. Based on this principle, if crimes are not precisely defined by the operating criminal statute, no such crime can be deemed to exist despite a prohibition elsewhere. Although other sources can be used to clarify, these other sources cannot be a basis for unpacking the elements of these crimes. Thus, perhaps the oversight in all the ICL statutes is the failure to recognise the high threshold of procedure within which ICL operates. Leaving crimes undefined under these statutes might have been a strategy to leave room for the development of crimes under ICL jurisprudence. However, with it came gaps of precision and specificity that go directly to the heart of the principle of legality – an overarching principle in ICL.

7 RECOURSE TO IHRL TREATIES: A VIOLATION OF THE ACCUSED'S RIGHT TO A FAIR TRIAL

It may be hard to imagine that recourse to human-rights treaties could in fact result in a human-rights violation. Such a situation becomes a reality when,

---

111 Judgment Case No IT-95-16-T ICTY (14 January 2000).

112 *Prosecutor v Kupreškić* Judgment *supra* par 566.

113 *Ibid.*

114 *Ibid.*

115 *Katanga and Chui* Decision on the Confirmation of Charges par 448.

116 *Ibid*.

in trying to give meaning to crimes by using IHRL treaties, courts disregard the accused's right to a fair trial. One of the cornerstones to a fair criminal justice system is the right to a fair trial. The accused's right to a fair trial is guaranteed under several IHRL treaties. Moreover, the principle of legality under IHRL treaties stipulates that an individual should not be punished for an offence that is not adequately defined under the law.[117] IHRL instruments, including article 7(2) of the ACHPR, article 15 of the ICCPR and article 11 of the UDHR, entrench the principle of legality guaranteeing the accused's right to a fair trial in very strong terms.[118]

This principle comes into force in ICL under article 22 of the Rome Statute, which reads:

> "1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
> 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."[119]

Stemming from IHRL, the principle of legality is part of the accused's right to a fair trial. The accused is protected by the principle of legality, which dictates that a crime should be clearly defined, published, accessible and foreseeable. An individual should be aware of what conduct is prohibited so that they can decide whether to engage in the said conduct.[120] Thus, where crimes are not clearly proscribed, the accused is deprived of the opportunity to know at the time they engage in such conduct whether their conduct would be regarded as a criminal offence under applicable law at the time.[121]

Bolstering the arguments for using IHRL treaties to define criminal acts, the act of forced marriage is prohibited by many relevant human-rights instruments. Notable provisions are article 23(3) of the ICCPR, article 16 of the UDHR and the most comprehensive rule forbidding forced marriage contained in article 1 of the Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages, which provides:

> "no marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnise the marriage and of witnesses, as prescribed by law."

---

117 Art 22 of the Rome Statute.

118 UDHR art 11(2); Banjul Charter art 7(2); ICCPR art 15.

119 Art 22(2) of the Rome Statute.

120 In slight contrast, see *CR v United Kingdom* Judgment Case No 48/1994/495/577 European Courts of Human Rights (EurCtHR) (27 October 1995), where the EurCtHR convicted the accused of marital rape, which the United Kingdom had abolished. The accused raised the defence that the criminal penalty for marital rape had been nullified and, therefore, subjecting the accused to an arbitrary prosecution and punishment violated the principle of legality. The accused had not foreseen that marital rape was a crime. The EurCtHR found the accused guilty by stating that he foresaw the reversal of the abolished law. The court did not apply new criminal statutes (*CR v United Kingdom* Judgment *supra* par 22–23, 34, 38, 41–43).

121 *Ibid*.

IHRL may prohibit forced marriage, but IHRL does not establish individual criminal responsibility for forced marriage. It is also possible that international courts or tribunals use IHRL treaties to define forced marriage as other inhumane acts or sexual slavery because IHRL treaties also define what a legal marriage is.

However, the fact that forced marriage is a violation of human rights does not necessarily mean that the principle of legality is satisfied. The principle of legality requires courts/tribunals to interpret criminal legislation in such a manner that the conduct of forced marriage remains on the fringes of the definition of existing crime. Also, criminal conduct should be in writing, clear, defined, foreseeable and accessible. Moreover, the conduct prosecuted needs to align with the *actus reus* and *mens rea* elements of a crime. For judges at the ECCC, ICC and the SCSL to review IHRL treaties to justify categorising forced marriage as inhumane acts or sexual slavery, one concludes that these international courts and tribunals are contravening the principle of legality as enumerated in article 22(2) of the Rome Statute, thereby undermining the accused's right to a fair trial.

8 CONCLUSION

While various IHRL instruments, including CEDAW, the UDHR and the ICCPR prohibit forced marriage, due to its coercive nature and the requirement for full and free consent, they do not explicitly define forced marriage as a crime. Additionally, IHRL does not attach individual criminal responsibility for the crime of forced marriage. IHRL merely indicates that forced marriage is forbidden. Thus, prosecuting an accused person for the offence of forced marriage under ICL violates the principle of legality since forced marriage is uncodified in all ICL statutes. Therefore, courts and tribunals should not be seen using IHRL to fill in careless gaps left by ICL statutes in prosecuting accused persons for forced marriages since IHRL treaties are not criminalising statutes. Rather, the crime of forced marriage should be codified so as to guarantee the rights of the accused under IHRL and ICL, which stipulates that accused persons should not be prosecuted for criminal acts that were not considered crimes at the time they engaged in such acts.

Nuremberg After Seventy-Five Years: A Reflection and Assessment of its Influence on International Law

George Barrie
BA LLB LLD
Professor Emeritus, Faculty of Law
University of Johannesburg, South Africa

SUMMARY

Seventy-five decades have elapsed since the conclusion of the International Military Tribunal at Nuremberg (IMT). Its influence on international law has been incalculable. Its two main contributions have been the concepts "crimes against humanity" and "crime of genocide". The former concept was owing to the influence on the proceedings of Hersch Lauterpacht, and the latter to that of Raphael Lemkin. Lauterpacht was an academic from Cambridge University, and Lemkin was an academic from Duke University. The concept "crimes against humanity" ultimately got a central role in the proceedings and, for the first time in history, was recognised to be an established part of international law. None of the IMT defendants were found guilty of genocide but the introduction of the concept during the proceedings led to the speedy adoption of the 1948 Genocide Convention.

1 INTRODUCTION

The trial of the major German war criminals seven-and-a-half decades ago at Nuremberg's Palace of Justice (known as the International Military Tribunal (IMT)) has had an incalculable influence on international law. The prosecution's case consisted of a catalogue of acts of aggression and criminality perpetrated during and prior to Hitler's "Thousand Year Reich". The first three days of the trial were consumed reading the indictment into the official record. The trial reached its conclusion on 1 October 1946.

Much has been written on the IMT[1] and its implications for international law. As seventy-five years have passed since the conclusion of the IMT, it is opportune to recall the IMT itself and its influence on international law, and to emphasise the lasting role played by two academics in the proceedings.

[1] There can be no substitute for reading the transcript of the proceedings, which are available in 42 volumes as *The Trial of the Major War Criminals Before the International Military Tribunal at Nuremberg, 20th November 1945 to 1 October 1946* (1946–1951). Further major sources are Gilbert *Nuremberg Diary* (1947)*;* Biddle *In Brief Authority* (1962); Woetzel *The Nurenberg Trial in International Law* (1962); Taylor *The Anatomy of the Nurenberg Trials* (1993); Perseco *Nuremberg: Infamy on Trial* (2000); Turley *From Nuremberg to Nineveh* (2008) and the monumental work by Sands *East West Street* (2016).

These two academics introduced the terms "crimes against humanity" and "crime of genocide" into the proceedings.

United States president Truman saw the precedent set by the IMT as the first international criminal assize in history and recognised that it would form the basis of international law in the future.[2] Warren R Austin, chief delegate of the United States to the United Nations expressed similar sentiments when, on 30 October 1946, he stated:

> "Besides being bound by the law of the United Nations Charter … members of the Assembly … are also bound by the law of the Charter of the Nuremberg Tribunal. That makes planning or waging a war of aggression a crime against humanity for which individuals as well as nations can be brought before the bar of international justice, tried and punished."[3]

Although history has shown that there are ultimately few limitations on how a victorious nation can treat a vanquished enemy in war, the Allies (Great Britain, France, United States and the USSR) sought to establish rational and just grounds for imposing liability on those responsible for the atrocities committed in World War II. When the decision was collectively made to pursue a legal rather than purely political means to accomplish this end – to subject the accused to a trial or a series of trials – consideration had to be given to the jurisdictional bases for such proceedings.

The Moscow Conference issued a declaration on 1 November 1943, which provided:

> "Those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the above atrocities, massacres and executions, will be sent back to the countries in which the abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein … without prejudice to the case of the major criminals, acting in the interests of the European Axis countries whether as individuals or as members of organisations whose offenses have no particular geographical localization and who will be punished by the joint decision of the Governments of the Allies."[4]

As a result of the Moscow Conference, the Allies concluded the London Agreement[5] on 8 August 1945[6] to establish the IMT to try the major war criminals. The British viewpoint initially was that a trial would be too slow and that the acts of the major Nazi war criminals should be addressed by

---

2 US Dept of State Bulletin Vol 15, 775 (27 Oct 1946).

3 *New York Times* (1946-10-31) 31 as quoted by Wright "The Law of the Nuremberg Trial" 1947 41 *Amer J of Intl Law* 38. It must be noted here that at the time of this statement, the UN had already come into being, on 24 October 1945.

4 President Roosevelt, Mr Winston Churchill and Marshal Stalin *Moscow Declaration on Atrocities* Moscow Conference (1 November 1943).

5 United Kingdom of Great Britain and Northern Ireland, United States of America, France, and Union of Soviet Socialist Republics *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* 82 UNTC 280; EAS 472 (8 August 1945). Those war criminals who were not seen to be "major war criminals" were tried before 12 Nuremberg Military Trials (NMTs) following on the IMT. Details of the NMTs are chronicled in Heller *The Nuremberg Military Tribunals* (2012).

6 US Dept of State Bulletin Vol 9, 311 (6 Nov 1945).

summary executions. This led to extensive bureaucratic talks between the Allies with pro-trial views prevailing.

2 CHARTER

Attached to the London Agreement was the Charter of the IMT (Charter).[7] This Charter provided for a tribunal composed of one judge and one alternative judge from each of the four Allied Powers – for a procedure designed to produce a fair trial and to found jurisdiction to try and sentence persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the crimes defined in the Charter. The Charter also authorised a committee consisting of the chief prosecutors of each of the four Allied powers to prepare the indictment and to present evidence based on the law set out in the Charter. The Charter represented the law that the judges of the tribunal were to apply in the trial. According to article 13 of the Charter, the tribunal drew up its own rules.

3 THE INDICTMENTS AND SENTENCES: A SYNOPSIS

The trial commenced on 20 November 1945 and lasted until 1 October 1946. It was conducted in four languages by means of a simultaneous interpretation device. There were four counts. Count one alleged conspiracy to commit war crimes – on which all 22 defendants were indicted. Count two alleged planning, preparing, initialling or waging aggressive war – on which 16 defendants were indicted. Count three alleged violation of the laws and customs of war – on which 19 defendants were indicted. Count four alleged crimes against humanity – on which 19 defendants were indicted. The United States prosecuted count one, the British prosecuted count two, the French prosecuted counts three and four as they applied to deeds committed in the Western part of the theatre of war, and the Soviet prosecution prosecuted counts three and four as they applied to the Eastern part of the theatre of war. The defence was represented by German lawyers, calling many witnesses over a period of five months and concluding with legal arguments on behalf of each defendant.

Three defendants were found not guilty on any counts; seven were sentenced to prison terms varying from 10 years to life and 12 were sentenced to death by hanging. Fifty-two of the 76 counts on the indictment were sustained. All those sentenced to death were found guilty of crimes against humanity and executed, except for Goering, who committed suicide a few hours prior to the executions, and Bormann, who could not be found. Four defendants, despite being found guilty of crimes against humanity, were given prison sentences owing to mitigating circumstances. Those defendants found guilty of aggressive war or conspiracy to commit aggressive war were given life sentences, except in two instances where

[7] Supplement 1945 39 *Amer J of Intl Law* 259.

mitigating circumstances were found. Of the six organisations indicted, three were acquitted.

4 CRITICISM

With hindsight, it goes without saying that the aggressive war conducted by Germany, and the atrocities committed by its officials and soldiers during World War II, provided the necessary impetus for the creation of the IMT and was a logical culmination of the pre-World War II debate over an international court.[8] Inevitably, however, the fact that the tribunal was established by the victors to try the vanquished gave rise to much debate. Hermann Göring, one of the principal defendants, compared the crimes he was defending with those perpetrated in the empires of the victorious nations. He claimed, for example, that the British Empire had not been built with due respect for the principles of humanity. He referred to the ways in which the United States had treated its indigenous peoples in seeking its own *lebensraum.*[9] He emphasised the fact that the victorious Allied nations had reasons to close their eyes to the darkest aspects of their own colonial history.

The defence hotly contested the validity of the Charter of the IMT, submitting that it transgressed the fundamental principles of justice and applied *ex post facto* laws in a criminal trial.

The IMT rejected the argument that the defendants were being prosecuted for international crimes under rules of law *ex post facto* because prior to 1939–1940 such crimes as crimes against the peace had not been defined or made punishable under existing international law. It pointed out that the defendants must have known that their actions were illegal and wrong, and were in defiance of international law.[10] The defendants repeatedly claimed that, contrary to the principle of *nullum crimen sine lege*, they were being tried under law enacted after the commission of the imputed acts. In the verdict of the IMT, however, it was clearly explained that the acts of which the defendants were accused constituted violations of international treaties concluded with the participation of Germany *before* these acts were committed.

The IMT was criticised for being a derogation of Germany's sovereignty. This was a major criticism and deserves more than a passing mention. State sovereignty, also referred to as state immunity, is a rule of international law that serves to preclude a state or its representatives from being sued or prosecuted in a foreign court. This principle was aptly described by Nicolas J in the South African case *Liebowitz v Schwartz*,[11] where he held that the courts of a country will not by their process make a foreign state a party to

---

8 Dugard, Du Plessis, Maluwa and Tladi *Dugard's International Law* (2018) 246.

9 IMT *Trial of the Major War Criminals* vol 9 (1945) 63. See Olusasoga and Erichsen *The Kaiser's Holocaust* (2011) 344. Criticism on the fairness of the IMT is made by Von Kneriem *The Nuremberg Trials* (1959).

10 *Trial of the Major War Criminals* vol 7 (1945) 219.

11 1974 (2) 661(T). See Barrie "Sovereign Immunity of States: Acts *iure imperii* and Acts *iure gestionis* – What is the Distinction" 2001 26 *SA Yearbook Intl Law* 156.

legal proceedings against its will and that this principle was founded on grave and weighty considerations of public policy, international law and comity. It can however be submitted that the IMT's derogation from German sovereignty was based on exceptional circumstances. The Nazi government in Germany had disappeared with the unconditional surrender of Germany, and in 1945 the Allied powers were in complete control of Germany. In 1945, in the Declaration of Berlin, the four Allied powers as the Control Council of Germany (consisting of the Supreme Commanders of the Allied armed forces)

> "assumed supreme authority with respect to Germany including all powers possessed by the German Government, the High Command and any state, municipal or local government or authority in order to make provision for the cessation of any further hostilities on the part of the German armed forces, for the maintenance of order in Germany, and for the administration of the country with no intention of effecting the annexation of Germany".[12]

This declaration was recognised by all states of the United Nations, which had come into existence on 24 October 1945.

5 DUE PROCESS

Was the trial procedurally fair? In the judgment, the tribunal emphasised that the defendants had received a fair trial on the facts and on the law, to which they were entitled.[13] It would appear that the tribunal provided a suitable procedure to comply with the international-law principle that any state or group of states when exercising criminal jurisdiction over aliens shall not deny justice.[14] Article 13 of the Charter of the IMT assured each individual defendant of a period of 30 days before their trial to study the indictment and prepare their case – ample opportunity to obtain counsel of their choice; to obtain witnesses and documents; to examine all documents submitted by the prosecution; to address motions; to make applications and to make special requests to the tribunal. This also applied to members of accused organisations. Articles 17 and 18 of the Charter further required that proceedings be fair, expeditious, without unreasonable delay and that irrelevant issues and statements be ruled out. At the request of defence counsel, in addition to the 19 defendants who were prepared to give testimony: 61 witnesses gave testimony for the defence; a further 143 witnesses for the defence gave testimony in the form of written answers to interrogatories; 101 witnesses for the defence gave testimony to officers designated by the tribunal; and written depositions were received from more than 300 000 people related to criminal organisations. Two defendants, Hank and Frank, refused to testify.

---

12 See Kelsen "The Legal Status of Germany According to the Declaration of Berlin" 1945 39 *Amer J Intl Law* 518; Von Laun "The Legal Status of Germany" 1951 45 *Amer J of Intl Law* 267.

13 Sands, who has made the most incisive study of the IMT, is of the opinion that due process was followed (*East West Street* 330–375).

14 For the minimum standards for the treatment of aliens, see Barrie "Reaction of USA Courts to the *Avena* judgement" 2006 31 *SA Yearbook Intl Law* 287.

The doors of the tribunal's proceedings were never shut. Representatives of the press, radio and newsreels from many countries attended the proceedings. The testimony of witnesses, the defendants, documents made public in court and statements made by the prosecutors and defence counsel soon became known to the whole world. A paradoxical feature of the trial was that there was a surfeit of information, unlike the usual situation when investigating premeditated crimes where there is difficulty owing to a shortage of information and evidence. This was owing in no small measure to the German bureaucratic machine's carefully kept archives. Thanks to the swift advance of the Allied forces, the transportation of these documents from their place of discovery to temporary army depositaries was accomplished in hundreds of truckloads. The use of such documents was expressly stipulated in article 21 of the Charter of the tribunal. The Charter also empowered the tribunal to take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investigation of war crimes. These damning documents were supplemented by accounts of eyewitnesses and victims of the atrocities and high-ranking officials of the SS, who may have been moved by a sense of belated repentance. Added to this was eyewitnesses' evidence of the conditions in the concentration camps, of people who were forced to live in ghettoes, of executors of criminal orders such as generals and field-marshals, and of the screening of German and Soviet documentary films.

The tribunal treated the issues put before it as being issues of substantive law. It saw aggressive war as an international crime, as had been formally accepted by all states who had ratified the Pact of Paris on 27 August 1928.[15] This Pact condemned recourse to war for the solution of international controversies, and renounced recourse to war as a national policy. The IMT consequently saw resort to a war of aggression as illegal and a supreme international crime.[16] It emphasised that Germany had ratified the Pact of Paris, and referred to the analogous situation with the Hague Conventions of 1899, as revised in 1907,[17] which determined the rights and duties of belligerents in the conduct of their military operations, and which limited the means of doing harm, attempting to strike a balance between military necessity and humanitarian considerations.

We are still left without any clear or convincing answers as to why the IMT judges failed to address the subject of their jurisdiction more fully than they did in the tribunal's judgment. They merely asserted the broadest of

---

15 League of Nations *General Treaty for Renunciation of War as an Instrument of National Policy* 94 LNTS 57 (27 August 1928) (also known as the Kellogg-Briand Pact).

16 On 14 December 2017, the ICC's jurisdiction over the crime of aggression was activated as of 17 July 2018 for ICC member states that have ratified or accepted the amendment to the Rome Statute. Lord Bingham, in *R v Jones* [2006] UKHL 16 par 16, held that in order to qualify as a crime of aggression, an act of aggression must be performed by a person in a position effectively to exercise control or to direct the political or military action of the state. This approach retains the notion raised at the IMT that aggression is a "leadership crime" that cannot in the words of Lord Bingham be committed by minions and foot soldiers.

17 For a list of the Hague Conventions to which South Africa is bound, see Smart "The Municipal Effectiveness of Treaties Relevant to the Executive's Exercise of Belligerent Powers" 1987–8 13 *SA Yearbook of Intl* L 23.

jurisdictional bases, referring to a) the Moscow Conference Declaration of 1 November 1943, b) the London Agreement of 8 August 1945, and c) the Charter of the IMT attached to the London Agreement, "which was proclaimed in the interests of the United Nations". Contained in this tacit approval of the world community was an implied grant of authority conferring jurisdiction upon the IMT to determine individual responsibility and to mete out punishment for the commission of those crimes alleged in the IMT indictment. With jurisdiction being established in this manner, it was possible for the four Allied powers to avoid the necessity of reconciling varying and conflicting notions as to the jurisdiction of the IMT.

With hindsight, the verdict of the IMT meets the tests of objectiveness, persuasiveness and the principles of morality and law. To safeguard the rights of the defendants to contest their culpability or invoke extenuating circumstances owing to the gravity of the charges, the IMT questioned twice as many witnesses for the defence as witnesses for the prosecution. All documents that were submitted as evidence for the prosecution – amounting to several thousand – were submitted to the defence in the form of copies (photostats) or in translations into German. The IMT sought to draw its conclusions from irrefutable evidence. The latter consisted mainly of documents of the defendants' own making, the authenticity of which was not seriously challenged. In the expository portion of the verdict, the investigated events were invariably confirmed, and the main defendants were found guilty. Kaltenbrunner and Frank were found not guilty on the first count but guilty on the third and fourth counts. Frick and Funk were also acquitted on the first count but convicted on the second, third and fourth counts (crimes against the peace, war crimes and crimes against humanity). Neurath was found guilty on all four counts of the indictment, but extenuating circumstances were found on all four counts.

The IMT entered its verdict on 1 October 1946 as the sole and supreme court over the major war criminals. No court was legally competent to review and repeat the verdict that existed. Consequently, the verdict of the tribunal entered into legal force from the moment it was pronounced. The Charter of the IMT declared that, in the case of guilt, sentences shall be carried out in accordance with the powers of the Control Council of Germany, which may at any time or otherwise alter the sentences but may not reduce the severity thereof. This Control Council (consisting of the Supreme Commanders of the armed forces of the Allies as the seat of supreme authority) could grant pardons and, as an administrative function, implement the verdicts.

6 THE IMMEDIATE CONTRIBUTION OF THE IMT TO INTERNATIONAL LAW

The immediate contribution of the IMT to international law was immense. Two weeks after its conclusion, the United Nations had on its agenda for 11 December 1946 a draft of resolutions with a view to creating a new world

order. In creating the Universal Declaration of Human Rights (UDHR)[18] on 10 December 1948, the General Assembly affirmed the principles of international law recognised by the Charter of Nuremberg trial. On 9 December 1948, the General Assembly adopted the Genocide Convention.[19] Shortly after the Nuremberg Tribunal, a Tokyo War Crimes Trial commenced in respect of crimes against the peace, war crimes and crimes against humanity committed by the principal leaders of the Japanese regime during World War II.

The IMT proved the practicality of a fair trial for war crimes by an international tribunal and laid the basis for future similar tribunals. The International Criminal Tribunal for Former Yugoslavia (ICTY) was established by the UN Security Council in 1993,[20] and in 1994 the UN Security Council created the International Criminal Tribunal for Rwanda (ICTR).[21] The former was mandated to prosecute persons responsible for serious violations of international humanitarian law, and the latter to prosecute persons for violations of humanitarian law and genocide. The Statute for the International Criminal Court (ICC)[22] was adopted on 17 July 1998 by an overwhelming majority of states attending the Rome Conference. The ICC has jurisdiction over the most serious crimes concerning the international community, such as war crimes, crimes against humanity and genocide, all of which are defined in its statute. The ICC's exercise of jurisdiction may be triggered in three ways. First, a State Party may refer it to a situation where one or more crimes within the court's jurisdiction appear to have been committed. Secondly, the Security Council acting under Chapter VII may refer a situation to the prosecutor. Finally, the prosecutor may independently initiate an investigation. Some States Parties, such as South Africa with Act 27 of 2002, have enacted legislation allowing national courts to exercise jurisdiction over ICC crimes.

The major contribution of the IMT to international law, however, has been the introduction of the concepts "crimes against humanity" and "crime of genocide". This can be illustrated by the introduction of two tribunals this century. The first is the Special Court for Sierra Leone (SCSL) constituted in 2002. The SCSL is best known for the trial of Charles Taylor, who was

---

18 UNGA *Universal Declaration of Human* Rights A/RES217(III) (10 December 1948). See Lauterpacht "The Universal Declaration of Human Rights" 1948 25 *British Yearbook Intl L* 354.

19 UNGA *Convention on the Prevention and Punishment of the Crime of Genocide* 78 UNTS 277. Adopted: 09/12/1948; EIF: 12/01/1951.

20 UNSC *Security Council Resolution* 808 (1993) [International Criminal Tribunal for the former Yugoslavia (ICTY)] SRES/808 (1993) (22 February 1993). See De Waynecourt-Steele "The Contribution of the International Court of Justice to the Enforcement of International Law in the Light of Experiences of the ICTY" 2002 27 *SA Yearbook Intl L* 1.

21 UNSC *Security Council Resolution* 995 (1994) [Establishment of an International Tribunal and Adoption of the Statute of the Tribunal] SRES/955 (1994) (8 November 1994).

22 UNGA *Rome Statute of the International Criminal Court* 2187 UNTS 90 (1998). Adopted: 17/07/1998; EIF: 01/07/2002. See Schabas *The International Criminal Court: A Commentary on the Rome Statute* (2010). South Africa, by adopting the Rome Statute of the International Criminal Court Act 27 of 2002, provided for the prosecution of Rome Statute crimes in South Africa. See *Minister of Justice and Constitutional Development v South African Litigation Centre* 2016 (3) SA 317 (SCA) 70–84.

convicted for war crimes and crimes against humanity and sentenced to a term of 50 years. The second is the Extraordinary Chambers of the Courts of Cambodia (ECCC), which commenced operations in 2006. Kaing Guek Eav, chairman of the Khmer Rouge Security Centre, was convicted for crimes against humanity in 2014. Nuon Chea and Khieu Samphan were found guilty of genocide and crimes against humanity in 2018.

7 CRIMES AGAINST HUMANITY

The individual who proposed including the term "crimes against humanity" in the IMT indictments was Hersch Lauterpacht, professor of international law at Cambridge University. He had a great influence on the British IMT-prosecution team. He is regarded as the father of the modern human-rights movement. He prepared the draft for the closing address of Lord Shawcross, the chief British prosecutor at the IMT. The gist of this draft was that the community of nations had in the past successfully asserted the right to intercede on behalf of violated rights of man that have been trampled upon by the State in a manner calculated to shock the moral conscience of mankind. At the time this submission was made, it was ambitious as it invited the tribunal to rule that the Allies were entitled to use force to protect the "rights of man". Lord Shawcross based his main argument on the thesis of Hersch Lauterpacht, arguing that the tribunal should sweep aside the tradition that sovereigns could act as they wish, free to kill, maim and torture. Shawcross further emphasised an argument put forward by Lauterpacht that the State is not an abstract entity, that its rights and duties are the rights and duties of men, and that politicians should not be able to seek immunity behind the intangible personality of the State. Lauterpacht's contribution to Shawcross's closing address consisted of 15 pages. The proposition put forward by Lauterpacht was radical at the time, as it placed "fundamental human rights" and "fundamental human duties" at the forefront of a new international legal system. Shawcross conceded that this proposition was innovative but submitted that it was one that could be defended. He concluded by repeating that those who helped a state commit a "crime against humanity" should not be immune by sheltering behind the State and he emphasised Lauterpacht's view that the individual must transcend the State.

Shawcross's closing argument represented the essence of Lauterpacht's approach. This approach had virtually no appreciation of the concept of genocide. This is because Lauterpacht saw the individual as the ultimate unit of all law, as is illustrated in his work *An International Bill of Rights of Man.*[23] This work was ultimately the inspiration for the UDHR, which heavily influenced further similar and regional human-rights instruments. At

[23] Lauterpacht *An International Bill of Rights of Man* (1944). An overview of Hersch Lauterpacht's life is given by Elihu Lauterpacht *The Life of Hersch Lauterpacht* (2010). The development of the concept "crimes against humanity" is set out by Donnelly (*Universal Human Rights in Theory and Practice* (2003)) and Luban ("A Theory of Crimes Against Humanity" 2004 29 *Yale Journal of International Law* 35). For the practical application of crimes against humanity, see Bassiouni *Crimes Against Humanity in International Law* (2012); May *Crimes Against Humanity* (2005).

Nuremberg, the notion "crimes against humanity" – so enthusiastically propagated – by Lauterpacht was limited *only* to those attacks that occurred during an *international armed conflict*. The reason was that the Allied powers were concerned about drawing attention to the treatment of minorities in their own colonies. It was consequently submitted that a crime against humanity could only be committed if associated or linked with other crimes under the IMT's jurisdiction – that is, acts that occurred *during* an international armed conflict – such as war crimes, or acts against the peace such as aggression. That is why the Nuremberg trials are sometimes referred to as the "war crimes trials".

Resolutions of the UN General Assembly have broadened the notion of crimes against humanity to include the practices of racial discrimination; in article I of the Convention on the Suppression of the Crime of Apartheid,[24] the States Parties declare apartheid to be a crime against humanity.

With the passage of time, the UN General Assembly has become concerned that the operation of statutes of limitation would make it difficult for the further prosecution of persons accused of crimes against humanity and war crimes. The Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity was consequently adopted.[25] This Convention defines war crimes and crimes against humanity primarily by reference to the Charter of the IMT, but irrespective of the date of their commission. However, in addition to the crimes against humanity so defined, the crimes within the Convention (whether committed in time of war *or* peace) include eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid and the crime of genocide as defined in the Genocide Convention, even if such acts do not constitute a violation of the domestic law of the country in which they were committed. The Convention emphasises the individual responsibility of those involved in the commission of the crimes referred to and continues to provide that parties will adopt measures to ensure that statutory limitations shall not apply to the prosecution and punishment of the crimes referred to, and that existing limitations shall be abolished.

It is a moot point whether a general rule of positive international law can be asserted that gives states the right to punish foreign nationals for crimes against humanity in the same way as they are, for example, entitled to punish for acts of piracy. There may be a gradual evolution in this regard. This will however have to entail the applicability of the rule of universality of jurisdiction and the recognition of the supremacy of the "law of humanity" over the law of the sovereign state. There will also have to be a violation of elementary human rights in a manner that may justly be held to shock the conscience of mankind.

---

[24] UNGA *International Convention on the Suppression and Punishment of the Crime of Apartheid* A/9030 (1974) 1015 UNTS 243; 13 *ILM* 50 (1974). Adopted: 30/11/1973; EIF: 18/07/1976.

[25] UNGA *Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity* 8 *ILM* 68 (1969). Adopted 26/11/1968; EIF: 11/11/1970

Crimes against humanity prohibited by article VII of the Rome Statute of the ICC cover: a) offences that are particularly egregious in that they constitute a serious "attack" on human dignity or are degrading or humiliating of one or more human beings; b) they form part of government policy, or of a widespread or systematic practice of atrocities tolerated, condoned or acquiesced in by a government or a *de facto* authority; and c) the victims of the crimes are civilians or, in the case of crimes committed during armed conflict, persons who do not take part (or no longer take part) in armed hostilities. Article VII paragraph 1 emphasises that the prohibited attack must be systematic and directed against a civilian population, with knowledge of the attack. Article VII paragraph 2 elucidates paragraph 1 when it states that such an attack means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population. The policy to commit such an attack requires the State or organisation actively to promote or encourage such an attack against a civilian population. The reference to "with knowledge of the attack" amounts to a form of specific intent. It can be submitted that each of the above underlying features (which must be present in terms of the attack) requires its own form of intent. It is each of these separate intents leading up to the main "attack" that gives the individual acts seen in totality the identity of a crime against humanity.

8 GENOCIDE

The individual responsible for introducing the concept of genocide to the IMT was Raphael Lemkin,[26] a professor at Duke University. He fled Poland in 1939 and worked with the American prosecution team during the IMT. He worked tirelessly to influence the prosecutors at the tribunal to introduce the concept of genocide during the trial, without any initial success. The French and Soviet prosecutors only made an initial passing reference to it, and the American and British prosecutors made no mention of the term. Thirty-one days of the trial passed without the term being referred to. The French judge at the trial, Donne Dieu de Vabres, was presented with a book written by Lemkin entitled *Axis Rule in Occupied Europe*. Shortly thereafter, Lemkin met with Robert Jackson, one of the chief prosecutors at the tribunal. Lemkin then sent a memorandum on the subject to Robert Kempner, his former colleague who had been expelled from the Reich in 1933. Kempner was attached to the United States War Crimes Office and was one of the prosecutors at the trial. This memorandum was entitled "Necessity to Develop the Concept of Genocide in the Proceedings". Lemkin had a second meeting with Jackson to persuade him to argue for genocide as a distinct crime. Four days after this meeting, the term "genocide" made its way back into the proceedings during the cross-examination of Hitler's foreign minister by the British prosecutor Sir Maxwell Fyfe. Fyfe used the concept freely thereafter, although without influencing the ultimate judgment. None of the defendants were found guilty of genocide. Successful prosecutions at the

[26] Lemkin *Axis Rule in Occupied Europe* (1944); Lemkin "Genocide, as a Crime Under International Law" 1947 41 *Amer J of Int l Law* 145; Sands *East West Street* 137–190. On the life of Lemkin, see Cooper *Raphael Lemkin and the Struggle for the Genocide Convention* (2008); Korey *Epitaph for Raphael Lemkin* (2001).

IMT were for crimes against humanity, war crimes and crimes against the peace. However, the important point is that Lemkin introduced the concept of genocide to the IMT, and there is no doubt that the Genocide Convention[27] would not have been adopted (9 December 1948) so soon after the conclusion of the IMT were it not for Lemkin's persistent efforts during the trial. Genocide has subsequently developed into a crime of customary international law and is defined in article VI of the Rome Statute of the ICC, which is based on article II of the Genocide Convention. Genocide can be committed during times of war and peace. The requirement of a nexus with armed conflict was done away with by the ICTY in *Prosecutor v Tadić*.[28]

Article II of the Genocide Convention defines genocide as acts committed with *intent* to destroy, in whole or in part, a national, ethnic, racial or religious group as such. This encompasses killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group. Article III of the Convention lists the five acts punishable by the Convention as: a) genocide; b) conspiracy to commit genocide; c) direct and public incitement to commit genocide; d) attempt to commit genocide; and e) complicity in genocide. Genocide, as stated by Larry May,[29] presents one of the most significant philosophical challenges in all the areas of international criminal law. More than 80 years after the Holocaust, it conceives the idea of killing or harming individuals because of their group membership, or to ultimately destroy the group itself by wiping it off the face of the earth. The subject continues to be of great relevance.[30] The modern understanding of the crime of genocide can be gleaned from examples emanating from the ICTR and the ICTY. In *Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*,[31] Nahimana, a founder of the newspaper *Kanguar,* and the editor Ngeze were prosecuted for incitement to genocide by allowing images of a machete to be published on the cover of their newspaper. They did not write or design the cover. Barayagwiza, who headed a programme on the radio station RTLM, allowed inciting broadcasts to go over the RTLM airways. He did not broadcast himself but allowed such broadcasts. In *Prosecutor v Jean-Paul Akayesu*,[32] a mayor of a commune was more directly involved by leading a meeting at which he sanctioned the death of one Karera and urged the population to eliminate Tutsis. Shortly after this, the killing of Tutsis commenced. In these cases, the ICTR grappled with the problem of complicity as opposed to

---

27 See Robinson "The Genocide Convention: Its Origins and Interpretation" 2007–8 40 *Case Western Reserve Journal of* International Law 1.

28 Appeals Chamber Decision IT-94-1-AR72 ICTY; 105 ILR 453; 35 *ILM* 32 (1996).

29 May *Genocide: A Normative Account* (2010) 2; Card *The Atrocity Paradigm* (2002); Lang *Act and Idea in the Nazi Genocide* (1990); Power *A Problem from Hell* (2002).

30 Schabas *Genocide in International Law* (2009); Chalk and Jonassohn *The History and Sociology of Genocide* (1990).

31 Judgment and Sentence ICTR-99-52-T ICTR (3 December 2003).

32 *Akayesu* (Judgment) ICTR-96-4-Y TCH 1 (2 Sept 1998).

being a principal perpetrator. In *Prosecutor v Tadić*,[33] the ICTY held that there is no difference between the moral gravity and guilt of an aider and abettor and that of one actually carrying out the acts. Put succinctly, the crux of the crime of genocide is the specific intent – *dolus specialis* – to destroy, in whole or in part, a national, ethnic, racial or religious group. In *Prosecutor v Jelisić (Appeal)*,[34] the ICTY emphasised that it is the *mens rea* that gives genocide its special character. In the *Akayesu* judgment,[35] this was reiterated, and this significant case represented the first conviction by an international tribunal for genocide, as well as the first time that rape in war was held to constitute genocide. In the influential ICTY Appeals Chamber case of *Prosecutor v Radislaw Krstić*,[36] the conviction for genocide was thrown out because of a *lack* of intent.

Milošević became the first former head of state to be charged with genocide when, in 2001 after he had left office, genocide charges relating to Bosnia and Srebrenica were added to his indictment for crimes against humanity before the ICTY.[37]

In 2007, the International Court of Justice ruled that Serbia had violated its obligations to Bosnia and Herzegovina by failing to prevent a genocide in Srebrenica.[38] On the facts, units of the Bosnian Serb army launched an attack on military-aged Muslim men from Srebrenica, took prisoners, detained them in brutal conditions, and executed them. More than 7 000 people were never seen again. Judge Lauterpacht held in par 100:

> "The prohibition of genocide … has generally been accepted as having the status not of an ordinary rule of international law but of *ius cogens*. Indeed, the prohibition of genocide has long been regarded as one of the few undoubted examples of *ius cogens.* Even in 1951, in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, [ICJ Reports 1951, 22] the Court affirmed that genocide was contrary to moral law and to the spirit and aims of the United Nations (a view repeated by the Court in paragraph 51 of today's Order) and that the principles underlying the Convention are provisions recognized by civilized nations as binding on States even without any conventional obligation."[39]

---

33 See Straub "The Psychology of Bystanders, Perpetrators and Heroic Helpers" in Newman and Erber (eds) *Understanding* Genocide (2002) 1; Syse and Gregory *Genocide* (2002) 11; Reichberg (ed) *Ethics, Nationalism and Just War* (2007) 352.

34 IT-95-10-A (2001); 40 *ILM* 1295 (2001).

35 *Supra*.

36 Appeal Judgment IT-98-33-T; 40 *ILM* 1346 (2001).

37 *Prosecution v Slobodan Milošević (Decision on Review of Indictment)* IT-01-51-I.

38 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* 2007 ICJ 43.

39 Separate Opinion of Judge ad hoc Lauterpacht in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures* (Order of 13 September 1993) 1993 ICJ Rep 325 par 100. The ICJ held further (2007 ICJ Rep 43 par 191–6) that for genocide to have occurred there must have been a collection of people who have a particular identity with specific distinguishing well-established characteristics. In addition, when part of the group is targeted, that part must be significant enough for its destruction to have an impact on the group as a whole. On how to identify groups, see *Report of the International Commission of Inquiry for Darfur to the United Nations Secretary-General: Security Council Resolution 1564* (25 January 2005) par 499.

This was the first occasion on which a state had been condemned by an international tribunal for violating the Genocide Convention.

In 2010, President Omar al-Bashir of Sudan became the first serving head of state to be indicted for war crimes, crimes against humanity and genocide by the ICC.[40]

9 UNIVERSAL JURISDICTION

For the sake of completeness, it is necessary to refer briefly to the issue of universal jurisdiction in relation to crimes against humanity and genocide. True universal jurisdiction applies to crimes under customary international law in respect of which all states have the right to prosecute. The original crime to which universal jurisdiction was attached was that of the act of piracy, which was in turn followed by slavery. In modern times, it has been extended to the so-called "core crimes" of customary international law, – namely, genocide, crimes against humanity, breaches of the laws of war, especially of the Hague Convention of 1907, and grave breaches of the Geneva Conventions of 1949. In recent years, numerous international crimes have been created by multilateral treaties, which confer wide jurisdictional powers on States Parties. Universal jurisdiction as a concept in international law applies to crimes that may be punished by any state having custody of the offender, irrespective of the place where the offence was committed. The criterion for the application of the principle of universal jurisdiction must be sought in the heinous nature of the crime.

What is the situation regarding universal jurisdiction in South Africa? South Africa is under an obligation to bring to justice persons who find themselves within its jurisdiction and who are suspected of crimes against humanity or genocide – irrespective of where these crimes were committed. These crimes are not only subject to universal jurisdiction but are further referred to in the ICC statute to which South Africa is party. These crimes are also part of customary international law and, in terms of section 232 of the Constitution of the Republic of South Africa, 1996, are consequently part of the law of the Republic unless inconsistent with the Constitution or an Act of Parliament. Despite section 232 of the Constitution, section 4(1) of the ICC Act 27 of 2002 creates added jurisdiction for a South African court over ICC crimes by providing: "despite anything to the contrary in any other law of the Republic, any person who commits [an ICC] crime is guilty of an offence and liable on conviction to a fine or imprisonment." Part 3 section 2 of the ICC Act 2002 states that applicable law for any South African court hearing any matter under the Act "includes conventional international law, and in particular the [Rome] Statute".

---

[40] *Prosecutor v Amar Hassan Al-Bashir* ICC 02/05-01/09-94. In May 2012, Charles Taylor became the first head of state to be convicted for crimes against humanity and sentenced to 50 years in prison. See *Prosecutor v Charles Chankay Taylor* SCSL-03-O1-A.

10 CONCLUSION

The two concepts “crimes against humanity” and “crime of genocide” have developed side by side and can be linked with the atrocities committed in the former Yugoslavia and Rwanda, which were a catalyst for a meeting in Rome where more than 150 states agreed to a statute for an International Criminal Court (ICC). The ICC can take up only the most serious crimes of concern to the international community as a whole – genocide, crimes against humanity and war crimes. Genocide is understood as involving the international mass destruction of entire groups or members of that group. Crimes against humanity are prohibited under article VII of the Rome Statute and make up those crimes commonly associated with egregious abuses of human rights. Article VIII of the Rome Statute generally sees war crimes as crimes committed in violation of international humanitarian law during armed conflicts.

It would appear that in practice, genocide has gained greater traction than crimes against humanity and the latter has come to be seen as a lesser evil. This is an unfortunate unintended consequence of Lauterpacht’s emphasis on the individual at the Nuremberg trial and Lemkin’s insistence that genocide be recognised. An obvious question is whether the difference between crimes against humanity and genocide is important. For Lauterpacht, the killing of individuals as part of a systematic plan, would be a crime against humanity. For Lemkin, the focus was on genocide, the killing of many with the intention of destroying the group of which they were part. Does the difference matter? Does it matter whether the law seeks to protect you because you are an individual or because of the group of which you happen to be a member?

Both Lauterpacht and Lemkin shared the belief in the power of law to do good and protect people and the need to change the law to achieve this objective. Both agreed on the value of a single human life and on the importance of being part of a community. They fundamentally disagreed, however, on the most effective way of protecting these values – that is, on whether to focus on the individual or the group.

The IMT and its offspring helped to restore the confidence of the world that international law embodies justice – that crimes against international law are committed by human beings, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

The IMT’s impact continues today. On 12 April 2022, the Central African Republic’s (CAR) long-awaited Special Criminal Court began its first trial. This hybrid court was created in 2015 to try war crimes and crimes against humanity perpetrated in the CAR since 2003.

An Examination of South African Corporate Law Through the Lens of *Ubuntu*

Siphethile Phiri
LLB LLM LLD
Law Lecturer, Private Law Department, Africa University, Zimbabwe
https://orcid.org/0000-0002-8428-0390

SUMMARY

This article submits that *ubuntu* is indubitably a constitutional value that informs the constitutional epoch. Constitutional supremacy means that all values and principles of the Constitution must be observed to avoid invalidation. In light 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 black-letter law, which encompasses extensive scrutiny of relevant legal literature. This research methodology is selected owing to its ability to address the question of what the law is in a particular case. The article intends to determine the position of *ubuntu* as a constitutional principle in the context of South African corporate law. The conclusion reached is that South African corporate law contains significant traces of the ontological elements of *ubuntu*. This is reinforced by a clear correlation between the values of *ubuntu* and corporate law principles. Simply put, several South African corporate-law concepts appear to be founded on the influence of *ubuntu* – for instance, the exception to the cornerstone principle of juristic personality. The lifting of the corporate veil aims to avoid unconscionable abuse of the corporate structure, which is in line with the *ubuntu* principles, which operate against any form of unconscionable abuse, as defined in common law. Nonetheless, since there is still no express inclusion of *ubuntu* in the Constitution or corporate statutes, the conclusions reached in this article are based on its implied application.

Keywords: Constitution; constitutional value; corporate law; South Africa; transformative constitutionalism; *ubuntu*

1 INTRODUCTION

Since the judgment of *S v Makwanyane*[1] (*Makwanyane*), *ubuntu* has been widely accepted as a constitutional value because its status is equal to that of the constitutional right of human dignity.[2] In *Makwanyane*, Sachs J

[1] 1995 (3) SA 391 (CC).

[2] Mokgoro "Ubuntu and the Law in South Africa" 1998 1(1) *Potchefstroom Electronic Law Journal* 16–32; Metz "Ubuntu as a Moral Theory and Human Rights in South Africa" 2011 11

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 advancement of human rights and freedoms.[4] Although the object of this article 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:

> "[T]he concept of *ubuntu*, like many concepts, is not easily defined. 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 "*umuntu ngumuntu ngabantu*", which translates as "a person is a person through other persons".[6] Thus, *ubuntu* involves an interdependent relationship among persons and a sense of communality.[7] *Ubuntu* is also translated to refer to humaneness, personhood, and morality.[8]

Mokgoro 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]

In 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 an already existing and continuing community that considers the living, the living dead and the yet to be born.[11]

African Human Rights Law 532–559; Himonga, Taylor and Pope "Reflections on Judicial Views of Ubuntu" 2013 16(5) *Potchefstroom Electronic Law Journal* 371–429.

3 *Makwanyane supra* par 365.

4 S 1(*a*) of the Constitution of the Republic of South Africa, 1996 (Constitution).

5 Mokgoro 1998 *PELJ* 1. See also Tutu *No Future Without Forgiveness* (1999) 34–35, where he argues: "[U]buntu is very difficult to render into Western language."

6 Breda "Developing the Notion of Ubuntu as African Theory for Social Work Practice" 2019 55(4) *Social Work* 439.

7 Mokgoro 1998 *PELJ* 19.

8 *Ibid*.

9 Mokgoro 1998 *PELJ* 10–11.

10 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* 113.

11 Grootboom 2019 *Pretoria Students Law Review* 113; Khomba "Shaping Business Ethics and Corporate Governance: An Inclusive African Ubuntu Philosophy" 2013 13(5) *Global Journal of Management and Business Research* 31–42.

The communal understanding of the concept of *ubuntu* plays an imperative role in South African corporate law. This is revealed through corporate-law concepts such as corporate social responsibility (CSR), corporate legal responsibility (CLR) and environmental, social and corporate governance (ESG), which are examined below under heading 4.

2 *UBUNTU* AS A PRINCIPLE OF TRANSFORMATIVE CONSTITUTIONALISM

Ubuntu is one of the principles that has influenced transformative constitutionalism in South Africa, alongside 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 overarching and key transformative principle of constitutionalism.[15] Consequently, it has been widely accepted that *ubuntu* is an implied constitutional value because its status is equal to that of human dignity.[16]

Kroeze[17] highlighted the constitutional importance of *ubuntu* – namely, that, as a constitutional value, it gives content to rights[18] and the limitation of rights, in an open and democratic society. This submission is accurate since *ubuntu* recognises communal existence, which requires respecting the rights of others for a harmonious coexistence.[19] As a result, certain rights can be limited in order to avoid a conflict between people's rights. Thus, individuals' rights are exercised within the context of and in relation to the needs of the entire community.[20] Therefore, *ubuntu* is based on the primary values of humanness, caring, respect and ensuring a good quality of community life in the spirit of family.[21]

The connection between *ubuntu*'s limitation of rights and the limitation of rights in terms of the Constitution illustrates that both systems acknowledge that no right is absolute. The limitations clause contained in section 36 of the

12 S 1(*a*)–(*d*) of the Constitution.

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

14 S 251(4) Interim Constitution.

15 Himonga *et al* 2013 *PELJ* 380.

16 *Makwanyane supra* par 311; see also art 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 Kroeze "Doing Things With Values II: The Case of Ubuntu" 2002 13 *Stellenbosch Law Review* 252–253.

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

19 Grootboom 2019 *Pretoria Students Law Review* 92 and 113.

20 *Ibid*.

21 Tshoose "The Emerging Role of the Constitutional Value of Ubuntu for Informal Social Security in South Africa" 2009 3 *African Journal of Legal Studies* 13; Radebe and Phooko "Ubuntu and the Law in South Africa: Exploring and Understanding the Substantive Content of Ubuntu" 2017 36(2) *South African Journal of Philosophy* 240.

Constitution may be considered as a rights-balancing mechanism that is partially influenced by *ubuntu*. This is attributed to the fact that the constitutional limitation of rights, as in African communities, aims to promote peaceful coexistence among individual claimants of rights.[22] For instance, section 16(2) of the Constitution limits the fundamental right to freedom of expression by excluding "(*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.[23] 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 a scramble for survival within the community. For instance, the right to freedom of expression, if not properly managed may result in the enticement of violence or hatred. This constitutional qualification that a democratic society must be based on human dignity, equality and freedom reverts back to *ubuntu*, which has equal status with human dignity.[24] The provision of section 36 of the Constitution may be summed up to indicate that rights may be limited in order to promote peaceful coexistence, which in African philosophy is interpreted as ubuntuism.

Ubuntu is considered to be an integral part of the Constitution. Sachs J in *Dikoko v Mokhakla*[25] (*Dikoko*) held that *ubuntu* is "intrinsic to and constitutive of our constitutional culture"[26] and it supports the whole constitutional order.[27] It combines individual rights with a communitarian philosophy.[28] In *Dikoko*,[29] Sachs J portrays *ubuntu* as a fundamental constitutional value. Despite its importance and influence, *ubuntu* has faced exclusion in South African law, which previously mainly consisted of Roman-Dutch and English law.[30] The formal recognition of indigenous law in the South African legal system is a recent phenomenon.[31] Although *ubuntu* is not a Western concept, its respect for human rights and human dignity aligns it with the Constitution and, more specifically, with the Bill of Rights.[32]

---

22 Mokgoro 1998 *PELJ* 25.

23 S 36(1) of the Constitution.

24 *Makwanyane supra* par 311.

25 2006 (6) SA 235 (CC).

26 *Dikoko v Mokhakla supra* par 113.

27 *Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) par 37.

28 *Ibid*.

29 *Dikoko v Mokhakla supra* par 235.

30 Hosten *Introduction to South African Law and Legal Theory* (1995) 1268.

31 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* 8; 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* 94–106.

32 Himonga *et al* 2013 *PELJ* 382–383.

However, *ubuntu* still faces the serious challenge of being either under- or over-explained.[33] This is due to difficulty in finding a precise definition of the concept.[34] This challenge is the main reason for the irregular and inconsistent application of *ubuntu*, even by courts.[35]

In a nutshell, although the Constitution does not have an express provision on *ubuntu*, *ubuntu* is recognised as a founding value of the Constitution and has been applied in many instances as such.[36] The exclusion of this influential African philosophy as an express founding principle might be owing to Bhengu's observation that the three founding principles of the Constitution (equality, freedom and dignity) are of Western origin.[37] Thus, the Eurocentric nature of the Constitution led to the obscuring of *ubuntu*. Bhengu's submission proposes that the express founding values of the Constitution originate from the Western philosophical view that "one is born a human and therefore deserving equal treatment, freedom and dignity".[38] The Eurocentric notion of human beings is individualistic in nature, and 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)*.[39]

In the African philosophy of *ubuntu,* the definition of a human being is communal and not individualistic. The community-based viewpoint of a human being has given birth to famous African idioms such as *umuntu ngumuntu ngabantu* (a person is a person because of others)[40] and *inkosi yinkosi nga bantu bayo* (a king is a king because of his people).[41] The way in which members of the Ndebele tribe from Zimbabwe greet each other portrays a communalist spirit. One will greet by saying "*linjani*" (How are you? in a plural sense) and the responder will say "*sikhona*" ("we" are fine as opposed to "I" am fine).[42] The "li" prefix is plural, which illustrates the value placed on communality, as opposed to the "u" prefix, which expresses individualism. Nonetheless, the express exclusion of the African philosophy of *ubuntu* owing to Eurocentric constitutional influence does not in any way render *ubuntu* less important or irrelevant in the South African legal system. *Ubuntu* continues to

---

33 English "Ubuntu: The Quest for an Indigenous Jurisprudence" 1996 *South African Journal on Human Rights* 645.

34 *Ibid*.

35 English "Ubuntu: The Quest for an Indigenous Jurisprudence" 1996 *South African Journal on Human Rights* 645.

36 Himonga *et al* 2013 *PELJ* 369; *Makwanyane supra* par 224; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); Hosten *Introduction to South African Law and Legal Theory* 1268.

37 Bhengu *Ubuntu: The Essence of Democracy* (1996) 4; Grootboom 2019 *Pretoria Students Law Review* 112.

38 Bhengu *Ubuntu: The Essence of Democracy* 4; Grootboom 2019 *Pretoria Students Law Review* 112.

39 Ramose "An African Perspective on Justice and Race" 2001 3 *Polylog: Forum for Intercultural Philosophy* 12; Tutu *No Future Without Forgiveness* 34–35.

40 Ifejika "What Does Ubuntu Really Mean?" (2006) *The Guardian* https://www.theguardian.com/theguardian/2006/sep/29/features11.g2 (accessed 2023-08-09).

41 Ndlovu-Gatshen "Inkosi Yinkosi Ngabantu: An Interrogation of Governance in Precolonial Africa – The Case of the Ndebele of Zimbabwe" 2008 20 *Southern African Humanities* 1.

42 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 155.

be silently and indirectly applied in many aspects of the law, and it is undisputedly playing a vital role in the legal system.

3 THE ROLE OF COURTS IN THE INCLUSION OF *UBUNTU*

Courts have attempted to define and interpret *ubuntu* as a "culture" and philosophy of the African people that expresses compassion, justice, reciprocity, dignity, harmony and humanity in the interests of building, maintaining and strengthening the community, which combines individuality with communitarianism.[43]

In *S v Mhlungu*,[44] Sachs J, in advocating for the incorporation of the history of South Africa in decision-making by the courts, held:

> "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."[45]

Courts encourage the application of *ubuntu* in decision-making.[46] *Mhlungu* not only paved the way for the application of indigenous values that stem from *ubuntu*, but also urged courts to reflect on *ubuntu* in decision-making.[47] In the Constitutional Court, Ngcobo J in *Hoffmann v South African Airways*[48] (*Hoffmann*) promoted the constitutional rights to equality and human dignity by expressly applying *ubuntu*, *mero motu*, and held that *ubuntu* must be shown towards HIV patients.[49]

The ruling of the court is based on the observation that, in the application of *ubuntu,* all human beings are equal and deserve respect regardless of their status or any other qualification.[50] Bhengu asserts that if a nation follows the principles of *ubuntu*, there will be no discrimination.[51] This aligns with the definition of *ubuntu* in *Hoffmann* as "the recognition of human worth and respect for the dignity of every person".[52] This indicates that the courts view *ubuntu* through the same lens as African communities, which consider *ubuntu* as comprising of unqualified aspects that include human dignity. In the African

---

43 For instance, *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) par 37; *City of Johannesburg v Rand Properties (Pty) Ltd* 2006 (6) BCLR 728 par 62–63.

44 1995 (7) BCLR 793 (CC).

45 *S v Mhlungu supra* par 127.

46 *Ibid*.

47 Netshitomboni *Ubuntu: Fundamental Constitutional Value and Interpretive Aid* (unpublished Master of Laws dissertation, University of South Africa) 1998 20.

48 2001 (1) SA 1 (CC).

49 *Hoffmann supra* par 38.

50 *Ibid*.

51 Bhengu *Ubuntu: The Essence of Democracy* 38.

52 *Hoffmann* (fn 48 above) fn 31.

community, one deserves respect by mere dint of being a human being within a community.[53] A person is treated with dignity and respect regardless of their status or any qualification. Similar to the courts, they consider *ubuntu* as being analogous to the unqualified constitutional right of human dignity.[54] This was also demonstrated in the leading case of *Makwanyane*,[55] where the Constitutional Court related the protection of human dignity to the concept of *ubuntu*. In that case, the influence of *ubuntu* was central to the development and promotion of entrenched constitutional rights by the Constitutional Court.[56]

Similarly, in conducting their business, corporations must not include terms that are contrary to *ubuntu*.[57] To explain the influence of *ubuntu* on corporate contracts, in *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd*[58] (*Mohamed*), counsel for the respondent contended:

> "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."[59]

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".[60] Furthermore, "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".[61] To substantiate further, reference was made to *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*[62] (*Everfresh*), where it was held:

> "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."[63]

---

53 Bhengu *Ubuntu: The Essence of Democracy* 58.

54 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* 8; 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* 109.

55 *Makwanyane supra* par 481.

56 *Makwanyane supra* par 302.

57 *Hoffmann supra* par 38; Hosten *Introduction to South African Law and Legal Theory* 1268.

58 [2017] ZASCA 176.

59 *Mohamed supra* par 12.

60 *Mohamed supra* par 16.

61 *Mohamed supra* par 17.

62 [2011] ZACC 30, 2012 (1) SA 256 (CC).

63 *Everfresh supra* par 22.

In the above discussions, the term "good faith" has been employed extensively. Therefore, it is imperative to define the term. Good faith has been defined to mean "honesty" or "sincerity of intention".[64] The need to act in honesty and sincerity reflects elements of *ubuntu*, which has been seen in a number of corporate law concepts.[65]

Courts should accept overall responsibility for giving content to all constitutional values, including *ubuntu* as an implied constitutional value that the Constitution seeks to promote.[66] Placing emphasis on human dignity and social justice in the Constitution accepts that these values must be given an indigenous perspective.[67] In *Everfresh,*[68] the Constitutional Court emphasised that, when developing the common law, the courts must infuse the law with constitutional values, including values of *ubuntu*, which inspires much of the constitutional compact.

4 *UBUNTU* AND SOUTH AFRICAN CORPORATE LAW

As in the Constitution, the Companies Act[69] (the Act), which is South Africa's main corporate-law statute, does not have an express provision on *ubuntu*. However, traces of *ubuntu* are seen in most of its provisions. 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 intent to defraud any person or for any fraudulent purpose. Personal liability is imposed on directors of a company who engage in prohibited conduct.[70] To curb abuse of juristic personhood, section 20(9) of the Act gives the courts the discretion to lift the corporate veil where there is "unconscionable abuse" of juristic personality.[71] In *Ex Parte: Gore NO*[72] (*Ex Parte: Gore*), the court found irregularities and dishonesty in the management of a group of companies owned by three brothers.[73] The group of companies were managed as a single entity through the holding company.[74] The court held that the group was a mere sham aimed at deceiving the shareholders.[75] This resulted in the court disregarding the separate legal personality of the subsidiary companies and treating them and the holding company as one entity.[76] In the modern transformative

64 Cambridge Dictionary "good faith" (undated) https://dictionary.cambridge.org/dictionary/english/good-faith (accessed 2023-08-16).

65 See for instance s 76(3)(*a*) of the Act.

66 S 39 of the Constitution.

67 Kroeze 2002 13 *Stellenbosch Law Review* 252–253; Netshitomboni *Ubuntu: Fundamental Constitutional Value and Interpretive Aid* 20.

68 *Everfresh supra* par 34.

69 71 of 2008.

70 See also ss 20(9) and 163(4) of the Act.

71 See 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* 17–26.

72 [2013] ZAWCHC 21; [2013] 2 All SA 437 (WCC).

73 *Ex Parte: Gore supra* par 8.

74 *Ibid*.

75 *Ex Parte: Gore supra* par 15.

76 *Ex Parte: Gore supra* par 37.

constitutionalism era, which requires that *ubuntu* be promoted, it is correct to submit that the conduct of directors who infringe on ubuntuism falls within the ambit of "unconscionable abuse" of corporate personality. This includes conduct such as dishonesty and irregularities, as stipulated in *Gore*. It is clear 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.[77] Thus, the impact of one's conduct on others and the surrounding environment is of considerable importance. In corporate-law concepts, this can be seen through CSR, CLR and ESG, which require and oblige companies to consider the impact of companies' activities on their employees and the surrounding environment at large. *Ubuntu* is associated with concepts such as humanness, interconnectedness and concern for others, which are consistent with CSR, CLR and ESG values.[78] These corporate-law concepts have been incorporated into the Act. For instance, section 72(4) of the Act requires certain categories of company to have a social and ethics committee (SEC). The determination to have an SEC is based on public-interest consideration.[79] Companies have both a statutory and a constitutional obligation to act considerately towards the environment in which they operate.[80] Companies in their operations must therefore ensure that, at all times, they act with care for and in harmony with their environment, which accords with the concept of *ubuntu*.

Woerman and Engelbrecht, in their paper, explore the manner and the extent to which *ubuntu* can serve as an alternative theory for determining the responsibility of companies towards involved parties. Their submission favours the relationholder theory, as opposed to the stakeholder theory.[81] This is because the relationholder theory is premised on *ubuntu*, which better accommodates the interests of various stakeholders on a moral basis, promoting a harmonious relationship with parties with whom the company communes, as opposed to their stakes.[82] 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 through the lens of stake-holding interests.[83] This is because *ubuntu*, or relationholder theory, grounds the responsibility of companies towards different parties involved with the company solely on their existing relationship with the company.[84] From the *ubuntu* perspective, a company is not a nexus of contracts in terms of the stakeholder theory but is a nexus of relationships or

77 Mbigi and Maree *Ubuntu: The Spirit of African Transformation Management* (1995) 75.

78 *Ibid*.

79 S 72(4) of the Act.

80 E.g., s 72(4) of the Act; Ch 7 of the National Environmental Management Act 107 of 1998 and s 24 of the Constitution.

81 Woerman and Engelbrecht "The Ubuntu Challenge to Business: From Shareholders to Relationholders" 2019 157 *Journal of Business Ethics* 28.

82 Woerman and Engelbrecht 2019 *Journal of Business Ethics* 29–30.

83 Woerman and Engelbrecht 2019 *Journal of Business Ethics* 30.

84 Woerman and Engelbrecht 2019 *Journal of Business Ethics* 31.

communality.[85] However, Du Plessis *et al*'s[86] definition of stakeholder refers to an individual or group of individuals who are affected by the activities of a company – such as customers, suppliers, employees, creditors and the environment. There is a close relationship between the stakeholder and relationholder theory, in that they both foster communal consideration. Therefore, Woerman and Engelbrecht seem not to be introducing a new concept. Philips *et al*[87] describe stakeholder theory as a theory involving ethics similar to Woerman and Engelbrecht's submission.

Makwara *et al*[88] also advocate for the inclusion of African ethical ethos such as *ubuntu* in the regulation of African business practices because Western theories fail to align with the moral values of many African communities. *Ubuntu* is a "code of ethics and behaviour and it honors the dignity of others and development and continuous mutual affirming and enhancing relationships".[89] This is because *ubuntu* not only provides an understanding of what being is, but it also gives an understanding of what "being with others" entails.[90] Ethical business practice entails appreciating the importance of human dignity.[91] Khomba states:

> "Ethical behavior is characterised by unselfish attributes which balance 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."[92]

Ubuntu is demonstrated through care and compassion. Thus, through the lens of *ubuntu*, companies have a moral responsibility to affirm and enhance humanity.[93] In corporate law, this relates to a number of aspects such as the stakeholder inclusive value approach and the enlightened shareholder value approach. The stakeholder inclusive value approach requires that company directors, in conducting their fiduciary duties in the best interests of a company, must consider the interests of all stakeholders, in and out of the company.[94] This approach is confirmed by the modern consideration of a company as both a social and economic tool as envisaged by the Act.[95] Section 7(*d*) of the Act provides that the Act aims to reaffirm the concept of the company as a means of achieving economic and social benefits. This reinforces the triple bottom line approach, which requires a consideration of

---

85 *Ibid*.

86 Du Plessis, McConvill and Bagaric *Principles of Contemporary Corporate Governance* (2005).

87 Phillips, Freeman and Wicks "What Stakeholder Theory Is Not" 2003 13(4) *Business Ethics Quarterly* 480.

88 Makwara, Dzansi and Chipunza "Contested Notions of Ubuntu as a Corporate Social Responsibility (CSR) Theory in Africa: An Exploratory Literature Review" 2023 15 *Sustainability* 3–8.

89 Nussbaum "Ubuntu: Reflections of a South African on Our Common Humanity Reflections" 2003 17(1) *World Business Academy* 2.

90 Grootboom 2019 *Pretoria Students Law Review* 113.

91 Byars and Stanberry *Business Ethics* (2018) 9.

92 Khomba 2013 *Global Journal of Management and Business Research* 32.

93 Woerman and Engelbrecht 2019 *Journal of Business Ethics* 31.

94 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* 98–99.

95 S 7(*d*) of the Act.

the impact of corporate activities in three contexts – that is, society, environment and economy – in which a company operates.[96] The enlightened shareholder value approach, on the other hand, supports a traditional consideration of a company.[97] It regards a company as an economic tool, incorporated to generate profits for the shareholders.[98] However, in terms of the enlightened shareholder value approach, the interests of other stakeholders may be considered if such is to the benefit of the shareholders.[99] The enlightened shareholder value approach opens room for consideration of communal interests, even though such consideration is subject to the benefit of shareholders.[100] Thus, this approach does not completely neglect the fact that the success of a company is not achieved in isolation. South African corporate law, similarly to the Constitution,[101] limits freedom of expression.[102] For instance, freedom of expression in corporate law is limited when it comes to the choice of a company name.[103] The selection of an appropriate company name is an essential aspect of corporate law.[104] Although companies for the most part enjoy the freedom to choose whatever name they consider fit, companies may not use names that fall within the ambit of section 16(2) of the Constitution. Such names are regarded as unconstitutional and prohibited. 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 reflects *ubuntu*. This is because *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 are 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 from using a name that is misleading,[105] or that constitutes: "(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."[106] The main idea

---

96 Księżaka and Fischbach "Triple Bottom Line: The Pillars of CSR" 2017 4(3) *Journal of Corporate Responsibility and Leadership* 99–106.

97 Kiarie "At Crossroads: Shareholder Value, Stakeholder Value and Enlightened Shareholder Value: Which Road Should the United Kingdom Take?" 2006 17(11) *International Company and Commercial Law Review* 332.

98 Kiarie 2006 *International Company and Commercial Law Review* 332.

99 Wiese *Corporate Governance in South Africa With International Comparisons* (2017) 8; 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* (unpublished PhD thesis, University of Cape Town) 2016 51.

100 Mupangavanhu *Directors' Standards of Care, Skill, Diligence, and the Business Judgment Rule* 51.

101 S 16(2) of the Constitution.

102 See for instance s 11(2)(*a*)–(*c*) of the Act.

103 *Ibid*.

104 Cassim, Cassim, Jooste, Shev and Yeats *Contemporary Company Law* (2012) 113.

105 S 11(2)(*b*) of the Act.

106 S 11(2)(*c*) of the Act.

behind section 11 of the Act is to prevent deception and abuse of the public through the use of misleading, offensive or unconstitutional names.[107]

In *Islamic Unity Convention v Independent Broadcasting Authority*[108] (*Islamic Unity Convention*), the Constitutional Court limited the freedom of expression, holding:

> "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."[109]

Since *ubuntu* is equated with human dignity, limiting the constitutional right to freedom of expression on the basis that it violates the dignity and other values of the Constitution signals that *ubuntu* is carried through the 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.[110] This constitutional freedom has also found its way into South African corporate law. The fiduciary duty of company directors to act in the best interests of a company[111] has been broadly accepted to imply that directors must consider not only the interests of the company but also those of other stakeholders involved with the company directly or indirectly.[112] Section 76(3)(*b*) of the Act, read with the Constitution, imposes an obligation on company directors to ensure the protection of the fundamental right to freedom and security of corporate employees, community members and the environment in which a company operates.[113] This statutory provision recognises the value of community, as the core element of *ubuntu*.[114] As has been stated, the communal influence of *ubuntu* advocates for the promotion and protection of the interests of every individual living in the community and in generations to come.[115] Thus, the directors' duty to consider the interests of all stakeholders and their environment reveals the inclusion of the spirit of *ubuntu* in corporate law. This element of *ubuntu* is incorporated in the enlightened shareholder value approach and in the stakeholder inclusive value approach, as already highlighted.

Principle 16 of the King IV Report[116] also advocates for a stakeholder inclusive approach.[117] It provides that, in executing the responsibilities and roles of governance in the best interests of a company, the governing

---

107 Cassim *et al Contemporary Company Law* 113.

108 2002 (4) SA 294 (CC).

109 *Islamic Unity Convention supra* par 10.

110 Nwafor "The Protection of Environmental Interests Through Corporate Governance: A South African Company Law Perspective" 2015 11(2) *Corporate Board: Role, Duties & Composition* 6.

111 S 76(3)(*b*) of the Act.

112 Nwafor 2015 *Corporate Board: Role, Duties & Composition* 8–9.

113 *Ibid*.

114 Grootboom 2019 *Pretoria Students Law Review* 92 and 113.

115 *Ibid*.

116 Institute of Directors Southern Africa *King VI Report on Corporate Governance For South Africa 2016* (2016) (*King IV*).

117 *King IV* 71–73.

corporate body should adopt an approach that balances the needs, interests and expectations of different stakeholders.[118] In constitutional terms, it implies that, in its operations, a company must ensure that it does not violate anyone's rights and freedoms, and should rather promote harmonious operation and coexistence.[119] 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",[120] and aims also to reaffirm the concept of the company as a means of achieving economic and social benefits.[121] Company employees, the community and the environment in which the company operates must be protected (for example, from harm that might result from hazardous operations undertaken by the company).[122] Companies must ensure that the environment in which they operate is safe for humans and for the natural environment.[123] 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 also reflects *ubuntu* elements.[124]

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.[125] In other words, the right to freedom and security indirectly imposes a duty on companies to protect employees from exposure to a hazardous environment that might be caused by companies. The right also directly includes the right to a secure working environment.[126]

In *Mankayi v AngloGold Ashanti*[127] (*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.[128] 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.[129] According to Gwanyanya, framing the claim in terms of section 24 of the Constitution would have been useful, prior to the coming into effect of the Act, for determining the extent to which courts are willing to recognise the obligation of companies to protect human rights.[130] Failure by

---

118 Principle 16 of *King IV* 71.

119 See s 8(2) of the Constitution.

120 S 7(*a*) of the Act.

121 S 7(*d*) of the Act.

122 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) (*Fuel Retailers Association*) par 60; principle 3 par 14(c)–(d) of *King IV* 45.

123 Principle 3 par 14(c)–(d) of *King IV* 45. See also the stakeholder inclusive approach.

124 S 7(*a*) of the Act.

125 Gwanyanya "The South African Companies Act and the Realisation of Corporate Human Rights Responsibilities" 2015 18(1) *Potchefstroom Electronic Law Journal* 3116.

126 *Fuel Retailers Association supra* par 63.

127 2011 (3) SA 237 (C).

128 *Mankayi supra* par 17; read also par 13 and 15.

129 Gwanyanya 2015 *PELJ* 3116.

130 *Ibid*.

the courts to depart from the "classical libertarian roots and a concomitant hostility" to promoting constitutional values shows that there is a need for a more favourable approach, in which human-rights protection takes centre stage in the business sector.[131] However, *Mankayi* does not represent an absolute failure on the part of the courts, since the court in this case 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 environmental factors.[132]

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 the South African economy should be expanded by "encouraging transparency and high standards of corporate governance".[133] Transparency and high standards of corporate governance support the *ubuntu* spirit[134] in the sense that they promote "efficient and responsible management of companies" – such as good corporate governance (GCG)[135] and ESG.[136]

One of the principles of GCG is that directors of a company must act in the best interests of the company. Section 76(3) of the Act states that directors, in pursuing the best interests of a company, must act in good faith and for a proper purpose. Directors acting in good faith must be honest, must not receive secret profits, and must promote the purpose of the company.[137] The section 76 standard of directors' duty was confirmed in *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd*[138] (*Visser Sitrus*). The court found that the directors of the first respondent company acted in the best interests of the company in declining to approve the transfer of shares.[139] This is because permitting the transfer of shares would have negatively affected the interests of other shareholders as a collective body.[140] This indicates the "communal/collective" consideration of interests, which is an element of *ubuntu*. The decision of the court shows that the best interests of a company are not considered based on the interests of an individual shareholder but of all shareholders as a collective body.

The GCG approach is seen from three different perspectives, namely: the shareholder system; enlightened shareholder value system; and the pluralist

131 Gwanyanya 2015 *PELJ* 3116.

132 *Ibid*.

133 S 7(*a*)–(*b*)(iii) of the Act. See also Botha "First Do No Harm! On Oaths, Social Contracts and Other Promises: How Corporations Navigate the Corporate Social Responsibility Labyrinth" in Botha and Barnard *De Serie Legenda Developments in Commercial Law Vol III Entrepreneurial Law* (2019) 17.

134 Principle 1 par f of *King IV* 44.

135 See s 7(*b*)(iii) of the Act; Botha in Botha and Barnard *De Serie Legenda Developments in Commercial Law Vol III Entrepreneurial Law* 17.

136 S 72(4) of the Act.

137 Botha "The Role and Duties of Directors in the Promotion of Corporate Governance: A South African Perspective" 2009 *Obiter* 708; s 76(3)(*a*)–(*c*) of the Act; Botha and Shiells "Towards a Hybrid Approach to Corporate Social Responsibility in South Africa: Lessons From India?" 2020 83 *Journal of Contemporary Roman Dutch Law* 586.

138 2014 (5) SA 179 (WCC).

139 *Visser Sitrus supra* par 95.

140 *Ibid*.

approach (stakeholder inclusive approach).[141] In respect of the shareholder system, shareholders of the company are the focus of corporate activity.[142] In contrast, the enlightened shareholder value perspective holds that directors should, in appropriate circumstances, ensure productive and long-term relationships with stakeholders, while consideration of shareholders' interests remains an important aspect.[143] The pluralist approach further entails the balancing of shareholders' interests with those of other stakeholders of the company.[144] South African corporate law is a combination of the enlightened shareholder approach and the stakeholder inclusive approach since a company serves a dual purpose – that is, profit generation for the shareholders, while also balancing the interests of other stakeholders.[145] GCG in the South African context requires a balance to be struck between the interests of various stakeholders of the company, thereby displaying the elements of peaceful coexistence and interdependency advocated by *ubuntu*.[146] 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 represents a change from the traditional position where a company served only as an economic tool for the shareholders, with no consideration for other stakeholders. This object of the Act evinces 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 interests of the company.[147] This code advocates for the consideration of the community interests, which is the core element of the principles of *ubuntu*.[148] Even though King IV is a voluntary code on good corporate governance, the Johannesburg Stock Exchange (JSE) regards the King IV principles on good corporate governance as mandatory for all listed companies.[149] Failure to comply with its listing requirements can lead to the suspension of the company's listing.[150] However, although the suspension is a sound enforcement measure, it applies only to large public companies listed on the JSE.[151]

---

141 Botha 2009 *Obiter* 704–705.

142 Botha 2009 *Obiter* 705.

143 *Ibid*.

144 Botha 2009 *Obiter* 705.

145 Botha 2020 *Journal of Contemporary Roman Dutch Law* 582.

146 Mokgoro 1998 *PELJ* 25.

147 Principle 16 of *King IV* report 36.

148 Grootboom 2019 *Pretoria Students Law Review* 92 & 113.

149 JSE Listing Requirements https://www.bing.com/ck/a?!&&p=c26697b3078e672cc045df11d0731f57d36b0b5a9051f9b23b2d177685563b68JmltdHM9MTczMzcwMjQwMA&ptn=3&ver=2&hsh=4&fclid=101ed174-1e1c-6643-237a-c57c1fe867bc&psq=jse+listing+requirements&u=a1aHR0cHM6Ly9jbGllbnRwb3J0YWwuanNlLmNvLnphL19sYXlvdXRzLzE1L0Rvd25sb2FkSGFuZGxlci5hc2h4P0ZpbGVOYW1lPS9Jc3N1ZXJfUmVndWxhdGlvbnMvQXJjaGl2ZWRfTGlzdGluZ19SZXF1aXJlbWVudHMvU2VydmljZSUyMElzc3VlJTIwMTYucGRm&ntb=1 (accessed 2024-12-09) par 3.84.

150 *Ibid*.

151 Botha and Shiells 2020 *Journal of Contemporary Roman Dutch Law* 586.

GCG is essential in the business of a corporation.[152] In *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd*[153] (*Water Affairs*), Hussain J highlighted the importance of GCG by stating:

> "Practising sound corporate governance is essential for the well-being of a company and is in the best interests of the growth of this 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."[154]

Hussain J also pointed out that the King Committee was correct in stating that "one of the characteristics of GCG is social responsibility".[155] This implies that, like *ubuntu*, the governing board, acting in the best interests of a company, has the responsibility to consider the interests 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.[156] This means that companies, in their GCG strategies, should consider the impact of their activities on the community, environment and the economy in which they operate.[157]

GCG has been applauded for playing a crucial role in the success of companies.[158] Thus, the King IV Report puts in place the expected standards of GCG by considering a company to be both an economic and a societal entity that should strike a balance between making profits and the interests of the community. It is thus submitted that this concept of corporate law is drawn from the *ubuntu* concept; incorporating these principles may lead to the transformation and Africanisation of South African corporate law.

The corporate law concepts discussed above attune to the main fundamentals of *ubuntu* by advocating for the new dual dimension of corporate governance which aims to advance both the social and the economic needs of all the stakeholders involved. This is attributed to the ontological elements of *ubuntu* which aspire to peaceful communal existence, where individuals are expected to operate in a communally acceptable manner, considering the needs and interests of existing and future members of the community. From the *ubuntu* perspective, the well-being of an individual is established through the wellness of the community.[159] In this philosophy, a company that exploits its employees and the surrounding community cannot be considered to be thriving.[160] In simple terms, a company that is not a good corporate citizen may not (through the lens of *ubuntu*) be considered to be doing well since it fails to take into account the needs of the involved stakeholders. In the

---

152 Botha in Botha and Barnard *De Serie Legenda Developments in Commercial Law Vol III Entrepreneurial Law* 20.

153 2006 (5) SA 333 (W).

154 *Water Affairs supra* 351.

155 *Water Affairs supra* 352; Botha and Shiells 2020 *Journal of Contemporary Roman Dutch Law* 587.

156 Principle 3 of *King IV* 45–46.

157 *Ibid*.

158 *Water Affairs supra* 351.

159 Harris *Corporate Governance and Ubuntu: South African and Namibian Perspective* (unpublished LLM thesis, University of Cape Town) 2021 29.

160 See further Mangena "African Ethics Through Ubuntu: A Postmodern Exposition" 2016 9(2) *Africology: The Journal of Pan African Studies* 69.

communal nature of *ubuntu*, an individual's existence is premised on their environment as well as the community in which they live.[161]

5 GENERAL CHALLENGES IN INCLUDING *UBUNTU* IN SOUTH AFRICAN CORPORATE LAW

The general challenge associated with African philosophies is their lack of codification.[162] They are, instead, transmitted from one generation to the other through word of mouth, which may result in distortion of information.[163] Unlike European philosophies, which are codified, African philosophies are not, which makes it challenging to implement and practise them comprehensively and accurately.[164] Starting with the Constitution, the supreme law of the land,[165] *ubuntu* is not expressly entrenched therein, despite its acceptance as a constitutional principle.[166] Even though it is submitted that *ubuntu* has been introduced into South African corporate law, the Act also lacks express provisions in this regard. *Ubuntu* operates on inferred applications. The lack of solid provisions to back up the application of this principle poses challenges to its application and interpretation.[167]

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 an interest in and paid some attention to African philosophies such as *ubuntu*. Gwaravanda and Ndofirepi observe, however, that African philosophers are sometimes blinded by the Eurocentric tendencies in the practice of African philosophy.[168] This is because the European mindset is considered universal, and it is assumed that, since Europeans discovered the way the world operates, all that is left for Africans is to lay their own "burnt" bricks on top of the European foundation.[169]

Perceived inferiority and the Eurocentric influence also pose a challenge in applying the African philosophy of *ubuntu*.[170] Anything of African origin is generally considered sub-standard.[171] Thus, preference is given to ideologies of European origin because of their perceived superiority over Africanism.[172]

---

161 Harris *Corporate Governance and Ubuntu: South African and Namibian Perspective* 29.

162 Keevy "Ubuntu Versus the Core Values of the South African Constitution" 2009 34(2) *Journal for Juridical Science* 23.

163 Mugumbate, Mupedziswa, Twikirize, Mthethwa, Detsa and Oyinlola "Understanding Ubuntu and Its Contribution to Social Work Education in Africa and Other Regions of the World" 2023 *Social Work Education* 12.

164 Mugumbate *et al* 2023 *Social Work Education* 12–13.

165 S 2 of the Constitution.

166 Himonga *et al* 2013 *PELJ* 380.

167 Himonga *et al* 2013 *PELJ* 380.

168 Gwaravanda and Ndofirepi "Eurocentric Pitfalls in the Practice of African Philosophy: Reflections on African Universities" 2020 21 *Phronimon* 1.

169 Gwaravanda *et al* 2020 *Phronimon* 2.

170 Alvares "Critique of Eurocentric Social Science and the Question of Alternatives" 2011 46(22) *Economic and Political Weekly* 72.

171 *Ibid*.

172 *Ibid*.

The validation of African legal concepts has always been weighed through the lens of other legal systems.[173] For instance, for many years, the rules of customary law have been weighed against common-law values. In cases of inconsistency, the common law takes precedence.[174] This is conceivably also the position with the Constitution, which recognises *ubuntu* through customary law.[175] The Constitution permits the application of customary law by courts, subject to the Constitution and any legislation that specifically deals with customary law.[176] 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 a parallel footing with the common law.[177] In *Alexkor Ltd v Richtersveld Community*[178] (*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."[179]

Indigenous legal systems have been recognised as part of the South African pluralistic justice system.[180] 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."[181]

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

---

173 Ntlama and Ndima "The significance of South Africa's Traditional Courts Bill to the challenge of promoting African traditional justice systems" 2009 4 *International Journal of African Renaissance Studies – Multi-, Inter- and Transdisciplinarity* 6.

174 Ntlama and Ndima *International Journal of African Renaissance Studies* 6; 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* 276.

175 S 39(2); ch 12 of the Constitution.

176 S 211(3) of the Constitution.

177 Rautenbach 2015 *Journal of International and Comparative Law* 276.

178 2003 (12) BCLR 1301 (CC).

179 *Alexkor Ltd v Richtersveld Community supra* par 51.

180 Par 16(1) of sch 6 of the Constitution.

181 *Dikoko v Mokhakla supra* par 48; see also Mukheibir "Ubuntu and the Amende Honorable – A Marriage between African Values and Medieval Canon Law" 2007 28 *Obiter* 583.

Although, in recent decades *ubuntu* has found some recognition, there is a need to develop certain aspects for it to meet the changing standards of the current democratic era. The courts and other adjudicating forums have given constitutional recognition to *ubuntu*.[182] The Constitution requires that the development of customary law aspects must promote the spirit, purport and objects of the Bill of Rights.[183] Even though customary law and *ubuntu* are not the same, *ubuntu* forms an indispensable part of African customs. Thus, South African customary law incorporates *ubuntu*.[184]

6 CONCLUSION

In conclusion, from the literature examined above, it is clear that *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 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 noticeable success, developments are still needed, beginning with the express inclusion of *ubuntu* in the Constitution and in corporate-law frameworks. This will assist in a better understanding of *ubuntu*, which is still clouded in the midst of subjective interpretations.

182 S 39(2) of the Constitution.

183 *Ibid*.

184 *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC) par 24.

The Contemporary Role of the Global Refugee Regime: Analysis of Equal Protection Under South Africa's National Refugee Regime

Callixte Kavuro
LLB LLM LLD
Postdoctoral Research Fellow, Department of Public Law, Stellenbosch University, Stellenbosch South Africa
https://orcid.org/0000-0003-3041-5971

SUMMARY

This article analyses the role of the global refugee regime in protecting both *de jure* and *de facto* refugees in South Africa, with a specific focus on the principle of equality at the national level. It refers to South Africa's commitment to achieving equality, and to the interpretation of equality in the post-1994 constitutional order. Building on this, the article discusses the impact of the guiding standards of favourable treatment outlined by the global refugee regime on the implementation of provisions within the national refugee regime. The main argument of the article is that treating refugees the same as non-citizens, in accordance with these guiding standards, undermines the constitutional protection of refugees' socio-economic rights. Refugees are not in the same circumstances as vulnerable non-citizens with permanent residence permits or special dispensation permits, nor are they in the same circumstances as historically disadvantaged citizens. The position of refugees in South African society is unique. Therefore, a special and differentiated approach to their treatment regarding access to socio-economic rights is recommended. It is argued that this approach should be considered and implemented in the spirit of substantive equality to achieve a key objective of the global refugee regime.

Keywords: Refugee protection, socio-economic rights, constitutional equality, favourable treatment

1 INTRODUCTION

When the apartheid system was defeated, South Africa had not only a moral obligation but also a responsibility to bear the mantle of champion of the oppressed and persecuted.[1] Therefore, it focused on becoming a democratic country that upheld and observed human-rights norms and principles. On this basis, South Africa has committed itself to providing a safe haven for

[1] *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* 2007 (4) BCLR 339 (CC) par 140.

victims of political persecution, civil war, generalised violence or other events that have disrupted public order.[2] It has also committed to respecting such victims' rights as refugees, as outlined in the global refugee regime.[3] This regime consists of the 1951 United Nations Convention Relating to the Status of Refugees[4] (and its 1967 Protocol)[5] and the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa.[6] These treaties were incorporated into the South African legal system through the adoption of the Refugees Act,[7] which came into effect in 2000.

The national refugee regime is aligned with and equally affected by constitutional values, rights and freedoms. It is infused with the notions of equality and human dignity. Nonetheless, it bears pointing out that while the *global* refugee regime is underpinned by the doctrine of standards of favourable treatment, grounded in the notion of non-discrimination,[8] the *national* refugee regime is underpinned by the principle of equal treatment, grounded in the notion of human dignity.[9] Under the global refugee regime, socio-economic rights accrue to refugees in the context of different entitlements and treatment. These depend on, or flow from, the four standards of favourable treatment that guide how a socio-economic right can be enjoyed or how a refugee's entitlement to it works, in accordance with the circumstances of non-citizens or citizens, depending on the nature of the socio-economic right involved. Under the national refugee regime, no differentiation is made in respect of entitlements to socio-economic rights, taking into consideration the circumstances of non-citizens. Refugees access all socio-economic rights equally – in the same way that citizens do – to protect their dignity and health.[10] In this regard, South Africa adopts equal treatment for refugees and citizens when it comes to their protection.

The equal-treatment approach implies that refugees should be equally entitled to the universal rights contained in South Africa's Bill of Rights. In this way, the national refugee regime entitles *de jure* refugees to full legal protection, including that of the Bill of Rights, except for those rights that only apply to citizens.[11] The national regime further entitles *de facto* refugees

---

2 S 3 of the Refugees Act 130 of 1998 (as amended) (Refugees Act).

3 *Union of Refugee Women supra* par 140.

4 UN General Assembly *Convention Relating to the Status of Refugees* (28 July 1951)189 UNTS 137.

5 UN General Assembly *Protocol Relating to the Status of Refugees* (31 January 1967) 606 UNTS 267.

6 Organization of African Unity (OAU) *Convention Governing the Specific Aspects of Refugee Problems in Africa* (10 September 1969) 1001 UNTS 45; see *Union of Refugee Women supra* par 104 (see notes 24). See too s 1A of the Refugees Act, as amended by Act 33 of 2008.

7 130 of 1998.

8 These standards are: (i) favourable treatment as accorded to citizens (or equal treatment with citizens); (ii) the most favourable treatment as accorded to non-citizens in the same circumstances; (iii) treatment as favourable as possible, and in any event, not less favourable than that accorded to non-citizens generally; and (iv) same treatment as accorded to non-citizens generally.

9 Ss 27(*b*) and 27A(*d*) of the Refugees Act entitle refugees and asylum seekers to equal access to the rights in the Bill of Rights that apply to everyone.

10 *Ibid*.

11 S 27(*b*) of the Refugees Act.

(that is, asylum seekers) to the rights in the Bill of Rights that accrue to everyone.[12] The equal-treatment approach – it is argued – denotes treatment that is not less or more favourable than that accorded to citizens with respect to universal rights. In the national refugee-protection realm, the approach of equal treatment is further strengthened by the constitutional demands to promote its founding values of human dignity, equality and freedom,[13] and to interpret and apply rights in such a way that promotes human dignity, equality and freedom for achievement of an egalitarian society.[14] Achieving an egalitarian society requires addressing the issues of socio-economic-related inequality, discrimination, marginalisation, indignity, exclusion and deprivation that lead to human suffering or insecurities. Refugees are deprived people with human insecurities in humanitarian emergencies. Their conditions require humanitarian relief and assistance, on the one hand, and socio-economic protection, on the other, to protect their human dignity, promote their self-reliance, and restore normalcy to their lives.

In line with section 39(2) of the Constitution of the Republic of South Africa, 1996 (Constitution), the objects of the Refugees Act (as the national refugee regime) are to respond constitutionally to human insecurities, human suffering and vulnerabilities of refugees by reconciling the refugee rights contained in the global refugee regime and the human rights contained in South Africa's Bill of Rights.[15] Therefore, refugees' rights cannot be divorced from the constitutional rights that apply to everyone. The salient question that arises is whether the national refugee regime positions refugees in South African society to such a degree that it reconciles constitutional rights and refugee rights. This means there should be no constitutional differentiation in entitlements. While there can be considerable disagreement about the best way to reconcile the rights of refugees with the rights of citizens, the South African government appears to distance itself from the implementation of the national refugee regime. The political unwillingness to offer the protection set forth under the national refugee regime is justified on various grounds: economic migrants abuse the asylum system; a high number of bogus asylum seekers are a threat to national security; asylum seekers are unlawfully present in the country as they transgress the immigration-law rules; the condition of self-sufficiency to be admitted in the country must be adhered to; refugees do not suffer from past racial practices and therefore cannot benefit from the fruits of democracy; and so forth.[16] These grounds are therefore relied on to adopt the anti-immigration and anti-

12 *Ibid*.

13 S 1(*a*) of the Constitution of the Republic of South Africa, 1996 proclaims that South Africa is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.

14 S 39(1) of the Constitution.

15 The Refugees Act vests the universal rights of the Bill of Rights in refugees whereas s 39(2) of the Constitution demands that any legislation be interpreted in a manner that promotes the spirit, purport and objects of the Bill of Rights.

16 See the minority judgment delivered by Sachs J in *Union of Refugee Women supra* par 136, in which he noted: "[i]t would accordingly be inappropriate for the state to act towards refugees in a manner that is consonant with the general discretionary provisions of the regime constructed upon immigration, security, and other municipal priorities, while ignoring the specific obligations that flow from the refugee regime."

refugee measures that relegate treatment and protection to that accorded to self-reliant non-citizens and, thus, deprive refugees of more favourable treatment.

This article examines the principle of equality within the constitutional setting, and what equality means in the constitutional vision of achieving an egalitarian society, and in addressing the deprivation and suffering/insecurities of refugees. A critical-analysis approach is employed to illustrate the impact of applying standards of favourable treatment (espoused under the global refugee regime) on the accessibility of socio-economic rights in South Africa, and to provide recommendations on how favourable treatment and protection can be developed to meet the object and spirit of the global refugee regime. The absence of other groups of non-citizens in the same circumstances as refugees makes it difficult to provide refugees with, or to claim, necessities of life in the same or comparable way.[17] Non-citizens with permanent residence status are a category of non-citizen that is accorded more favourable treatment than refugees,[18] whereas non-citizens who are holders of special-dispensation permits are a category of non-citizen that is afforded less favourable treatment than refugees.[19]

That said, this article, in part two, discusses the global guiding standards of treatment and demonstrates how they may be subject to socio-economic exclusions if refugees are treated in the same way as non-citizens are generally treated. In part three, the article illustrates the incompatibilities, inconsistencies and deviations in the constitutional transformative approach adopted by South Africa to achieve equality. The approach adopted tends to sideline the interests of refugees, who are viewed as not belonging to historically marginalised communities. In part four, the article concludes by noting that the guiding standards of treatment are not principled mechanisms that can effectively protect refugees, as there are no groups of non-citizens in South Africa who are in the same circumstances as refugees. Besides, the treatment of non-citizens under the immigration system does not place non-citizens in a favourable position to claim socio-economic protection.

2 A CRITIQUE OF THE GLOBAL REFUGEE REGIME'S APPROACH TO EQUALITY

As noted above, the global refugee regime grounds the notions of equality and non-discrimination in standards of favourable treatment, which can be classified into four different treatments. A particular standard of treatment is generally linked to a particular right. Therefore, the standards are:

---

17 In the majority judgement in *Union of Refugee Women supra* par 64–65, the Constitutional Court agreed with the Government of South Africa that only non-citizens with permanent residence are treated more favourably than refugees and such favourable treatment cannot be extended to refugees.

18 *Ibid*.

19 Despite their socio-economic vulnerabilities, they do not have any state support to sustain their lives. Hence, they are excluded from social grants. See *Scalabrini Centre v Department of Social Development* 2021 (1) SA 553 (GP) in which it was argued that because of the impact of the COVID-19 pandemic, they should be considered for social relief of distress.

(i) favourable treatment as accorded to citizens;
(ii) most favourable treatment as accorded to non-citizens in the same circumstances;
(iii) treatment as favourable as possible, and in any event, not less favourable than that accorded to non-citizens generally; and
(iv) same treatment as accorded to non-citizens generally.[20]

In light of these guiding standards, the first standard of treatment accords refugees treatment that is "equal" to that accorded to citizens in respect of artistic rights and industrial property,[21] labour recruitment,[22] rationing,[23] basic education,[24] public relief and assistance,[25] and labour and social security.[26] The second standard of treatment accords to refugees "the most favourable treatment" accorded to non-citizens (in the same circumstances) in relation to the right to engage in wage-earning employment.[27] The third standard of treatment accords to refugees the same (not more or less favourable) treatment than is accorded to non-citizens with regard to the acquisition of property and rights pertaining to movable and immovable property,[28] self-employment,[29] the practice of a liberal profession,[30] housing[31] and tertiary education.[32] The fourth standard of treatment is provided for under article 7(1) of the 1951 Refugee Convention, which recommends the same treatment afforded to non-citizens generally, in line with conditions of reciprocity.[33]

Put more clearly, the fourth standard applies to those socio-economic rights that are not entrenched in or guaranteed by the 1951 Refugee Convention, such as the right to have access to medical care, food and water.[34] In a narrow sense, the four standards of favourable treatment can either be understood as the same treatment afforded to citizens or the same treatment afforded to non-citizens. This is due to the fact that three standards of favourable treatment must be measured or determined in accordance with the manner in which the host government treats other non-

[20] See Chapters III and IV of UN General Assembly *Convention Relating to the Status of Refugees* (1951) 189 UNTS 137. Adopted: 28/07/1951; EIF: 22/04/1954.
[21] Art 14 of the 1951 Refugee Convention.
[22] Art 17(3) of the 1951 Refugee Convention.
[23] Art 20 of the 1951 Refugee Convention.
[24] Art 22(1) of the 1951 Refugee Convention.
[25] Art 23 of the 1951 Refugee Convention.
[26] Art 24 of the 1951 Refugee Convention.
[27] Art 17(1) and 17(3) of the 1951 Refugee Convention.
[28] Art 13 of the 1951 Refugee Convention.
[29] Art 18 of the 1951 Refugee Convention.
[30] Art 19 of the 1951 Refugee Convention.
[31] Art 21 of the 1951 Refugee Convention.
[32] Art 22(2) of the 1951 Refugee Convention.
[33] Art 7(1) states that "[e]xcept where [the Refugee] Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to [non-citizens] generally."
[34] It should be borne in mind that the right to public relief under art 23 of the 1951 Convention is widely interpreted to include "hospital treatment, emergency relief, relief for the blind and also the unemployed, where social security benefits are not applicable". See Weis *The Refugee Convention, 1951: The Travaux Préparatoires Analysed With a Commentary* (1990).

citizens. Out of the four standards of treatment, only one standard of treatment with citizens can be employed to determine whether refugees enjoy favourable treatment with citizens in the context of certain socio-economic rights falling within the scope of the said standard of treatment. This creates two different contextual analyses for the scope of favourable treatment: Equal protection with citizens and equal protection with non-citizens.

The article discusses the impact of the guiding standards of the aforementioned treatments, with a particular focus on the treatment afforded to refugees in the same way as to other non-citizens. Of concern is the shift made by the national refugee regime from offering protection of favourable treatment envisaged under the global refugee regime to offering protection of favourable treatment on an equal footing with citizens insofar the socio-economic rights are concerned. On the face of it, equal protection with citizens is set forth under South Africa's constitutional dispensation.

2 1 The treatment of non-citizens

In South Africa, the treatment of non-citizens is prescribed by the Immigration Act[35] (as amended). The Act is framed within an exclusionary model that espouses twin principles of exclusivity and self-sufficiency.[36] The twin principles are concerned with the sovereign nation's goal of self-preservation,[37] which is achieved through:

(i) admitting non-citizens within South African boundaries on the condition that they are self-supportive and self-reliant; and
(ii) excluding non-citizens with temporary residence visas or permits from accessing socio-economic programmes designed to address citizens' inequality and deprivation, thereby developing and empowering them economically.[38]

Drawing from our analysis of the standards of favourable treatment, this immigration approach to the treatment of non-citizens at the national level sets the benchmark for the equal treatment of refugees. This immigration approach requires that refugees – as non-citizens – be considered to be self-supportive and thus excluded from constitutionally based socio-economic programmes. In light of immigration law, treating refugees in the same or equal way to non-citizens renders certain socio-economic rights unrealisable to them. This is consistent with the fourth standard of

35 13 of 2002.

36 S 10(4) of the Immigration Act provides that "[a] visa is to be issued on terms and conditions that the holder is not or does not become … an undesirable person". An undesirable person is defined in terms of s 30 of the Immigration Act to include, but not limited to anyone who is or is likely to become a public charge.

37 The notion of self-preservation inherent in sovereignty is defined to refer to the responsibilities of the State to protect its citizens as sovereign, including those duties and obligations to "secure and maintain the peace, protect individual subjects and provide and maintain the conditions necessary for a commodious life". See Curran "Can Rights Curb the Hobbesian Sovereign? The Full Right to Self-Preservation, Duties of Sovereignty and the Limitations of Hohfeld" 2006 25 *Law and Philosophy* 243 252–253.

38 S 42 of the Immigration Act provides that no one can aid, abet, assist, enable or in any manner help an illegal foreigner, save for necessary humanitarian assistance.

favourable treatment entrenched under article 7(1) of the 1951 Refugee Convention. The consequences of such treatment position refugees unfavourably in relation to access to socio-economic rights. The same treatment as non-citizens, in line with the rules of immigration law, implies that refugees cannot have access to subsidised socio-economic rights.

Any favourable treatment of non-citizens envisaged by the 1951 Refugee Convention implies depriving refugees of their rights, as the immigration-law standard of treatment requires non-citizens to be self-sufficient. A lack of self-sufficiency in non-citizens results in their classification as undesirable persons within the boundaries of South Africa. Undesirability implies being expelled from the territory of South Africa. A critical analysis of article 7(1) in light of the immigration rule of self-sufficiency illustrates that the South African government is obligated to apply immigration rules to refugees. Article 7(1) states: "Except where [the] Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to [non-citizens] generally." This provision requires a host country to accord refugees the same treatment as is generally accorded to non-citizens while they stay within its boundaries. Article 7(1) appears to set out a threshold standard, obligating the host state to define the treatment of refugees in comparison with the favourable treatment accorded to non-citizens generally,[39] or to accord refugees "the full protection enjoyed by other non-citizens with no special protection attached to their status".[40] Within the South African context, article 7(1) can only work to disadvantage refugees in their daily realities if it is prioritised in giving scope and meaning to the socio-economic rights of refugees.

However, the scope and ambit of the exceptions to the twin principles of exclusivity and self-sufficiency can be drawn from or defined by the provisions of the Constitution, social assistance legislation and bilateral agreements, as discussed below.

First, the provisions of the immigration system provide for some favourable treatment of non-citizens in certain circumstances. Vulnerable non-citizens can, in terms of section 42(1) of the Immigration Act, have access to socio-economic rights but only for necessary humanitarian relief and assistance. Given that refugees can be understood as vulnerable non-citizens, they can be accorded the same treatment as non-citizens in relation to humanitarian relief and assistance. This approach will be contrary to the standard of favourable treatment as accorded to citizens. As noted, this standard seeks to confer the right to public relief and assistance on refugees on par with citizens. In practice, refugees falling under section 42(1) are those who are still undocumented. If refugees are physically present in the country and have filed their applications for asylum, but their applications are still in the process of adjudication, they are legally recognised as "documented" asylum seekers. In these instances, their rights are protected under the national refugee regime.

---

[39] Commentary on the Refugee Convention 1951, art 2–11, 13–37, published by the Division of International Protection of the United High Commissioner for Refugees 1997 (Commentary on the Refugee Convention) 16.

[40] *Ibid*.

Secondly, section 35(2)(*e*) of the Constitution affords favourable treatment to non-citizens in the context of entitling all detained persons (regardless of their nationality) to social services at state expense, including "adequate accommodation, nutrition, reading material and medical treatment". This provision not only applies to non-citizens detained at police cells or correctional service centres (or prisons) but also to those non-citizens who are held at deportation facilities.

Thirdly, regulation 9(5) of the Regulations to the Social Assistance Act[41] prohibits discrimination against non-citizens if they are affected by a (declared or undeclared) disaster that took place within South Africa's territorial boundaries. They are entitled to access social relief and assistance if they are affected. In this context, non-citizens – holders of special dispensation permits, or asylum seeker permits – became beneficiaries of the COVID-19 grant for social relief of distress.[42]

Fourthly, section 2(1) of the Social Assistance Act[43] vests a right to social assistance for non-citizens if there is a bilateral agreement between South Africa and a non-citizen's country of origin. In practice, there are non-citizens for whom the right to social assistance accrues in terms of bilateral agreements. Nonetheless, relaxation of the twin principles of exclusivity and self-sufficiency further manifests itself in South Africa's move, in terms of section 31(2)(*b*) of the Immigration Act, to grant special-dispensation permits to non-citizens from certain countries that allow them to stay, work, study and run a business in the country. For example, the Zimbabwean Exemption Permit, previously known as "the Special Dispensation Permit", was a result of bilateral agreements between the ministers of home affairs from Zimbabwe and South Africa.[44] These special permits allow the holders access to health-care services.

Fifthly, there are further instances in which citizens of certain countries are given access to socio-economic rights through regional treaties. For instance, the Southern African Development Community (SADC) Protocol on Education and Training of 1997[45] requires member states to treat SADC students as citizens of the member state when it comes to university tuition fees, charges and accommodation.[46]

Considering the above, the exclusionary model adopted under the South African immigration law appears to allow non-citizens in certain circumstances to have access to humanitarian relief (or social relief of distress), social assistance (or social grants), tertiary education, employment, self-employment and social security. Objectively analysed, refugees can, in line with the guiding standards of treatment, claim treatment

41 13 of 2004.

42 See *Scalabrini Centre v Department of Social Development supra*, in which the High Court decided that refugees and special-permit holders are also beneficiaries of the grant for social relief of distress of R350 a month.

43 13 of 2004.

44 Parliamentary Monitoring Group "Briefing by the Department of Home Affairs on the Zimbabwean Documentation Project" (19 September 2021) https://pmg.org.za/committee-meeting/13428/ (accessed 2024-03-14).

45 SADC *Protocol on Education and Training* (8 September 1997).

46 Art 7(A)(5) of the SADC Protocol on Education and Training.

as favourable as possible and, in any event, not less favourable than that accorded to non-citizens regarding the aforementioned exceptions to the twin principles of exclusivity and self-sufficiency. However, the right to the highlighted exceptions can hardly be claimed by refugees in practice as they are not in the same circumstances as the prescribed categories of non-citizens. For instance, *de facto* refugees could claim the COVID-19 social relief of distress grant because the COVID-19 pandemic was declared a national disaster, placing them in the same circumstances as citizens and non-citizens alike.[47]

2 2 The national refugee regime's approach to equality

On the face of it, the standards of favourable treatment found in the 1951 Refugee Convention do not inform the Refugees Act; rather, the Act is couched in the values of equality, dignity and freedom. This is because it was crafted in line with the spirit, purport and objects of the Constitution's Bill of Rights. However, it can also be argued that the guiding standards of favourable treatment were indirectly transposed into South Africa's refugee protection system if it is accepted that the Refugees Act domesticates the global refugee regime. The Refugees Act does not expressly refer to socio-economic rights contained in the global refugee regime or to socio-economic rights contained in the Bill of Rights. Equal treatment and protection in relation to constitutionally protected socio-economic rights are implied in the entitlements to universal rights enshrined in the Bill of Rights for *de jure* and *de facto* refugees. The equality that permeates the national refugee regime points to the treatment of refugees that is equal to that of citizens in relation to all universal rights in the Bill of Rights. In the context of the national refugee regime, it would be irrational, unlawful, and discriminatory to exclude refugees from access to socio-economic rights that the Constitution vests in everyone. Of concern is that the Refugees Act makes it mandatory to interpret and apply the constitutional rights conferred on refugees in light of international refugee and human-rights conventions.[48] It is within this mandate that the four guiding standards of favourable treatment in the determination of the ambit and scope of the socio-economic entitlements become important.

Equal treatment cannot, therefore, be interpreted and applied in line with the spirit and object of immigration law because, in all refugee matters, the national refugee regime supersedes immigration rules and principles. Regard must be had to the fact that refugee law is a special law dealing with refugee protection, whereas immigration law deals with the regulation of non-citizens generally.[49] The national refugee regime provides for the rights

---

47 In *Scalabrini Centre v Department of Social Development supra*, the High Court opined that the exclusion of *de facto* refugees and special permit holders from the COVID-19 Unemployment Relief Scheme or Social Relief of Distress was arbitrary and unreasonable and unconstitutional. The exclusion violated their constitutional rights to equality, dignity, and access to social security (par 5, 7, 40).

48 S 1A of the Refugees Act.

49 According to the *maxim generalia specialibus non derogant*, it is presumed that if lawmakers have, after considering all circumstances, adopted a special law for a particular

of those individuals formally recognised as refugees (*de jure* refugees) and those whose applications to be recognised as refugees formally are still pending (*de facto* refugees or asylum seekers). It is presumed that the universal socio-economic rights in the Bill of Rights apply to *de jure* and *de facto* refugees on an equal basis. However, the Refugees Act uses different terminology in relation to these two groups. On the one hand, section 27(*b*) of the Act states that refugees must enjoy full legal protection, which includes the rights in the Bill of Rights, except those that only apply to citizens. On the other hand, section 27A(*d*) of the Act states that asylum seekers are entitled to the rights in the Bill of Rights insofar as those rights apply to an asylum seeker. These differences in formulation raise interpretive difficulties. First, the rights of *de facto* refugees (i.e., asylum seekers) are not subject to the notion of full legal protection. Secondly, the provisions of section 27A(*d*) sound like a tautology (asylum seekers are entitled to the rights that apply to them). There are no rights in the Bill of Rights that are specifically or expressly vested in asylum seekers. These interpretive difficulties raise the salient question of the extent to which *de facto* refugees can access socio-economic rights.

The provisions of section 27(*b*) are presumed to confer on refugees full legal protection concerning the rights traditionally associated with citizenship.[50] These provisions thus extend socio-economic rights and some rights having political dimensions that apply to refugees.[51] Conversely, equality in entitlements has given rise to interpretive difficulties. The question that arises is whether section 27(*b*) entitles refugees (who are temporary residents) to the same treatment as non-citizens with permanent-resident status. Section 25(1) of the Immigration Act states that a non-citizen with permanent-resident status "has all the rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship". Although section 25(1) of the Immigration Act does not expressly refer to the rights in the Bill of Rights (as section 27(*b*) of the Refugees Act does), the Bill of Rights constitutes the foundation upon which the fundamental rights and freedoms of citizens and non-citizens are based.[52] It could be argued that despite the different language used in the framing of section 27(*b*) of the Refugees Act and section 25(1) of the Immigration Act, these provisions place both refugees and permanent residents in the same legal

case, a law of general character would not interfere with a special law. In cases such as this, "the special provision stands as an exceptional proviso upon the general". See, for e.g., *Edmond v US* 520 US 651; *Warden, Lewisburg Penitentiary v Marrero* 417 US 653; *Seward v Owner of* "*The Vera Cruz*" (1884) 10 App Cas 59 and *the Privy Council in Barker v Edger* [1898] AC 748. See further De Ville *Constitutional & Statutory Interpretation* (2000) 66, 79–81, 175.

50 Some human-rights scholars maintain that the move from considering a state's inhabitants as citizen or non-citizen to seeing them as human beings implies that entitlements and privileges, notably socio-economic rights, are extended beyond citizens. See Kofman "Rights and Citizenship" 1993 25 *American Sociology Review* 393 395 and Fix and Laglagaron "Social Rights and Citizenship: An International Comparison" 2002 *The Urban Institute* 4.

51 Political rights, for example, include the right to freedom of association, the right to demonstrate and the right to freedom of expression.

52 S 7(1) of the Constitution.

circumstance or the same position, in that they are all entitled to the same constitutional socio-economic rights.

Yet, according to the Constitutional Court in *Union of Refugee Women v Private Security Industry Regulatory Authority* (*Union of Refugee Women*),[53] they are not in the same position or circumstances and, accordingly, they cannot be afforded the same or equal treatment. In this case, the issue before the court was the constitutionality of section 23(1)(*a*) of the Private Security Industry Regulatory Authority Act,[54] which only provided for the employment of citizens and permanent residents in the private security industry, to the exclusion of refugees who could not show good cause in terms of section 23(6) of the Act. The constitutionality of section 23(1)(*a*) was tested against the constitutional right to equality.[55] Furthermore, the constitutional right to choose employment, which is restricted to citizens under section 22 of the Constitution, was considered. In determining the scope and ambit of refugees' right to choose employment and whether refugees are in the same position as permanent residents, the court employed the standard of "the most favourable treatment" as accorded to non-citizens in the same circumstances.[56] Therefore, the core question revolved around whether the said standard entitled refugees to treatment that was equal to that of permanent residents. The majority judgment reasoned that refugees "may not be treated as permanent residents because they are not in the same circumstances for the simple reason that they have yet to meet the requirements for permanent residence".[57] In other words, the majority judgment agreed with the State that permanent residents are the only non-citizens who are treated more favourably.[58] Hence, they are entitled to more rights, privileges and opportunities. Unlike refugees, they are holders of the same identification documents as citizens. Considering the position of permanent residents, Kondile AJ, delivering the majority judgment, held that section 23(1)(*a*) of the Private Security Industry Regulatory Authority Act is not unconstitutional, discriminatory, or unfair towards refugees and did not breach equality in rights at the threshold.[59]

The minority judgment was of the view that the notion of full legal protection under section 27(*b*) of the Refugees Act entitled refugees to treatment equal to that accorded to non-citizens with permanent-resident status.[60] In delivering the minority judgment, Mokgoro and O'Regan JJ observed:

> "Refugees who have been granted asylum are a special category of foreign nationals. They are more closely allied to permanent residents than to those foreign nationals who have rights to remain in South Africa temporarily only. Permanent residents have a right to reside in South Africa and enjoy all the rights, privileges, duties and obligations of citizens save for those which a law or the Constitution explicitly ascribes to citizenship. Recognised refugees also

53 2007 (4) BCLR 339 (CC).
54 56 of 2001.
55 *Union of Refugee Women supra* par 20.
56 *Union of Refugee Women supra* par 62.
57 *Union of Refugee Women supra* par 66.
58 *Union of Refugee Women supra* par 64.
59 *Union of Refugee Women supra* par 67.
60 *Union of Refugee Women supra* par 97–99.

> have a right to remain in South Africa indefinitely in accordance with the provisions of the Refugees Act so their position is closer to that of permanent residents than it is to foreign nationals who have only a temporary right to be in South Africa or foreign nationals who have no right to be here at all."[61]

According to this view, the special position of refugees in the South African legal system thus finds expression in the notion of full legal protection, which affords refugees the same constitutional treatment as citizens or permanent residents. The equal-treatment approach is grounded in the Constitution in such a way that certain rights in the Bill of Rights apply universally to all people within South Africa. It also flows from the understanding that the Refugees Act extends the socio-economic protection traditionally given to non-citizens by entitling refugees to access socio-economic rights on an equal basis with citizens.

Objectively analysed, the majority judgment, on the one hand, implies that section 25(1) of the Immigration Act confers more favourable treatment on non-citizens with permanent-resident status, whereas section 27(*b*) of the Refugees Act accords favourable treatment to *de jure* refugees. Hence, permanent residents and *de jure* refugees are not in the same circumstances. On the other hand, section 27A(d) of the Refugees Act accords to *de facto* refugees less and not more favourable treatment than that accorded to *de jure* refugees. This assessment of these provisions points to different levels of favourable treatment of non-citizens. It is, therefore, difficult to determine what constitutes each level of treatment or to differentiate these accesses to socio-economic rights. For instance, to what extent will *de facto* refugees have access to the right to adequate housing if they enjoy less favourable protection? To what extent can *de jure* refugees or permanent residents access this right? What can the right to housing mean if it is applied in accordance with the favourable standards of the global refugee regime? With regard to the guiding standards of favourable treatment, the right to housing must be accessed in the same way that non-citizens in the same circumstances have access. The Housing Act[62] allows only non-citizens with permanent-resident status to have access to housing. As noted, permanent residents are not in the same circumstances as *de jure* refugees. In terms of the Refugees Act, refugees (be it *de jure* or *de facto*) should receive the same treatment accorded to citizens. Despite this protection, the Housing Act excludes refugees from the housing programme.[63] Therefore, equality in constitutional rights for refugees appears to be hypothetical, as the State disregards the national refugee regime's equal treatment under its socio-economic laws and policies.[64]

---

61 *Union of Refugee Women supra* par 99.

62 107 of 1997

63 The exclusion stems from the definition of housing development in the Housing Act, which restricts access to adequate housing to citizens and permanent residents. See s 1(vi) of the Housing Act.

64 The State tends to overlook the interests of refugees and disregards court judgments and binding legal rules and principles in the area of refugee law. See Botha "The Rights of Foreigners: Dignity, Citizenship, and the Right to Have Rights" 2013 130 *South African Law Journal* 837 854 and Gloppen "Social Rights Litigation as Transformation: South African Perspective" in Jones and Stokke *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (2005) 176.

It has also been argued that the Refugees Act grounds equal treatment for *de facto* refugees in the recognition that they are bearers of universal constitutional rights that reside in everyone, including socio-economic rights and benefits.[65] However, *de facto* refugees (asylum seekers) are not in the same situation as *de jure* refugees. There is also no doubt that there must be a differentiation between *de facto* refugees and other non-citizens (for example, economic migrants) if they are to qualify for more favourable treatment than that prescribed by the Immigration Act. Deviation from the immigration self-sufficiency rule is a prerequisite. In a number of cases, the Supreme Court of Appeal (SCA) has stressed that the duty to deviate from the immigration self-sufficiency rule applied to non-citizens with temporary status should be understood with reference to the principles of human dignity and *non-refoulement*.[66] Asylum seekers' dignity – like *de jure* refugees – should be protected favourably. The principle of *non-refoulement,* which is a cornerstone of the global refugee regime, protects both *de jure* and *de facto* refugees from being treated with indignity and contempt, as such treatment may result in constructive *non-refoulement*. The principle obligates states to take positive measures – devoid of legal deficiency or discrimination – to prevent involuntary returns arising out of a lack of state support. An involuntary return arising from ill-treatment or deprivation of state support is considered constructive *refoulement*. Whereas the principle of *non-refoulement* protects *de facto* refugees, other non-citizens do not enjoy such protection. The principle points to the fact that asylum seekers are not in the same circumstances as other groups of non-citizens. Put differently, there is no group of non-citizens whose treatment can serve as a favourable standard that asylum seekers can claim for better protection.

Different levels of treatment of non-citizens in South Africa, coupled with the standards of favourable treatment, can further be assessed with reference to the constitutional framework of the right to equality. The question is whether refugees can rely on the right to equality to claim inclusion in socio-economic protection and what the right to equality means in the constitutional transformative order.

3 THE MEANING OF EQUALITY IN SOUTH AFRICAN CONTEXT

As noted, the principle of equality is central to the protection of human rights, including refugee rights.[67] It occupies a special place in the Constitution of South Africa, considering the vast inequality and institutionalised discrimination characterising South Africa's past and the need to achieve an egalitarian society. Equality is recognised as a constitutional right, a foundational value, and an interpretative tool.[68] Its unique value lies at the

---

65 S 27A(*d*) of the Refugees Act.

66 *Somali Association of South Africa v Limpopo, Department of Economic Development, Environment and Tourism* 2015 (1) SA 151 (SCA) par 44, *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) par 32 and *Union of Refugee Women supra* par 135.

67 See, for e.g., *Charter of the United Nations and Statute of the International Court of Justice* (1945) Preamble and art 1; UN General Assembly *The Universal Declaration of Human Rights* A/RES217(III) (10 December 1948) Preamble and art 1 and 7.

68 Ss 1, 7, 9, 36, 39 of the Constitution.

heart of the Bill of Rights.[69] The principle of equality permeates and defines the Bill of Rights[70] and informs the interpretation of all laws and policies, including the national refugee regime, which establishes a special dispensation for refugees to be treated equally and with special concern.[71] In this regard, Albie Sachs maintains that the principle of equal protection was entrenched in the Constitution to demand "positive action on the part of the state to enable people to live in conditions consistent with the minimum standards of human dignity".[72] Sachs views equal protection as a principled and powerful legal tool that the State can use to strengthen the position of those who were compelled "to live in disadvantage at the margins of society" by racial policies.[73]

As observed earlier, equal treatment with respect to access to socio-economic rights for refugees is controversial. Controversy arises from a number of factors, such as uncertainties about their treatment if they have to be accorded less favourable treatment compared to that afforded non-citizens with permanent-resident status, and uncertainties about their protection if they are to be excluded from preferential treatment afforded to vulnerable citizens who have been disadvantaged by the history of South Africa.

In addition, in policy and practice, refugees are regularly viewed as "outsiders", not belonging to the political community and essentially as economic migrants who compete with citizens. As such, they are excluded from being beneficiaries of transformative or remedial measures. They often find themselves compelled to live in disadvantaged or inferior positions in a host society that struggles to overcome discrimination and racism. The State does little to protect refugees from anti-immigrant-sentiment victimisation. Issues of safety and security, coupled with uncertainties about the extent to which refugees should have access to socio-economic protection, have implications for their right to equality. The fact that equality is a contested concept adds to the complexity of its meaning, relevance and significance in the protection of refugees.[74] In South Africa, the notion of equality must – according to the Constitutional Court – be understood in its textual setting,

---

69 *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC) par 85.

70 *Fraser v The Children's Court* 1996 (8) BCLR 1085 (CC) par 20; *Brink v Kitshoff* 1996 (4) SA 197 (CC) par 33; *S v Makwanyane* 1995 (3) SA 391 (CC) par 155–6 and 262; and *Shabalala v Attorney-General, Transvaal* 1996 (1) SA 725 (CC) par 26.

71 Its Preamble states that the passage of the Refugees Act creates an obligation to receive and treat refugees in accordance with the standards and principles established in international law.

72 Sachs "The Judicial Enforcement of Socio-Economic Rights: The *Grootboom* Case" in Jones and Stokke (eds) *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (2005) 137–138.

73 Sachs in Jones and Stokke (eds) *Democratising Development* 137.

74 It is sometimes even claimed that equality has no stand-alone substantive meaning and that it is not an independent right. See Ackermann "Equality and Non-Discrimination: Some Analytical Thoughts" 2006 22 *SAJHR* 597 597 601; Botha "Human Dignity in Comparative Perspective" 2009 20 *Stell LR* 171 213; and Botha "Equality, Dignity, and the Politics of Interpretation" 2004 19 *SAPR/PL* 724 746–751.

considering its social and historical context.[75] Accordingly, the meaning of equality within concrete situations is best explained by referring to the distinction between the formal and substantive dimensions of equality. These dimensions are moral and theoretical mechanisms to assess the entitlements of refugees to rights. Analysis of these dimensions of equality is particularly important to illustrate that the favourable treatment approach to refugee protection under the global refugee regime is similar to the substantive equality entrenched under the Constitution. Favourable treatment and substantive equality were adopted to alleviate misery, vulnerabilities, and suffering caused by deprivation and socio-economic inequality. It will, therefore, be argued that effective refugee protection in South Africa can meaningfully be achieved through an extension of a substantive-equality approach to the protection of the socio-economic rights of refugees. Factors that hinder such extension will be underlined.

3 1 Formal equality

Implementation of the global refugee regime in South Africa is constrained by formal equality as it does not favour preferential or favourable treatment of a person or a group of persons. From the perspective of formal equality, equality means sameness of treatment; that is, the State must "treat people in like circumstances alike"[76] or provide identical treatment to everyone.[77] It prohibits "laws from excluding anyone or drawing any distinction between people".[78] In this context, the question of whether laws negatively and adversely affect individuals or groups of people is irrelevant. In a complex world, what counts is to treat "like cases alike" and "unlike cases differently".[79] From a formal equality perspective, favourable or preferential treatment on the basis of specific distinctions, such as race, sex, poverty, refugee status or asylum seeker status, is presumed arbitrary.[80] This approach assumes that people are in an equal socio-economic circumstance or position.[81] Accordingly, it is not concerned with entrenched, systemic, systematic or structural inequality or vulnerabilities.[82] Hence, it does not seek to address or respond to actual human insecurities caused by socio-economic hardships and political persecutions from which vulnerable individuals and groups suffer. It is based on a standard that appears to be neutral with respect to humanitarian and socio-economic needs and experiences.[83] Formal equality is not a proper mechanism to protect the

---

75 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) par 22: A constitutional right in the Bill of Rights is interpreted in two contexts: (i) its textual setting and (ii) its social and historical context.

76 Currie and De Waal *The Bill of Rights Handbook* 5ed (2005) 232.

77 Greschner "Does Law Advance the Cause of Equality?" 2001 27 *Queen's Law Journal* 299 302.

78 Greschner 2001 *Queen's Law Journal* 303.

79 Greschner 2001 *Queen's Law Journal* 302.

80 *Ibid*.

81 Kavuro "Refugees and Asylum Seekers: Barriers to Accessing South Africa's Labour Market" 2015 19 *Law, Democracy & Development* 232 253.

82 Albertyn and Kentridge "Introducing the Right to Equality in Interim Constitution" 1994 10 *SAJHR* 149 152.

83 *Ibid*.

socio-economic needs of refugees because it does not allow for special consideration of their potential vulnerabilities. Formal equality is closely linked to a classical liberal understanding of equal opportunity,[84] which does not require the State to examine the actual conditions of individuals and groups to address social and economic disparities so as to achieve a just society.[85] Proponents of this form of liberalism would be more inclined to question the need for social welfare programmes that are used to channel resources to the poor or deprived.

Constitutionally, a commitment to formal equality is reflected in equal access to socio-economic rights and benefits by virtue of universal entitlement. This implies that everyone – regardless of their socio-economic status – can theoretically claim equality in access to social welfare.[86] At the same time, however, socio-economic rights are applied differently to different people, depending on their circumstances. Thus, a commitment to formal equality is unlikely to change human suffering or deep-rooted social inequalities, but rather, it will sustain them. The emphasis on addressing appalling conditions of the poor and vulnerable people led South Africa to view the formal equality approach as an inappropriate tool to ensure that socio-economic disadvantages be remedied, and social justice established.

A formal approach to equality, which is blind to the socio-economic differences between people, will not advance the object of the global refugee regime that seeks to restore normalcy to the lives of refugees and to provide them with a better life and future. Formal equality, therefore, appears to be inconsistent with the standards of favourable treatment, which require the host state to treat refugees differently and with special concerns. As will be discussed, substantive equality may be suitable to respond to their special concerns as it requires the government to consider the socio-economic vulnerabilities of individuals and groups to accord them differential or special treatment designed to address their vulnerabilities or deprivation.[87] The article next explores substantive equality and its significance in achieving the right to equality in refugee protection.

3 2 Substantive equality

In South Africa, refugees are granted the same socio-economic rights as citizens. The international obligations to provide favourable treatment to refugees should be implemented in accordance with the equality commitment of the Constitution, which is the supreme law in South Africa.[88]

---

84 The principle of equal opportunity as advocated by philosopher Robert Nozick revolves around the notion that it is unjust for the State to distribute wealth from the rich to the poor. Distribution should come about in accordance with the rules of acquisition, transfer and rectification regardless of how unequal such distribution may be. In addition, the State should ensure equal opportunities to raise their income and to own what they make. See Raphael *Concept of Justice* (2001) 214–215 and Kavuro "The South African Constitution and the Social Justice Jurisprudence of the Constitutional Court" 2012 1 *Young African Research Journal* 100 106–107.

85 Albertyn and Kentridge 1994 *SAJHR* 152.

86 *Khosa supra* par 42.

87 Albertyn and Kentridge 1994 *SAJHR* 152.

88 S 2 of the Constitution.

Constitutionally, the favourable, preferential or special treatment of citizens is derived from section 9(2) of the Constitution, which is based on a substantive vision of equality. The concept of substantive equality can be understood by its object and spirit, which are to restore the dignity of many citizens who have endured demeaning treatment, discrimination and prejudice owing to unjust laws and policies in the past. The Refugees Act does not deviate from this approach, as it grants refugees the same comprehensive legal protection in relation to the universal rights outlined in the Bill of Rights. With the goal of achieving substantive distribution of rights for social justice, section 9(2) of the Constitution stipulates:

> "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."

Seen from this point of view, it can be argued that, while refugees are not disadvantaged by unfair discrimination, they are disadvantaged by human-rights abuses committed by state actors and/or non-state actors in their country of origin. They are therefore in South Africa seeking sanctuary and are expected to return home when the situation is conducive for them to return. Apart from these arguments, the reason for analysing substantive equality is to illustrate its meaning and significance in protecting vulnerable people, and to argue that a similar approach is required to protect refugees effectively. In fact, substantive equality invokes distinction of treatment – that is, the State must ensure equality of outcome and, in so doing, must "tolerate disparity of treatment to achieve this goal".[89] It is concerned, through the equitable distribution of rights, benefits, opportunities, burdens and choices, with addressing issues related to major inequalities in people's resources, political and social power, and their well-being arising from exploitation and oppression.[90]

According to Albertyn and Goldblatt, the doctrine of substantive equality can be used by the poor to claim "positive state action" for the protection of their dignity.[91] This view is echoed by Moseneke J, who states that substantive equality sometimes necessitates measures that "disfavour one class to uplift another". In pursuit of substantive equality, socio-economic schemes must be designed to protect and advance disadvantaged groups.[92] Substantive equality can, therefore, be used in lieu of favourable standards to claim equal access to or inclusion in socio-economic laws and policies.

The notion of equality plays a major role in protecting the most vulnerable persons in South Africa. On this basis, the Constitutional Court has developed a substantive-equality jurisprudence, laying the foundation for transforming South African society "from a grossly unequal society to one in

---

89 Currie and De Waal *Bill of Rights* 232.

90 Greschner "Does Law Advance the Cause of Equality?" 2001 27 *Queen's Law Journal* 299 303. See too Currie and De Waal (*Bill of Rights* 233): substantive equality requires the State to consider the actual socio-economic condition of groups and individuals in the achievement of constitutional equality).

91 Albertyn and Goldblatt "Towards a Substantive Right to Equality" in Woolman (ed) *Constitutional Conversations* (2008) 247.

92 *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) par 42–43.

which there is equality between men and women and people of all races".[93] The Constitutional Court, in *Port Elizabeth Municipality v Various Occupiers* (*Port Elizabeth Municipality*),[94] reasoned that South African society is demeaned when national measures, rather than mitigating social inequality, intensify it through marginalisation, or when they drive vulnerable people from pillar to post.[95]

Socio-economic measures that are not harmonised with the national refugee regime have implications for marginalising refugees. In *Government of the Republic of South Africa v Grootboom* (*Grootboom*),[96] the court reasoned that socio-economic rights are personal and substantive rights that place a positive obligation on the State. In so doing, special concern must be directed to the protection of the dignity of the most vulnerable people, "who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations".[97] Traditionally, refugees are people in the greatest need of special concern. Their needs include not only humanitarian interventions but also economic empowerment. Equality in refugee protection demands favourable socio-economic inclusion. In *Khosa*, the same court reiterated the importance of equality with respect to access to socio-economic rights, stating that the exclusion of vulnerable groups from access to such rights has a detrimental effect on their dignity.[98] In this case, the court confirmed the intersection between socio-economic rights and the values of equality, human dignity and freedom, which, in the court's view, "reinforce one another at the point of intersection".[99]

Proceeding from this line of reasoning, it is through the lens of substantive equality that the provisions of the Refugees Act must be understood and applied. Through this lens, the equal-treatment approach to refugee protection should be interpreted constitutionally to mean differentiated and special treatment tailored to meet refugees' socio-economic needs. This can only be achieved if the State is willing to deploy its resources to protect refugees. Unless refugees are included as equal beneficiaries of socio-economic programmes, the realisation of their substantive rights, which requires South Africa's action, will remain fanciful.

Unfair discrimination arises from South Africa's reluctance to include refugees (especially *de facto* refugees) as co-beneficiaries of subsidised public goods and services. Owing to the immigration self-sufficiency rule,

---

93 Moseneke ("Remarks: The 32nd Annual Philip A. Hart Memorial Lecture: A Journey from the Heart of Apartheid Darkness Towards a Just Society: Salient Features of the Budding Constitutionalism and Jurisprudence of South Africa" 2003 *The Georgetown Law Journal* 749 761), quoting *Bato Star Fishing v Minister of Environmental Affairs & Tourism* 2004 (4) SA 490 (CC) par 74. See too *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) par 27 (all human beings must be accorded equal dignity, regardless of their position in society) and *Fraser v The Children's Court supra* par 20.

94 2005 (1) SA 217 (CC) (in respect of the eviction of homeless people).

95 *Port Elizabeth Municipality v Various Occupiers supra* par 18. See too *Government of the Republic of South Africa v Grootboom supra* par 23.

96 *Supra*.

97 *Government of the Republic of South Africa v Grootboom supra* par 24, 45, 83, 94, 99.

98 *Khosa supra* par 80.

99 *Khosa supra* par 41; see also *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) par 154.

South Africa has mixed feelings about whether it should protect refugees, or limit the exclusion from protection to economic migrants, illegal migrants and bogus asylum seekers.[100] These categories of non-citizen fall within the ambit of "undesirable persons" or "illegal foreigners" because they do not meet the requirements of immigration and refugee laws. These mixed feelings result in their exclusion from socio-economic measures that tend to distribute socio-economic rights and benefits to advance and cater to historically disadvantaged people. The exclusion of both *de facto* and *de jure* refugees from socio-economic laws precludes them from enjoying equality as envisaged by the Refugees Act.

Conversely, socio-economic protection in the context of substantive equality demands that the State pay attention to people's vulnerability and disadvantages and provide differentiated treatment tailored to alleviate their human suffering and poverty or to expand their freedom to live the life they wish to live.[101] The obligation to provide favourable or preferential treatment to poor citizens does not amount to a duty to refrain from interference with the enjoyment of the socio-economic rights of refugees, but involves a duty to include them in socio-economic measures designed to achieve equal and humane treatment. Substantive equality validates preferential, special or favourable treatment for the protection of the well-being, health, human dignity and equal worth of human persons.[102] The substantive-equality approach to the protection of refugees is not meaningfully applied as the State does not harmonise or reconcile the national refugee regime with its socio-economic measures. The absence of harmonisation results in socio-economic exclusion, which is justified by the sovereign need to safeguard the national resources for the happiness of citizens.[103] Such justifications are inconsistent with the commitment to protect refugees as proclaimed under the national refugee regime.

Owing to such inconsistency, refugee rights tend to be accommodated on the same terms that apply to non-citizens with temporary-residence status, whose admission, stay, and work are regulated by immigration law – in particular, the twin principles of exclusivity and self-sufficiency. The equal treatment of non-citizens does not address the social reality of the vulnerabilities of refugees. Since they live mostly in urban areas, often in poverty and deprivation, they cannot satisfy the basic necessities in life without positive state action.[104] Unlike some countries in the West, *de facto*

---

100 The government does not differentiate between genuine refugees and bogus refugees, and thus views all refugees as "bogus asylum-seekers and economic vultures that came into South Africa in search of a better life and thus a threat to South Africa's security, economy, identity and sustainable development". See Kavuro "Refugee Rights in South Africa: Addressing Social Injustices in Government Financial Assistance Schemes" 2015 *J Sustain Dev Law Policy* 182.

101 See Currie and De Waal *Bill of Rights* 230–234; Kavuro 2012 *Young African Research Journal* 113–115; and Kavuro 2015 *Law Democracy & Development* 253–254.

102 Kavuro 2015 *J Sustain Dev Law Policy* 185.

103 See the minority judgment delivered by Sachs J in *Union of Refugee Women supra* par 136, in which he noted: "It would accordingly be inappropriate for the state to act towards refugees in a manner that is consonant with the general discretionary provisions of the regime constructed upon immigration, security, and other municipal priorities, while ignoring the specific obligations that flow from the refugee regime."

104 Kavuro 2015 *J Sustain Dev Law Policy* 181.

refugees are not placed in centres where the State attends to their basic needs while they await decisions on their cases. Thus, their survival is dependent on access to socio-economic rights. This is important, given that the international obligation to protect refugees is not premised on their ability to demonstrate that they control sufficient available resources to maintain themselves during asylum. Rather, asylum is granted on the basis of the alleviation of human suffering and appalling conditions, as well as of protecting refugees against human-rights abuses. To achieve this, the national refugee regime envisages the full legal protection of refugees, which to achieve favourable treatment should be applied in the context of substantive equality. Substantive equality is a principled mechanism that can be used to offer refugees effective protection. Given that the global refugee regime demands that special vulnerabilities of refugees be responded to favourably, the constitutional substantive-equality approach becomes essential in advancing favourable or special treatment to meet the objectives of the global refugee regime. By virtue of the national refugee regime, the substantive-equality approach should apply to socio-economic rights and benefits that accrue to refugees in terms of the Bill of Rights.

4 CONCLUSION

Determination of the role or impact of the standards of favourable treatment under the global refugee regime is complex and multifaceted owing to the need to harmonise various international laws (such as human-rights law and international refugee law) and national laws (such as constitutional law, immigration law, refugee law and socio-economic laws). It has been demonstrated that standards of favourable treatment for non-citizens serve as a guiding principle for entitlements to most socio-economic rights at the national level. Considering the treatment of non-citizens in South Africa, such guiding principles relegate the treatment of refugees to the treatment accorded to the general category of non-citizens who are admitted into the country on the condition that they are economically independent. Vulnerable non-citizens – whose well-being, health and dignity are highly likely to be dependent economically on state support – are classified as undesirable persons who are deemed not deserving to be in South Africa. Vulnerable non-citizens with permanent-resident status are the only group of non-citizens who enjoy favourable treatment and who can rely on state support for socio-economic protection. Non-citizens who are holders of special dispensation permits may also be allowed to engage in general work and in informal business. The Immigration Act regulates the treatment of permanent residents and holders of special dispensation permits.

Given that they are not in the same circumstances as refugees, the treatment of permanent residents or holders of special dispensation permits cannot serve as a benchmark for the standards of favourable treatment. According to the judgment of the Constitutional Court in *Union of Refugee Women,* refugees can only be treated as permanent residents if they are granted such status. Yet, being treated as holders of special dispensation permits would not place them in a more favourable situation than their current situation. Both *de jure* and *de facto* refugees are entitled – in terms of the Refugees Act – to undertake employment in skilled, semi-skilled or

non-skilled positions and to engage in formal or informal business.[105] On the other hand, the Immigration Act restricts employment to skilled non-citizens,[106] and businesses to non-citizens who wish to invest in South Africa.[107] It is, therefore, evident that the equality envisaged by the global refugee regime appears to be non-favourable to refugee protection in South Africa, especially since there are no other groups of non-citizens in the same circumstances who receive favourable treatment with regard to socio-economic protection.[108]

In light of the above, the national refugee regime deviates from the standards of favourable treatment to afford refugees equal treatment with citizens in all socio-economic matters. It further exempts both *de facto* and *de jure* refugees from the immigration rules of self-sufficiency, exclusion and undesirability. Such deviation and exemption imply that the guiding standards of favourable treatment are not the principal benchmarks against which socio-economic protection can be measured. Rather, the treatment of citizens – in the context of substantive equality – should serve as a principled tool to define, analyse, discuss and review the treatment of refugees in South Africa. Equality in constitutional rights is, as discussed, guided by the transformative and remedial socio-economic measures designed to redress past injustices. Most socio-economic laws and policies are designed to achieve this purpose, which has the negative implication of leaving the national refugee regime unreconciled. Without reconciling or harmonising the national refugee regime with the socio-economic laws and policies that give effect to constitutional socio-economic rights, refugees find themselves unable to access socio-economic programmes.

Like citizens, any limitation to equal access to socio-economic rights must be imposed in compliance with section 36 of the Constitution. The limitation of any right is constitutionally reasonable and justifiable if it is imposed to promote the spirit, purport and objects of the Bill of Rights as set forth under section 7(1) of the Constitution. Apparently, the standards of favourable treatment are not the principled mechanisms to advance the constitutional rights of refugees in South Africa, for the simple reasons discussed throughout this article.

Besides, it should be noted that the ratification and domestication of the global refugee regime points to an intention and commitment to recognise

---

[105] S 27(*f*) of the Refugees Act states that "refugees are entitled to seek employment". The Supreme Court of Appeal interpreted this provision in *Somali Association of South Africa v Limpopo, Department of Economic Development, Environment and Tourism supra* par 43, to mean that both *de jure* and *de facto* refugees had a right to be employed or self-employed.

[106] Par (i) of the Preamble to the Immigration Act states that the immigration law sets out to put in place immigration control that allows admission of foreigners who will contribute to the South African labour market and whose contribution will not adversely impact existing labour standards and the rights and expectations of South African workers. Reg 18(3)(a)(i) of the 2014 Immigration Regulations GN No R 413 in *GG 37679* of 2014-05-22 sets out a condition that a non-citizen can be granted a general work visa if their prospective employer has shown that no citizen – despite a diligent search – is available to occupy the position.

[107] Reg 14(1) of the 2014 Immigration Regulation states that a business visa can be granted to a foreigner who intends to establish or invest in a business that is not yet established in South Africa.

[108] *Union of Refugee Women supra* par 64–65.

the fundamental rights flowing from refugee status, on the one hand, and to recognise refugees in South Africa as human beings endowed with certain inalienable rights, on the other. By recognising the necessity to protect them as humans, South Africa itself is obliged to respect, protect, promote and fulfil the doctrine of equal protection, which entirely rests on the belief that human beings are born free and equal in fundamental rights and human dignity as proclaimed under both the UN Charter and the 1948 Universal Declaration of Human Rights.[109] By virtue of being human beings and because of their vulnerabilities, refugee rights can be protected by means of a substantive-equality approach. Within this approach, a special and differentiated treatment of refugees can be re-engineered.

The role, significance, and importance of substantive equality in refugee protection is well expounded in the dignity jurisprudence. Relying on the right to human dignity, the SCA in the case of *Minister of Home Affairs v Watchenuka*[110] made it clear that the application of the treatment of non-citizens under the Immigration Act to refugees could, in some cases, lead to a serious impairment of their dignity by causing or perpetuating destitution.[111] The special and differentiated treatment of refugees is judicially reviewed from a human-dignity perspective.[112]

Differentiating the treatment of refugees from the treatment of other non-citizens is essential when determining the position of refugees with respect to the accessibility of socio-economic rights. This will occur when determining the meaning, scope and ambit of favourable treatment, not only in terms of the global refugee regime, but also within the framework of the national refugee regime. This differentiation is also essential when analysing the impact that the standards of favourable treatment have on refugees with regard to their ability to access aspects of public services and socio-economic programmes aimed at empowering the vulnerable, such as small businesses, loans, banking, social/financial assistance, humanitarian relief, employment, practising a liberal profession, social security, health care, housing, and education and training. The South African government must, therefore, align refugee protection with the object and spirit of the global refugee regime, which is to promote the widest possible exercise of refugees' rights and benefits contained in it.[113] To promote these rights, the principle of substantive equality should inform the implementation of the fundamental rights of refugees entrenched in the Bill of Rights as universal

---

109 Preamble to the Geneva Refugee Convention. See also Weis (*Refugee Convention* 6–8), which states that the chief aim of the Refugee Convention is to respond to the concern of the international community for the protection of human rights and liberties without discrimination of any kind as given expression in the UDHR.

110 *Supra*.

111 The court held that a general prohibition, as applied to asylum seekers, that does not allow access to employment and education in appropriate circumstances, is a material invasion of human dignity that is not justifiable in terms of s 36 of the South African Constitution. See *Minister of Home Affairs v Watchenuka supra* par 33 38.

112 The dignity jurisprudence was relied on in *Minister of Home Affairs v Watchenuka supra*, *Union of Refugee Women supra*, *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism supra*; *Minister of Home Affairs v Somali Association of South Africa, Eastern Cape* 2015 (3) SA 545 (SCA); and *Scalabrini Centre v Department of Social Development supra*.

113 Preamble to the 1951 Refugee Convention.

rights and, particularly, should be guaranteed by the Refugees Act. Within this view, it is therefore incumbent on South Africa to adopt socio-economic measures and strategies that speak equally to the national refugee regime and determine the extent to which socio-economic rights can be accessed. Refugees are not in the same circumstances as other non-citizens who are required to be self-reliant or who hold special dispensation permits. They are not in the same circumstances as citizens whose vulnerabilities were caused by past discriminatory practices. Refugees' position in South African society is unique. The favourable protection envisaged by the global refugee regime will, therefore, be defeated in situations where the standards of favourable treatment of non-citizens are deliberately applied to refugees, knowing that such application will result in depriving them of socio-economic rights. For instance, it is undesirable to exclude refugees from housing, health care, student financial assistance, small business loans, and COVID-19 relief packages on the ground that non-citizens are – in terms of immigration law – required to be self-sufficient and that they do not deserve state support, or on the ground that refugees do not fall within historically disadvantaged groups. In developing and adopting socio-economic laws and policies, the human suffering, deprivation, and trauma associated with the refugee situation should be taken into account and thus afford refugees special and differentiated treatment designed to respond to their plight.

Legal Protection of Linguistic Minority Under Discrimination: The Case of Anglophone Cameroon

D Kome
BA Philosophy, LLB, LLM University of Yaounde, Cameroon, LLM University of Deusto, Spain
PhD student and Researcher, University of Deusto, Spain
https://orcid.org/0000-0001-9382-9165

SUMMARY

The minority English-speaking population in Cameroon, where French is the majority language, has a number of political, economic and social complaints that collectively make up the "Anglophone problem". These grievances are described using the terms "discrimination", "marginalisation", and "second-class citizenship". The right to speak English in Cameroon must always be upheld as a fundamental right. To protect the rights of minorities, Cameroon has established a number of laws. Since Cameroon and many other countries have ratified a number of human-rights instruments, it is the State's duty to safeguard all the rights guaranteed by these instruments, including those of minorities. As demonstrated by the current crisis (another escalation in that cycle), several political systemic deficiencies need to be remedied if Cameroon is to grow as a single nation. Greater localised control over political and financial resources might be necessary to achieve this. To better serve the needs of citizens, existing institutions and leadership structures must become more accommodating.

Keywords: Anglophone Cameroon, linguistic minority, protection, legal framework, discrimination, marginalisation

1 INTRODUCTION

1 1 Background

The birth of the Federal Republic of Cameroon on 1 October 1961 marked the reunification of two territories that had undergone different colonial experiences since World War I, when the German *Kamerun* was partitioned between the French (who tried to culturally assimilate the country), and the British (who ruled indirectly).[1] Cameroon is often described as "Africa in miniature" because of the wide range of different landscapes, languages,

[1] Joseph "Is the Conflict in Anglophone Cameroon an Ethnonational Conflict?" 2019 *E-International Relations* https://www.e-ir.info/2019/08/26/is-the-conflict-in-anglophone-cameroon-an-ethnonational-conflict/ (accessed 2023-07-08) 1.

and ethnicities. Such differences can and do pose challenges to national unity but also create a rich tapestry of varied cultures that have the potential to become a strength in the longer term if properly leveraged.[2] According to Joseph, Cameroon is a country in central Africa often described as "Africa in miniature" which has come into the spotlight lately owing to a crisis of identity and cultural assimilation for the minority English-speaking people. Southern Cameroon's problem, popularly known as the "Anglophone crisis", is as old as the country. It is the expression of a poorly managed decolonisation process, which saw two distinct peoples (from British Southern Cameroons and French Cameroon) come together to form a country without any real foundations that would guarantee harmonious coexistence.[3]

Over the last 20 months, Cameroon has been seen as a nation sliding into civil war in Africa. Starting in November 2016, English-speaking lawyers, teachers, students and civil society aired legitimate grievances over the prolonged marginalisation of Southern Cameroons, but peaceful protests turned deadly when the government military shot at peaceful protesters, wounding many and killing several.[4] Leaders representing lawyers, teachers, and civil-society organisations made themselves available for dialogue seeking a quick solution.[5] Unfortunately, during the dialogue process, the government rejected talks over a return to federalism, which existed from 1961 to 1972, when bilingualism, biculturalism, bi-juralism, and equal opportunity for all were guaranteed, and which provided constitutional provisions for power sharing, economic independence and freedoms.[6]

Cameroon, like most other African countries has its internal problems, although there has been no major armed conflict since independence in 1961. However, the minority English-speaking group is being dominated by the French-speaking majority, which also controls the government. Thus, Anglophone Cameroon has been at the forefront of ethno-regional protests, which demand a rearrangement of state power. There is a widespread feeling in the Anglophone regions that reunification with Francophone Cameroon in 1961 has led to a growing marginalisation of the Anglophone minority in the state project controlled by the Francophone elites, thus endangering its political heritage and identity. It was not until the political liberalisation process in the early 1990s that the Anglophone elites began to mobilise the regional population against the allegedly subordinated position of Anglophones and to demand that self-determination and autonomy, the reintroduction of federalism and secession be added to the political agenda.[7]

In Cameroon, several laws have been put in place to protect the rights of minorities. Cameroon, like many other countries, has ratified a number of human-rights instruments that engage the State in a responsibility to protect

---

2 New African "Cameroon: All Africa in One Country" (24 March 2020) *New African* https://newafricanmagazine.com/22650/ (accessed 2023-08-27).

3 Joseph https://www.e-ir.info/2019/08/26/is-the-conflict-in-anglophone-cameroon-an-ethnonational-conflict/ 1.

4 *Ibid*.

5 *Ibid*.

6 *Ibid*.

7 *Ibid*.

and promote the human rights guaranteed in such instruments, including those of minorities.[8] Some of these treaties include the Charter of the United Nations,[9] the African Charter on Human and Peoples' Rights (African Charter),[10] the International Covenant on Civil and Political Rights (ICCPR),[11] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[12] the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[13] the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[14] the Convention on the Rights of the Child (CRC)[15] and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[16]

In terms of legislation, the Constitution of Cameroon recognises and guarantees the rights of minorities. This right is referred to in its Preamble. The Constitution of Cameroon is complemented by other pieces of legislation, including the Criminal Procedure Code, and the Penal Code.[17]

This article seeks to determine whether the conflict between Cameroon's two English-speaking areas is an ethnic or identity-based one.

1 2 Conceptual framework

In states where minorities exist, members of such groups should not be denied the right to enjoy their own culture, to profess and practise their religion, or to speak their language in community with other members of their group. Article 27 of the ICCPR, which served as the foundation for the 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities (UNDM)[18] states:

---

8 Pascal "The Legal Framework for the Protection of Liberty in Cameroon" 2022 *Academia Letters* https://www.academia.edu/70443491/THE_LEGAL_FRAMEWORK_FOR_THE_PROTECTION_OF_LIBERTY_IN_CAMEROON?email_work_card=view-paper (accessed 2023-03-09) 1.

9 United Nations *Charter of the United Nations* 1 UNTS XVI (24 October 1945).

10 Organization of African Unity (OAU) *African Charter on Human and Peoples' Rights ("Banjul Charter")* CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982) (27 June 1981).

11 United Nations General Assembly (UNGA) *International Covenant on Civil and Political Rights* (ICCPR) 999 UNTS 17 (1966). Adopted: 16/12/1966; EIF: 23/03/1976.

12 UNGA *International Covenant on Economic, Social and Cultural Rights* (ICESCR) 993 UNTS 3 (1966). Adopted: 16/12/1966; EIF: 03/01/1976.

13 UNGA *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) 1465 UNTS 85 (10 December 1984).

14 UNGA *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) 1249 UNTS 13. Adopted: 18/12/1979; EIF: 01/09/1981.

15 UNGA *Convention on the Rights of the Child* (CRC) 1577 UNTS 3 (1989). Adopted: 20/11/1989; EIF: 2/09/1990.

16 UNGA *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) 660 UNTS 195 (1966). Adopted: 21/12/1965; EIF: 4/01/1969; Pascal https://www.academia.edu/70443491/THE_LEGAL_FRAMEWORK_FOR_THE_PROTECTION_OF_LIBERTY_IN_CAMEROON?email_work_card=view-paper 1.

17 *Ibid*; Law No 2005 of 27 July 2005 on the Criminal Procedure Code; Law No 2016/007 of 12 July 2016 relating to the Penal Code.

18 UNGA *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (UNDM) A/RES/48/138 (20 December 1993). Adopted: 18/12/1992.

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

Despite the contribution of international legal frameworks, there are no globally recognised guidelines for what qualifies as a minority. The following description was put forward by UN Special Rapporteur Capotorti in 1979 in accordance with article 27 of the ICCPR:

> "A group numerically inferior to the rest of the population of a State, and in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religions, and language."[19]

According to recommendations from the UN Sub-Commission, Jules Deschênes amended this definition in 1985, and it now reads as follows:

> "A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.[20]"

Both definitions have distinct challenges, even though they each help with comprehending the concept of minorities. For instance, where there may be no obvious numerical majority or minority, the numerical minority criterion is not sufficient. A particular ethnic group may have a majority in terms of numbers while also holding a non-dominant position. As such, they are similarly entitled to the application of many minority standards to protect their rights to identity and non-discrimination, which are the cornerstones of minority rights. In addition, citizenship is a criterion that can be used to deny some people their rights as minorities and has not been recognised as a defining attribute of minorities. Slimane argues:

> "While both definitions contribute to an understanding of the concept of minorities they are not without their difficulties. For example, the criterion of numerical minority is not entirely satisfactory where there may be no clear numerical minority or majority. And, indeed, a distinct ethnic group can constitute a numerical majority and be in a non-dominant position and thus be similarly entitled to the application of many minority standards in order to ensure their rights to non-discrimination and to protection of their identity – which form the foundations of minority rights. Also, the limiting criterion of citizenship can be used to exclude certain groups from their rights as minorities and has in fact not been accepted as a defining minority characteristic."[21]

---

19 Sub-Commission on Prevention of Discrimination and Protection of Minorities *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities by Francesco Capotorti* E/CN.4/Sub.2/384 (Rev1 1979) (1979) 96.

20 Deschênes *Proposal Concerning a Definition of the Term Minority* E/CN.4/Sub.2/1985/31/Corr.1 (14 May 1985) par 181.

21 Slimane "Recognizing Minorities in Africa" (2003) *Minority Rights Group International* https://minorityrights.org/wp-content/uploads/2015/08/MRG_Brief_MinsinAfrica_FRE2003.pdf (accessed 2023-08-20) 2.

The complexity of multi-ethnic states in Africa (or on other continents) that are highly diverse in terms of ethnicity, religion and language – sometimes comprising more than 250 different ethnic groups, as is the case in Nigeria or Cameroon – may not be fully reflected in the criteria developed at the international level. Similarly, it is not always easy to distinguish between minority groups and indigenous peoples, and this is also true in the context of Africa. However, in Africa, the concept of a "minority" still holds true, and the international human-rights law system stipulates minimal requirements for domestic applicability. Slimane explains:

> "The criteria elaborated at the international level may not fully reflect the complexity of multi-ethnic states in Africa (or necessarily on other continents), that are highly diversified in terms of ethnicity, religion and language, and made up sometimes of more than 250 different ethnic groups, as is the case in, for example, Nigeria or Cameroon. Similarly, the distinction between minority groups and indigenous peoples is not always clear-cut and this is equally the case in the African context. However, the term 'minority' is still relevant in Africa and the international human rights legal framework provides minimum standards for domestic application. The criteria recognized in international law should guide our reflection and help to identify possible applications that may best fit in Africa. The examples of the colonial and minority white-ruled states of Angola, Mozambique, South-West Africa (now Namibia), Rhodesia (now Zimbabwe) and apartheid South Africa give a negative connotation to the term 'minority' in the eyes of some African states."[22]

2 ANGLOPHONE MARGINALISATION SYNDROME

2 1 Political discrimination

2 1 1 Centralisation and assimilation of Anglophones

The current crisis has increased support for federalism among the Anglophone population – which was probably already high – and has reinforced support for secessionism. This new configuration shows the depth of the Anglophone problem.

Ghost town operations and school closures could not have continued for nine months without the adherence of a large proportion of the population. As the population becomes more frustrated and disappointed, its desire for fair integration and willingness to coexist with Francophones is eclipsed by aspirations for autonomy.[23]

Although most Anglophones want federalism, there is no consensus about the number of states in a future federation. Possibilities include a two-state federation, as before unification; a four or six-state federation to better reflect the sociological composition of the country and make the idea of federalism acceptable to Francophones; and ten states to copy the current pattern of Cameroon's ten regions. Some people insist that however many federated

---

[22] Slimane https://minorityrights.org/wp-content/uploads/2015/08/MRG_Brief_MinsinAfrica_FRE2003.pdf 1.

[23] International Crisis Group *Cameroon's Anglophone Crisis at the Crossroads* Africa Report No 250 (2 August 2017) 18.

states are created, the federal capital Yaoundé should not be included in any of them. For some Anglophone activists, federalism seems to be a maximalist negotiating strategy. They raise the bar high in order to obtain at least an effective decentralisation, with genuine autonomy for the country's ten regions, starting with improvements to and full application of current laws on decentralisation.[24]

2 1 2 Limited political representation

The Anglophone problem is a combination of political, economic and social grievances expressed by English-speaking minorities in the predominantly French-speaking republic of Cameroon. These grievances are expressed using terms such as discrimination, marginalisation and second-class citizenship. Because the fundamental causes of the conflict have not yet been addressed or resolved, there has been an escalation of the conflict, which has resulted in destabilisation of social and economic activities in the economy.[25]

Notably, one of the factors that fuelled frustration with the Francophone-dominated state in the late 1980s was the increasing monopolisation of key posts by members of the President's ethnic group, who appeared to be much bolder in staking out claims on the State's resources than was Ahidjo's *barons.*[26] As of August 1991, according to Joseph Takougang, 37 of the 47 senior divisional officers were Beti,[27]as were three-quarters of the directors and general managers of the parastatals, and 22 of the 38 high-ranking bureaucrats who had been appointed in the newly created office of the Prime Minister.[28]

2 2 Economic discrimination

Economic marginalisation has played a major role in provoking discontent among Anglophones. Even though the two Anglophone regions are suffering no more than some Francophone regions from the prolonged economic crisis, Anglophones feel their potential is not being realised (or is being deliberately wasted) and feel abandoned.[29]

No serious economic study has been published on the economic impact of the crisis, but there is no doubt that the isolation for several months of these two regions, which contribute around 20 per cent of Cameroon's GDP, has had an impact on them as well as on the national economy. In 2016, the Anglophone regions were among the most digitally connected in Cameroon, just behind Douala and Yaoundé. Shutting down the Internet as a result of

---

24 International Crisis Group *Cameroon's Anglophone Crisis* 18.

25 Joseph https://www.e-ir.info/2019/08/26/is-the-conflict-in-anglophone-cameroon-an-ethnonational-conflict/ 3.

26 *Barons* means those loyal to the Head of State.

27 Beti, a dominant ethnic group to which the President of the Republic belongs.

28 Konings and Nyamnjoh "The Anglophone Problem in Cameroon" 1997 35(2) *The Journal of Modern African Studies* 207–229.

29 International Crisis Group *Cameroon's Anglophone Crisis* 21.

information to call on protest on government actions, paralysed several sectors of the local economy, notably banking and microfinance. The local economy is based on the oil sector (9 per cent of GDP), timber (4,5 per cent) and intensive agriculture (including large plantations owned by the Cameroon Development Corporation and other smaller plantations that supply Douala and the countries of the Central African Economic and Monetary Community), as well as cocoa and rubber.[30]

Anglophones and Southerners, in particular, often complain about the low proportion of Anglophones in the workforce and decision-making posts in state oil companies, such as the National Refining Company (Société Nationale de Raffinage (Sonara)), based in the south-west, and the National Hydrocarbons Corporation (Société Nationale des Hydrocarbures (SNH)). The crisis has hit all sectors of the local economy, except for hydrocarbons and forestry, the crisis has had an impact on some commercial sectors and industries in the Francophone regions. Several estimates put the direct cost of cutting access to the Internet at CFA2 billion (€3 million).[31]

In addition, there was the deteriorating economic crisis that Anglophones were inclined to attribute first and foremost to the corruption and mismanagement of Biya's[32] regime. They claimed that their region had failed in investing in projects to benefit from its rich oil resources and criticised the absence of increased investments in its ailing economy and neglected infrastructure. Oil revenues were alleged to have been used by those in power to feed "the bellies" of their allies, and to stimulate the economy in other regions. Sonara, the oil refinery near Limbe (or Victoria, as some prefer to call it) continued to be headed and predominantly staffed by Francophones. There was also great anxiety in Anglophone Cameroon that its major agro-industrial enterprises, especially the Cameroon Development Corporation (CDC) and Plantations Pamol du Cameroun Ltd (Pamol) would be either liquidated or sold to Francophone or French interests during the ongoing structural adjustment programme.[33]

2 3 Discrimination in recruitment, training and education

Anglophone lawyers claimed they were appalled by the gradual phasing-out of common-law principles in Cameroon's legislation, especially through the recent harmonisation of the Criminal Procedure Code, the Organisation for the Harmonisation of Business Law in Africa (OHADA) Uniform Acts, and the Inter-African Conference on Insurance Markets (CIMA) Code. They feared that the same phenomenon would be observed in the Civil Code and the Commercial and Civil Procedure Code, which are being drafted.[34] The government was blamed for their inability to organise under a separate

30 International Crisis Group *Cameroon's Anglophone Crisis* 21.

31 International Crisis Group *Cameroon's Anglophone Crisis* 21–22.

32 Current President of Cameroon.

33 Konings and Nyamnjoh 1997 *The Journal of Modern African Studies* 207–229.

34 Caxton "The Anglophone Dilemma in Cameroon: The Need for Comprehensive Dialogue and Reform" 2017 *Conflict Trends* 2.

Common Law Bar because the law proscribed the existence of any Bar other than the Cameroon Bar Association, which could permit them to cohere and defend their interests as common-law lawyers. They also asked for the creation of a Common Law Bench at the Supreme Court.[35]

The Anglophone lawyers raised issues of representation and the recruitment of legal personnel. In his statement, Esso mentioned that there were 1 542 active magistrates, including 91 in service at the Ministry of Justice, 1 412 in service in the courts, and 39 on secondment. This group included 1 265 French-speaking magistrates and 227 English-speaking magistrates. As for judicial officers, there were 514 in total – 499 Francophones and 15 Anglophones.[36] Of the 128 magistrates practising in the north-west region, 67 (52,3 per cent) are French-speaking with a civil-law background. Of the 97 magistrates in the legal services, 64 (65,9 per cent) are Francophones. Of the 27 magistrates in the legal services in Bamenda, there are 21 Francophones (77,8 per cent). A similar trend is observed in the south-west region.[37]

The current Anglophone crisis is an extension of the historical resistance to the alleged assimilation of the indigenous English-speaking population. It began with the provoked harassment of Anglophone lawyers engaged in peaceful protest marches in September 2016 to vent their grievances over the perceived marginalisation of Anglophone common-law practice in the country. In October 2016, the lawyers went on strike, and in November, the Anglophone Teachers Trade Union also staged a solidarity strike to protest against the distortions confronting the educational system in the Anglophone regions,[38] and to highlight the need for unity and solidarity in the Anglophone community to choose a concrete plan of action and reallocate its resources to guarantee its achievement.[39]

3 LEGAL FRAMEWORK FOR THE PROTECTION OF LINGUISTIC MINORITY IN CAMEROON

3 1 International instruments for the protection of linguistic minority

It was, not until the adoption of the ICCPR in 1966 (which came into force in 1976) that the question of minority rights entered the international agenda that safeguarded linguistic minorities, since there was no question of minority rights before ICCPR.[40] Article 27 states:

---

35 *Ibid.*

36 *Ibid.*

37 *Ibid.*

38 Joseph https://www.e-ir.info/2019/08/26/is-the-conflict-in-anglophone-cameroon-an-ethnonational-conflict/ 2.

39 Joseph https://www.e-ir.info/2019/08/26/is-the-conflict-in-anglophone-cameroon-an-ethnonational-conflict/ 4.

40 Vijapur "International Protection of Minority Rights" 2006 43 *International Studies* 367–394 374.

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

3 2 Regional instrument: African Charter on Human and Peoples' Rights

The African Charter provides for a series of collective rights on which "peoples" can rely. Although the African Commission has not yet defined the concept of a "people" contained in the African Charter, a brief reading of the Commission's case law clearly shows that the notion of a "people" has not been interpreted as encompassing only the idea of a state. The approach to the rights of minorities is also reflected in the General Directives on National Periodic Reporting, which require the application of article 19 of the Charter.[41]

Article 19 of the Charter states:

> "All peoples shall be equal. They shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another."

The principle of non-discrimination is a way to guarantee linguistic rights.

Article 2 stipulates:

> "Every individual shall be entitled to the enjoyment of the rights and freedom recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."

Furthermore, article 24 states:

> "All peoples shall have the right to a general satisfactory environment favourable to their development."

This was applied by the African Commission in the case of the Ogoni community in Nigeria.[42]

3 3 National framework for the protection of linguistic minority in Cameroon

3 3 1 Constitutional protection

The 1996 Constitution remains the principal tool for human-rights protection in Cameroon. Although these rights are contained in the Preamble of the Constitution, they are all binding. Preamble One indicates that "the human

---

41 Slimane https://minorityrights.org/wp-content/uploads/2015/08/MRG_Brief_MinsinAfrica_FRE2003.pdf 3.

42 Decision Regarding Communication 155/96 *Social and Economic Rights Action Center/Center for Economic and Social Rights v Nigeria* Case No ACHPR/COMM/A044/1.

person, without distinction as to race, religion, sex or belief, possesses inalienable and sacred rights". The Preamble also provides for the right to life, education, equal protection of the law, a healthy environment, and freedom of expression. It also provides for freedom from torture and cruel, inhumane, or degrading treatment, and it guarantees the right to liberty and security of the person as well as minority-rights protection.[43]

The Constitution of Cameroon remains a set of fundamental legal-political rules that are binding on everyone in the State, including ordinary law-making institutions. It also regulates the structure and functioning of governmental institutions, political principles and the rights of citizens. It can therefore be understood that the Constitution covers the exact content of the political set-up of a state (that is, it sets out the basic structure of the government and also declares and defines the rights and duties of citizens.[44]

The Constitution expresses the commitment to holding free, fair and genuine elections by universal, free, secret and direct suffrage. In other words, it protects electoral rights, which include: the right to vote and to run for elective office in free, fair, genuine and periodic elections conducted by universal, free, secret and direct vote; the right to gain access, in equal conditions, to elective public office; the right to political association for electoral purposes (for example, the right to establish or join or not join a political party, or any other grouping with electoral aims); and other rights inherently related to these, such as the right to freedom of expression, freedom of assembly and petition, and access to information on politico-electoral matters.[45]

The Preamble of the Cameroon Constitution expressly protects minority rights. It states:

> "1. All persons shall have equal rights and obligations. The State shall provide all its citizens with the conditions necessary for their development;
> 2. the State shall ensure the protection of minorities and shall preserve the rights of indigenous populations in accordance with the law."[46]

The Constitution has made it possible for certain regions to have special status. Article 62 of the Constitution of Cameroon states:

> "Without prejudice to the provisions of this Part, the law may take into consideration the specificities of certain Regions with regard to their organization and functioning."

Going by this provision, it goes without saying that the regions containing the Anglophone minorities should have a special status with regard to their organisation and functioning.[47]

---

43 Tonga *The State of Human Rights Protection in Cameroon: Prospects and Challenges* (2021) https://www.researchgate.net/publication/351097872_The_state_of_Human_Rights)Protection_in_Cameroon_Prospects_and_Challenges/citation/download 3.

44 Ghamu "The Legal Framework for the Protection of English-Speaking Minority in Cameroon" 2021 *Texas Journal of Philology, Culture and History* 28.

45 *Ibid*.

46 *Ibid*.

47 Ghamu 2021 *Texas Journal of Philology, Culture and History* 28 29.

Cameroon will elect its next president in 2025. While preparation for this important event is underway, the country is facing one of its greatest social crises – the Anglophone crisis. This reflection aims to highlight that the Constitution that was adopted on 18 January 1996, and revised by law 2008/001 of 14 April 2008, cemented a constitutional system that has failed to achieve one of the principles that the Constitution guarantees – namely, the principle of equality between Francophone and Anglophone citizens is still debatable with Anglophones suffering marginalisation.[48] Article 1(3) of the Constitution states:

> "The Official languages of the Republic of Cameroon shall be English and French, both languages having the same status."

The Constitution sets out the principle of linguistic equality in Cameroon, without further explanation on how this principle will be guaranteed. The same article further states:

> "The State shall guarantee bilingualism throughout the country. It shall endeavour to promote and protect national languages."

In the meantime, the Preamble of the Constitution states:

> "2. the State shall ensure the rights of minorities […] in accordance with the law."

However, the Constitution does not provide a definition for the term "minorities".[49]

3 3 2 Specific laws

Various other specific legal instruments help in the promotion and protection of minority rights in Cameroon, especially those of Anglophones. For instance, the Penal Code of 2016[50] protects several categories of rights. Sections 275 and 276 punish a violation of the right to life, such as murder and capital murder respectively. Other provisions that have a human-rights undertone include section 277, which punishes torture. Section 296 punishes rape, section 305 punishes defamation, section 293 punishes slavery and section 302 punishes sexual harassment.[51]

The Criminal Procedure Code[52] also helps in the protection of human rights in Cameroon. It lays down the procedural rules in criminal proceedings, starting with criminal investigation (searches and seizures, interrogations and questioning) and continuing to pretrial rights (right to a speedy and public trial, by an impartial jury of the State, and to be informed

---

48 Lemdjo "The Constitutional Problems to Protect the Principle of Linguistic Equality in Cameroon" 2018 *Advancing the Rule and Role of Law in Africa* https://africlaw.com/2018/08/28/the-constitutional-problems-to-protect-the-principle-of-linguistic-equality-in-cameroon/ (accessed 2023-09-10) 1.

49 *Ibid*.

50 Law No 2016/007 of 12 July 2016 relating to the Penal Code.

51 Tonga https://www.researchgate.net/publication/351097872_The_state_of_Human_Rights_Protection_in_Cameroon_Prospects_and_Challenges/citation/download 3.

52 Law No 2005 of 27 July 2005 on the Criminal Procedure Code.

of the nature and cause of the accusation), trial rights (right to be heard, presumption of innocence, right to counsel) and post-trial rights (right to appeal).[53]

The Cameroon Labour Code[54] also protects the human rights of minorities pertaining to labour issues. Section 2(1) of the 1992 Labour Code notes that "the right to work shall be recognised as a basic right of each citizen". The State is mandated to take all necessary steps to assist its citizens in securing employment.[55]

4 RECOMMENDATIONS

4 1 Return to decentralisation or federation

The Anglophone crisis has shown the limits of presidential centralism and a governance system that depends on co-optation. Implementation of effective decentralisation could mitigate this problem at the national level.[56]

The executive and senior levels of the administration are the only real opponents of decentralisation. That is understandable: it would take away the presidency's complete control over the regions and could – by opening the way for local democratic experiences with possible national impact – threaten the regime's absolute power. However, there is a serious risk that the crisis could deteriorate and, in time, destabilise the country. A government-backed decentralisation could provide a more consensual and peaceable future.[57]

Decentralisation could take place based on the ten current regions. It would require the full application and improvement of existing laws. At the moment, decentralisation is deficient: government-appointed representatives run the big cities, play the role of super-mayors, and report only to the President of the Republic, rendering town councils inoperative. The latter have to wait for their budgets to be allocated by government representatives, which provokes discontent among both opposition mayors and those belonging to the ruling party. The transfer of financial resources (the percentage of which is not detailed in legal texts) has only increased by 4 to 7 per cent in 13 years, while it is 20 per cent in other decentralised unitary states like Kenya and Ghana. Other powers are not always transferred and remain in the hands of authorities appointed by Yaoundé.[58]

If a new attempt at decentralisation is going to be acceptable and effective, it must reduce the powers of administrators appointed by Yaoundé by creating regional councils, introducing elected regional presidents,

---

53 Tonga https://www.researchgate.net/publication/351097872_The_state_of_Human_Rights_Protection_in_Cameroon_Prospects_and_Challenges/citation/download 3–4.

54 Law No 92/007 of 14 August 1992 relating to the Labour Code of Cameroon.

55 Tonga https://www.researchgate.net/publication/351097872_The_state_of_Human_Rights_Protection_in_Cameroon_Prospects_and_Challenges/citation/download 4.

56 International Crisis Group *Cameroon's Anglophone Crisis* 25–26.

57 International Crisis Group *Cameroon's Anglophone Crisis* 26.

58 *Ibid*.

transferring significant financial resources and powers, and implementing measures that are already provided for in law. It should also take legal measures specific to Anglophone regions in the areas of education, justice and culture (not currently covered by legislation).[59]

Anglophone lawyers and teachers have called for a return to the two-state federation to permit some level of local autonomy and control. While tenable, at the moment this demand seems a no-go option for many in the current government.[60]

According to Manikkalingam, federalism means a broad class of political arrangements within a single political unit – something between a unitary system, where all powers are concentrated at the centre, and secession, where there are a minimum of two independent political units. Federal arrangements can range from quasi-federal ones, like India's, to federal arrangements, as in the United States. A federal arrangement involves autonomous spheres of political action for the primary political unit and the subunits.[61] While federalism may be politically desirable in a culturally plural society, we first need to identify the specific conditions under which it is the primary means to ensure political equality. Linguistic pluralism alone is not such a condition. Political inequality that is rooted in linguistic pluralism can be addressed by a combination of local and provincial autonomy, special representation, and bilingualism. It does not require federalism. What leads to calls for federalism in the context of linguistic pluralism is group bias of the unitary state against a minority language group. Linguistic diversity alone can make federalism politically desirable, but it fails to make it morally imperative.[62] Manikkalingam considers four alternatives to federalism:

1. Local autonomy: Local autonomy provides a way of choosing indigenes by tapping into local knowledge. Local government services include the maintenance of streets and parks, the functioning of community centres for the youth, elderly and disabled, the disposal of waste and the provision of utilities. Some local governments have power over education and law enforcement. Local governments can tax residents to provide these services and the functioning of government. A creative and effective organisation of local-government services and support for the participation of different social groups can help turn cities and other local areas, such as villages and towns, into centres of cultural diversity and tolerance. The impact of local-government decisions is small in scale, minimising the cost of mistakes. While decisions can be made autonomously at the local level of the municipality, the town or the village, the basic constitutional structure of society provides the political context in which they are made.

---

59 *Ibid*.

60 Caxton 2017 *Conflict Trends* 2.

61 Manikkalingam "A Unitary State, A Federal State or Two Separate States?" 2003 2 https://www.files.ethz.ch/isn/55653/Unitary,%20Federal%20or%20Separate%20States_.pdf (accessed 2023-08-27) 6.

62 Manikkalingam https://www.files.ethz.ch/isn/55653/Unitary,%20Federal%20or%20Separate%20States_.pdf 11.

2. Provincial autonomy: It allows a number of contiguous local governments to internalise their externalities – that is, it provides a means by which they can coordinate the benefits and costs of programmes that cannot be restricted to the boundaries of local governments, and benefit from economies of scale. It forms an intermediate level of coordination between local governments with common areas of interest and the central government.
3. Special representation: The majoritarian system of territorial representation can place minorities at a disadvantage when electing representatives of their choice. Small swings in votes can bring large changes in electoral results. This leads to a huge discrepancy between the number of votes received by a party and the number of seats that it wins in Parliament. This discrepancy can undermine equality of representation. This may be tolerable when there are no linguistic differences because a group can persuade representatives through other means. However, in the presence of linguistic differences, informational failures owing to the cost of dealing with representatives who do not speak their language compound minorities' lack of representation. Under these circumstances, electoral systems weighted in favour of increased minority representation are not only compatible with political morality, but may even be required by it. These schemes can include linguistically defined electoral units, proportional representation or setting aside "minority" seats in Parliament.
4. Bilingualism: Local autonomy, provincial autonomy, and special representation address the cost of interaction between minority citizens and local bodies, enabling these citizens to participate in politics at the local level and have adequate representation at the national level. However, they do not address all the disadvantages suffered by minority citizens who speak a different language. Bilingual policies defray the cost faced by minority citizens in interacting with the State and the market. The cost of interacting with the State can range from filling out passport applications to language requirements for government employment. The cost of interacting with the market can range from restricted job opportunities to the challenge of reading labels and signposts.[63]

The Anglophone diaspora took over the leadership of the struggle, following the arrest and detention of the CACSC[64] leadership, especially the secessionist Ayaba Chou in Norway. The Anglophone diaspora substituted the initial quest for the restoration of two-state federalism with a demand for a separate state of Ambazonia.[65] Several groups emerged, mobilising Anglophone nationalism within Cameroon and beyond towards the attainment of Ambazonia. Prominent among these groups are the CACSC, Southern Cameroon Peoples Organization (SCAPO), Southern Cameroons

[63] Manikkalingam 2003 https://www.files.ethz.ch/isn/55653/Unitary,%20Federal%20or%20Separate%20States_.pdf 11–18.

[64] Cameroon Anglophone Civil Society Consortium (CACSC).

[65] Joseph https://www.e-ir.info/2019/08/26/is-the-conflict-in-anglophone-cameroon-an-ethnonational-conflict/ 1.

South Africa Forum (SCSAF), Movement for the Restoration of Independence in Southern Cameroon (MoRISC) and Southern Cameroonians in Nigeria (SCINGA). Others are the Southern Cameroon National Council (SCNC), Republic of Ambazonia (RoA), Ambazonia Governing Council (AGC) and the Southern Cameroon Youth League (SCYL).[66]

The experiences of the two federations in Canada suggest that a federal arrangement that does not accommodate those who do not belong to the empowered regional majority is likely to be subjected to perennial stress, and is less likely to succeed in managing ethnic diversity. The particular experience of African federations also highlights one of the conditions that continue to threaten the federal experiment in Africa – namely, a lack of consensus on liberal democratic values. One of the reasons for the success of federations in the West is the widespread consensus on liberal democratic values.[67] As Fessha notes, most Western federations are not afraid that national minorities will use their power to "persecute, dispossess, expel or kill anyone who does not belong to the minority group". In the absence of consensus and respect for liberal democratic values, the precarious federal experiments in Africa will continue to pose a grave threat to the fundamental rights of individuals and the political stability of the State.[68]

The imperative of developing consensus and respect for liberal democratic values becomes more evident when one notes that the territorial approach to subnational autonomy may not necessarily respond to the concerns of all ethnic groups. This relates to the fact that the territorial concentration of ethnic groups is a precondition for the extension of subnational autonomy towards a particular group.[69] To a group that is not geographically concentrated, the territorial solution that federalism provides is less appealing. The territorial arrangement in South Africa, which (albeit indirectly) gives certain ethnic groups political space at the subnational level, does not cater to Afrikaners who are dispersed throughout the country. This requires the State to look for innovative ways of addressing the anxieties of groups that cannot benefit from a territorial solution. At a minimum, it requires strict enforcement of liberal values in the form of fundamental individual rights.[70]

4 2 Inclusive dialogue and rebuilding confidence

It is difficult to envisage a credible dialogue in Cameroon unless the government takes conciliatory measures and until trust is rebuilt between the parties. A discourse of tolerance, openness to dialogue and recognition of the Anglophone problem by the head of state would constitute a first

---

66 Joseph https://www.e-ir.info/2019/08/26/is-the-conflict-in-anglophone-cameroon-an-ethnonational-conflict/ 2–3.

67 Fessha "Federalism, Territorial Autonomy and the Management of Ethnic Diversity in Africa: Reading the Balance Sheet" 2012 363 *L'Europe en Formation* https://doi.org/10.3917/eufor.363.0265 265 281.

68 *Ibid*.

69 *Ibid*.

70 Fessha 2012 *L'Europe en Formation* 281–282.

important gesture. This should be immediately followed by several measures to calm the situation: release members of the Consortium; invite exiles to return to the country; halt legal proceedings against Anglophone clergy; open legal proceedings against security forces responsible for abuses; reshuffle the government and senior officials to increase the political representation of Anglophones; replace senior officials whose actions have exacerbated tensions; and restructure and reconstitute the Commission for Bilingualism and Multiculturalism. Finally, the President of the Republic should visit the Anglophone regions.[71]

The government could then go on to reconstitute the ad hoc interministerial committee, this time with parity for senior Anglophone officials, and broaden its remit beyond dealing with sectoral demands. This would require decriminalising the political debate, including on federalism, and considering recourse to a third party (Catholic Church or an international partner) for mediation.[72]

To deal with the current impasse, the government needs to reengage in a more comprehensive dialogue and be more receptive to the problems raised and proposals made. Recently, the government created a National Commission on Bilingualism and Multiculturalism, which is to report directly to the President on matters affecting bilingualism and multiculturalism in the country. This is a positive gesture. The government also announced reforms, creating a Common Law Bench at the Supreme Court and common-law departments in state universities in the French-speaking part of the country. These could improve the lot of Anglophone lawyers. However, the government could show further commitment by acknowledging that the Anglophone population as a whole – not just teachers and lawyers – has general challenges that need to be addressed. In addition, remedial measures requiring perpetual inviolability could be embedded in the Constitution.[73]

4 3 Unconditional release of prisoners and amnesty for Anglophone protesters

For the government to be more persuasive, it also has to be more receptive. The government should stop the use of force by military officers on the populace. This violence only serves to complicate matters, and time has shown that this method has not been effective in solving the crisis. If the calls of the people are legitimate, then ordinary civilians should not be arrested for exercising their constitutional rights. The UN Secretary-General's Acting Special Representative, François Loucény Fall, who visited the country on 13 April 2017, asked for the unconditional release of those jailed in connection to the crisis. Their continued detention greatly mars renewed calls for dialogue. Protesters should also be granted amnesty by

71 International Crisis Group *Cameroon's Anglophone Crisis* 25.
72 *Ibid*.
73 Caxton 2017 *Conflict Trends* 2.

the government so that they can continue to behave, feel, think and act like Cameroonians.[74]

4 4 Political and economic reforms

The government should make concessions with a view to improving the political and administrative representation of Anglophones. The government should also increase public and economic investment in the Anglophone zone and ensure that the majority of security forces and administrative and legal authorities deployed there are Anglophones. Finally, it should apply the measures it has announced, or that were decided with the Consortium, and take additional measures to strengthen the semi-autonomous character of Anglophone educational and legal systems.[75]

5 CONCLUSION

This article has sought to determine whether the conflict between Cameroon's two English-speaking areas was an ethnic or identity-based one. The method and repressive tools that the current government has used to crush the opposition have reduced the strength of the Anglophone struggle, and some could even say that it has hit a brick wall. Even though it is losing ground, the fight nonetheless goes on despite internal conflicts, most notably the one between the south-west and north-west (the two regions making up the Anglophone community).

Although the Anglophone diaspora has done much to raise international awareness, much still needs to be done to achieve federalism, not to speak of complete separation and independence. What Southern Cameroon needs are strong international alliances and guarantors to push this struggle into the ultimate defining phase. This is because the government is heavily supported by France. Therefore, the Anglophone community needs to come together and show solidarity to select a specific course of action and reallocate its resources to ensure success.

English speakers' rights in Cameroon must always be safeguarded as fundamental rights. Several laws have been implemented in Cameroon to safeguard minorities' rights. A number of human-rights documents have been ratified by Cameroon and many other nations. As a result, it is the State's responsibility to uphold all of the rights protected by these instruments, including those of minorities. Minority protection is a well-established notion in international law. As a result, international legal instruments, which include both binding and non-binding measures, protect minorities. As a signatory to these documents, Cameroon has acknowledged its threefold obligation to respect, safeguard and uphold human rights. That minorities' rights are given adequate legal protection in the country is a positive sign that Cameroon is committed to fulfilling its three obligations to assure the preservation of human rights. On the other side, the government's failure in this endeavour suggests that it is not fulfilling its

---

74 *Ibid.*

75 International Crisis Group *Cameroon's Anglophone Crisis* 25.

tripartite obligation. Owing to a lack of enforcement, the State's legislation protecting Anglophone rights in Cameroon is still ineffectual.

There are a number of political systemic gaps that need to be filled if Cameroon is to advance as a single country, as evidenced by the current crisis, which is another escalation in that sequence. To overcome this, more localised control of political and economic resources may be required. Existing institutions and leadership structures must be more receptive to the requirements of citizens. Overly-centralised power systems restrict access and a connection with the populace. On the other side, the military needs to do better when it comes to protecting human rights, as young people who have recently graduated from school are becoming radicalised. The narrowing of these disparities depends greatly on civil society.

Legality of Professional Mixed Martial Arts in South Africa

Gerald Andrew Ramsden
BA LLB LLM LLD
Practising Attorney, High Court of South Africa
Extraordinary Lecturer of the Department of Procedural Law, University of Pretoria
https://orcid.org/0009-0001-5961-0423

Rian Cloete
BLC LLB LLM LLD
Professor and Head of the Department of Procedural Law, University of Pretoria
https://orcid.org/0000-0002-2262-2017

SUMMARY

Senator John McCain may have been on point when he described mixed martial arts (MMA) as "human cock-fighting" in its formative years in the early 1990s in the United States of America (US). Those early MMA contests were no-holds-barred brutal affairs, fought between bloodied combatants of all shapes, sizes and combat styles, in a metal cage. Like bare-knuckle prize-fighting during the 18th and 19th centuries, this new form of combat sport closely resembled a glorified street fight. The sheer brutality of these spectacles ultimately led to the banning of MMA across the US. Realising that MMA's future depended on governmental sanction and regulation, its organisers actively sought out such sanction and regulation. Although MMA is now legal in all US states, its regulation in both the United Kingdom (UK) and South Africa has lagged behind, raising uncertainty about its legality in these jurisdictions. This uncertainty has been exacerbated by the absence of legislative intervention and judicial scrutiny regarding MMA in both the UK and South Africa. There is, furthermore, a dearth of academic literature addressing this legal lacuna. This study endeavours to bridge that gap by examining the legality of MMA in South Africa. In so doing, guidance is sought from the manner in which the English courts have approached boxing and other activities that entail consensual bodily harm, such as sadomasochism.

1 INTRODUCTION

Mixed martial arts (MMA), sometimes also referred to as cage fighting, can broadly be described as follows:

> "a form of combat that allows moves from a variety of blood sports, including boxing, kickboxing, wrestling, muay thai, and jujitsu – hence the name mixed

> martial arts. Fighters strike each other with punches, kicks, knees and elbows, and try to choke opponents and break, dislocate, or otherwise damage arms, legs and joints … [T]he winner is declared when a fighter is knocked unconscious or submits by 'tapping out', or the referee stops the contest or names a winner on points. Mixed martial arts are governed by rules, and acts such as eye gouging, biting, blows to the groin, and hair pulling are forbidden. However, the unrelenting nature of the striking makes MMA, in contrast with boxing, more closely resemble a street fight."[1]

No other sport in the modern day has attracted as much legal, political and public attention (albeit for the wrong reasons) than MMA when it first made its appearance in the United States of America (US) in the early 1990s.[2] So vociferous was the initial opposition to MMA that a prominent US politician, Senator John McCain, described it as "human cock-fighting" in his impassioned pleas to the various state legislatures in the US to ban MMA in their respective states. Although that campaign ultimately succeeded in getting MMA banned across the US, those bans were later lifted after the organisers of MMA undertook a concerted effort to change MMA's image from a no-holds-barred brawl to a properly regulated combat sport under state control.

Although MMA is now legal in all US states following legislative intervention, its legality in both the UK and South Africa remains uncertain in the absence of similar legislative intervention or judicial scrutiny. This legal uncertainty is not ideal since MMA's legality has important implications for its participants, both from a criminal-law and civil-law perspective.[3] It also raises the question whether there is a duty on the South African legislature in a constitutional democracy to intervene and regulate MMA as a practice that embodies the mutual infliction of consensual bodily harm, or whether MMA

---

1 Dixon "A Moral Critique of Mixed Martial Arts" 2015 *Public Affairs Quarterly* 365. In South Africa, MMA has become closely associated in the public mind with the Extreme Fighting Championship (EFC) and the Ultimate Fighting Championship (UFC), the dominant MMA promotions nationally and internationally respectively.

2 The initial controversy surrounding MMA was sparked by its sparse rules, the lack of weight divisions and the free style of fighting permitted, which resulted in a brutal and bloody spectacle closely resembling a street fight. The fact that these fights were contested in steel cages reminiscent of the structures used to control dangerous entities such as violent criminals or wild animals, further contributed to MMA's early reputation as a violent and barbaric sport. See Channon "'The Man in the Middle': Mixed Martial Arts Referees and the Production and Management of Socially Desirable Risk" 2022 *Qualitative Research in Sport, Exercise and Health* 744 747.

3 The legality of MMA in South Africa could be called into question in the following three possible scenarios: (i) a combatant and/or any other participant in an MMA bout (e.g., the promoter) might be criminally prosecuted for participating in the bout, which would call into question the legality of MMA in terms of South African criminal law; (ii) a combatant or his dependants (in the event of his death) might sue his opponent and/or other participants (e.g., the promoter) for compensation for the injuries or death suffered by him in an MMA bout, in which event the legality of MMA would be called into question in relation to possible defences such as *ex turpi causa non oritur actio* and/or *in pari delicto*; or (iii) the National Prosecuting Authority (NPA) or the Department of Sports, Arts and Culture (Department), for example, might wish to seek a declaration from the High Court as to the legality of MMA in terms of the South African criminal law. (These scenarios are modelled on the corresponding English-law scenarios referred to in Gunn and Ormerod "The Legality of Boxing" 1995 *Legal Studies* 181 185–186).

should instead be left to regulate itself on the basis of interactions between consenting adults.[4]

This article critically examines the legality of MMA in South Africa and in doing so, draws analogies with the legality of professional boxing[5] and other consensual-harm practices (such as sadomasochism)[6] in terms of prevailing laws and jurisprudence in South Africa and the UK.[7]

Although the legality of MMA has a potential bearing on both the criminal and civil liability of its participants, the latter aspect falls outside the scope of this article. The scope of this article is subject to the following further delimitations: a) this study focuses specifically on professional MMA; b) this study does not cover other forms of unarmed combat sport, save for professional boxing, but then only to the extent required for purposes of drawing analogies for use in this study; c) the bodily harm contemplated in this study is bodily harm suffered by a combatant during a specific MMA bout, and does not include bodily harm suffered from the long-term effects of MMA participation such as chronic traumatic encephalopathy (CTE), also known as punch-drunk syndrome, or adverse health effects caused by the transmission of communicable diseases, such as human immunodeficiency virus (HIV) during an MMA bout; and d) the role of *volenti non fit iniuria* in MMA is examined in the narrow context of whether the combatants in an MMA bout may legally consent to the infliction of bodily harm.[8]

---

4 Soni *The End of the Rope: The Criminal Law's Perspective Regarding Acts of Consensual Sexual Violence Between Adult Partners Within the South African, English and Canadian Legal Frameworks* (LLM dissertation, University of KwaZulu-Natal) 2018 abstract iv–v.

5 A comparative study of the corresponding legal position of professional boxing in South Africa provides little assistance to this study since professional boxing has been legalised by the South African legislature from a relatively early stage (viz. 1923), which has obviated the need for any academic or judicial scrutiny regarding its legality. In contrast, the legality of professional boxing has been the subject of much academic and judicial scrutiny in the UK, which provides a useful analogy for purposes of this study.

6 Although not a sport, sadomasochism nevertheless shares an important legal feature with MMA, namely that they both entail the infliction of consensual bodily harm. As strange as it may seem at first blush, sadomasochism therefore provides a useful analogy for purposes of this study.

7 The reasons for selecting the UK as the comparative jurisdiction for this study are primarily twofold: (i) first, South African law, particularly its common law, shares much in common with English law owing to South Africa's English heritage. English law accordingly provides a useful legal resource when addressing any *lacuna* found to exist in South African law, particularly from a criminal-law and delictual perspective; and (ii) secondly, although the legality of MMA in the UK itself remains uncertain, in that it has not yet not been judicially considered nor subjected to legislative intervention, the English courts have on several occasions considered the legality of boxing and other activities such as sadomasochism, which, like MMA, entail the infliction of consensual bodily harm. These English judicial precedents provide an invaluable legal resource from which analogies can be drawn for purposes of this study. Although MMA originated in the US, which currently remains the epicentre of MMA activity globally, MMA has been legalised in most US states pursuant to legislative intervention. The US therefore does not provide a suitable comparative basis for purposes of this study.

8 The study does not embark on a wider discourse into the general nature and effect of *volenti non fit iniuria* within sport generally, the details of which have already been well researched and documented in various earlier legal studies and publications. Notable among these legal publications are Cornelius "The Expendables: Do Sports People Really Assume the Risk of Injury? (Part one)" 2015 *Global Sports Law and Taxation Reports 8*; Cornelius "The Expendables: Do Sports People Really Assume the Risk of Injury? (Part

2 CONSENT TO BODILY HARM

It is generally accepted that society tolerates, to some extent, rough and potentially injurious contact sports because of the benefits that society and the participants derive from engaging in sport generally.[9] In this regard, the participants' consent is generally deemed effective and their conduct, which would otherwise constitute criminal behaviour, is condoned by society.[10]

There are, however, limits to society's willingness to tolerate such conduct and there is accordingly a point beyond which the participants' consent to bodily harm is disregarded and their conduct is regarded as unlawful. The relevant case law reveals the courts' difficulty in determining those limits based largely on public-policy considerations. In the determination of what may and may not be consented to by participants in competitive contact sports, value can be derived from the approach that the courts have taken in relation to other practices that entail consensual bodily harm, such as sadomasochism.[11]

An individual who knowingly and voluntarily consents to the infliction of bodily harm to themselves has taken the conscious decision that some other benefit, whatever it may be, is more important to them than their own physical well-being.[12] Thus, whenever the State, as the institutional embodiment of society, chooses not to recognise that individual's consent to the infliction of bodily harm to themselves, the State, through its laws (whether statutory laws or common law), is effectively restricting that individual's personal freedom.[13] While personal freedom is a fundamental right in a modern democracy, it is generally accepted that public-policy considerations may in certain circumstances require the State to adopt a paternalistic role[14] and impose an appropriate restriction on the personal freedom of its subjects, either generally or for specific classes.[15]

Generally, most forms of conduct that cause bodily harm to a person (other than *bona fide* medical procedures) are not considered beneficial, and thus the legal issue is at what point, in the absence of sufficient benefits, does the State's interest in preventing bodily harm outweigh the consenting party's personal freedom of choice, rendering their consent to the bodily harm ineffective and the perpetrator's associated conduct unlawful.[16]

---

two)" 2016 *Global Sports Law and Taxation Reports 6*; and Neethling and Potgieter *Law of Delict* (2020) 128–129.

9 Farrugia "Consent Defence: Sports Violence, Sadomasochism, and the Criminal Law" 1996 *Auckland UL Rev* 472.

10 Farrugia 1996 *Auckland UL Rev* 472.

11 *Ibid*.

12 Farrugia 1996 *Auckland UL Rev* 473.

13 *Ibid*.

14 In short, legal paternalism advocates using the criminal law to protect individuals from harming themselves. See Allen "Consent and Assault" 1994 *Journal of Criminal Law* 183; Kell "Social Disutility and the Law of Consent" 1994 *Oxford Journal of Legal Studies* 121 133; Gendall "The Sport of Boxing: Freedom Versus Social Constraint" 1997 *Waikato Law Review* 71 75–76.

15 Farrugia 1996 *Auckland UL Rev* 473.

16 Farrugia 1996 *Auckland UL Rev* 474.

Prior to examining the role of consent as a ground of justification for the infliction of bodily harm in South African criminal law, it is worth examining the comparative legal position in the UK, where consent to bodily harm has undergone extensive judicial scrutiny, particularly within the contexts of boxing and sadomasochism.

2 1 Consent to bodily harm in English criminal law

Since the 1890s, a tacit understanding appears to have developed between the English criminal-justice system and the boxing fraternity, the effect of which is that boxing has seldom *directly* attracted the attention of the criminal courts.[17] That understanding has been grounded in the notion that boxing with gloves, conducted in accordance with the Queensberry Rules,[18] is less dangerous and disorderly, and hence more socially acceptable than its predecessor –, bare-knuckle prize fighting.[19]

In the limited number of instances in which boxing has been *indirectly* considered by the English criminal courts during the Queensberry-Rules era,[20] *dicta* (albeit, *obiter dicta*) from those reported cases indicate that boxing has been granted a *sui generis* immunity from the ordinary English criminal law – primarily on account of its commendable transformation pursuant to the introduction of the Queensberry Rules, as well as the societal need to promote sport generally, and the consent given by the participating boxers.[21]

In the earliest of the aforementioned cases (*Coney*), the court's acceptance of the lawfulness of boxing in its transformed format (that is, in what it referred to as "boxing with gloves in the ordinary way")[22] was, however, explicitly qualified on the basis that the blows struck should "not [be] likely, nor intended to cause bodily harm".[23] It is submitted that this latter qualification renders the court's acceptance of the lawfulness of boxing of

---

17 Anderson "The Right to a Fair Fight: Sporting Lessons on Consensual Harm" 2014 *New Criminal Law Review* 55 56.

18 The codification of the rules of gloved boxing within the Queensberry Rules in 1867, signalled the start of the gradual phasing out of bare-knuckle prize fighting, which ultimately ended in the late 1890s. The Queensberry Rules thus, in effect, ushered in the modern era of professional boxing as we know it today. See Anderson 2014 *New Criminal Law Review* 56.

19 Anderson 2014 *New Criminal Law Review* 56.

20 The four pivotal cases in this regard (in chronological order) are: *R v Coney* [1882] 8 QBD 534 (*Coney*); *R v Donovan* [1934] 2 KB 498 (*Donovan*); *Attorney General's Reference (No 6 of 1980)* [1981] QB 715 (*AG Reference*); and *R v Brown* [1993] 2 WLR 556 (*Brown*). With regard to these cases, Brayne *et al* point out: "[F]rustratingly, none of these cases [save for *Coney*] actually concerned boxing, which means that the judges were making non-binding statements about the law, having heard no evidence or argument relating to boxing itself ... Yet these are the cases generally considered to prove that boxing cannot be a criminal offence." See Brayne, Sargeant and Brayne "Could Boxing Be Banned? A Legal and Epidemiological Perspective" 1998 *BMJ* 1813 1814.

21 Anderson 2014 *New Criminal Law Review* 56–57.

22 Although not explicitly stated, it can be assumed that the court was referring to boxing conducted in accordance with the Queensberry Rules, which, significantly, introduced the wearing of gloves.

23 *Coney supra* 539.

little relevance to modern-day competitive boxing (either in the professional or amateur format) since it is common cause that modern-day competitive boxing's "ultimate goal is to inflict a concussive head injury upon an opponent or at least cause sufficient damage to render an opponent incapable of further self-defence".[24] The nature of modern-day competitive boxing thus stands in stark contrast to the form of boxing that the court in *Coney* considered to be lawful owing to the participants' consent.[25] On the contrary, it is submitted that modern-day competitive boxing, particularly professional boxing,[26] falls squarely within the ambit of the aforementioned qualification imposed by the court in *Coney*, which is ironic since *Coney* continues to be recognised as authority in English law for the exemption of professional boxing from the ordinary criminal law.[27] This anomaly has accordingly prompted some legal commentators to refer to this exemption as a *sui generis* form of immunity that the English courts have granted to professional boxing.[28]

---

[24] Beran "The Law(s) of the Rings: Boxing and the Law" 2009 16 *Journal of Law and Medicine* 684. Gendall (1997 *Waikato Law Review* 77) describes this situation as follows: "Modern professional boxing and its participants are a world away from what has been described in the early cases as amicable demonstrations of the skill of sparring. The pressures from promoters, spectators, the media and others involved in boxing today are to see action, excitement and overwhelming knockouts."

[25] If one considers the manner in which the judges in the *Coney* case described the form of "gloved boxing" that they considered acceptable in order for consent to apply, it is submitted that what they were contemplating was not competitive professional boxing (or for that matter, even competitive amateur boxing), but boxing more akin to sparring or exhibition boxing as we know it today. In the separate judgments that they delivered in the *Coney* case, Hawkins J and Stephen J in fact go so far as to refer to it explicitly as "amicable spar[ring] with gloves" and "sparring with gloves", respectively. Cave J, in his separate judgment, refers to it as "boxing in the ordinary course", without defining what he means by the qualifying phrase, "in the ordinary course". In all these instances, it is submitted that the judges had in mind a form of boxing that was amicable, and that did not pose a risk of serious injury to the combatants.

[26] Although the risk of injury or even death exists in both amateur and professional boxing, the risk is higher in professional boxing because of its higher intensity and the greater number of rounds contested in a professional boxing bout. In amateur boxing bouts, referees also tend to stop bouts more quickly to prevent further bodily harm to a stricken boxer, than is the case in a professional boxing bout. See Ramsden *The Legal Liability of the Various Role Players in Professional Boxing for an Injury or Death Suffered by a Boxer During a Professional Boxing Bout Held in South Africa* (LLM dissertation, University of Pretoria) 2021 20.

[27] It is submitted that, at best, the *Coney* case can serve as authority for the lawfulness of amicable sparring (for example, between team mates in a boxing gym) or exhibition boxing undertaken for the sole purpose of displaying the boxers' respective boxing skills in a non-competitive context (for example, an exhibition boxing match between two boxing champions to raise funds for charity), provided that in both the aforesaid instances the boxing does not exceed the acceptable limits as cautioned by Hawkins J. in his following *dictum* in the *Coney* case: "if two men, pretending to engage in an amicable spar with gloves, really have for their object the intention to beat each other until one of them be exhausted and subdued by force, and so engage in a conflict likely to end in a breach of the peace, each is liable to be prosecuted for an assault".

[28] Anderson 2014 *New Criminal Law Review* 56–57, citing Foley "Boxing, the Common Law and Non-Fatal Offences Against the Person Act 1997" 2002 *Irish Crim LJ* 15 16. In this regard, Foley remarks as follows: "Despite [that the infliction of harm in boxing is always intentional], boxing has been considered legal in several English court decisions …, which appear to place boxing in a 'special position', without offering a reasoned understanding of its legality or otherwise within the framework of the law of assault."

Fifty-two years after *Coney*, the English Criminal Court of Appeal in *Donovan*, after considering the legal implications of consensual bodily harm in the English criminal law, concluded:

> "[A]s a general rule, although it is a rule to which there are *well-established exceptions*, it is unlawful to beat another person with such degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial."[29]

The court went on to state that the aforementioned "well-established exceptions" included so-called "manly diversions"[30] and "rough and undisciplined sport or play, where there is no anger and no intention to cause bodily harm."[31] Save for confirming that there were these so-called "well-established exceptions" to the general rule regarding consent to bodily harm and describing (in broad and generic terms) the two types of activity that would fall within those exceptions, it is submitted that *Donovan* never took the legal discussion regarding consent to bodily harm in the context of boxing any further than had earlier been discussed in *Coney*.[32]

A century after the *Coney* case, the English Court of Appeal in *AG Reference* was called upon to consider at what point public interest requires a court to deviate from the proposition that ordinarily an act consented to will not constitute an assault.[33] The court held that "it is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason".[34] In this regard, the court stated that "most fights will be unlawful regardless of consent", but emphasised that its statement in this regard was not intended to cast doubt upon "the accepted legality of *properly conducted games and sports*", which the court said was justified on the basis of public interest.

The aforementioned *dictum* in the *AG Reference* case is often referred to as authority for the acceptance by the English criminal courts that a sport such as competitive boxing, if "properly conducted", can, despite the fact that it promotes direct, intentional harm by and against both participants,[35] be

---

29 *Donovan* case *supra* 507.

30 *Donovan* case *supra* 508. The court described these as friendly contests (such as wrestling), in which bodily harm (despite being a possibility) was not the motive on either side and that the contests were intended "to give strength, skill and activity, and may fit people for defence, public as well as personal in time of need".

31 *Donovan* case *supra* 508.

32 Common to both types of activities that the court said would fall within the "well-established exceptions" to the general rule on consent to bodily harm, is the absence of motive or intent to cause bodily harm. It is submitted that modern-day competitive boxing (particularly professional boxing) would accordingly fall outside the ambit of those activities since its "ultimate goal is to inflict a concussive head injury upon an opponent or at least cause sufficient damage to render an opponent incapable of further self-defence". See Beran 2009 *Journal of Law and Medicine* 684.

33 *AG Reference* case *supra* 718.

34 *AG Reference* case *supra* 719.

35 "[T]here are certain sports, such as boxing, in which the use of violence is intentional and indeed constitutes the chief means of prosecuting the activity. To claim that when Mike Tyson throws a punch at his opponent, he is not intending to cause him harm is peculiar, to say the least" (Athanassoulis "The Role of Consent in Sado-Masochistic Practices" 2002 *Res Publica* 141 149).

lawful on the ground of public interest.[36] The court in *AG Reference* did not, however, explain why a sport such as competitive boxing would, if properly conducted, be in the public interest and accordingly not an assault.[37]

The *AG Reference* decision was followed 10 years later by the House of Lords decision in *Brown*, which is currently still the leading English-law precedent on the general application of consent to bodily harm in the English criminal law.[38] The appeal to the House of Lords (now the Supreme Court)[39] related to the following point of law of general public importance:

> "Where A wounds or assaults B occasioning him actual bodily harm in the course of a sado-masochistic encounter, does the prosecution have to prove lack of consent on the part of B before they can establish A's guilt under section 20 or section 47 of the Offences Against the Person Act 1861?"[40]

After considering the aforementioned point in law, the court in *Brown* concluded that

> "consent of the victim is no answer to anyone charged with the latter offence [i.e., assault occasioning actual bodily harm] or with a contravention of section 20 [i.e., assault occasioning grievous bodily harm] unless the circumstances fall within one of the well-known exceptions such as organised sporting contests and games."[41]

The parameters of this latter exception were, however, unfortunately left poorly defined by the court.[42]

Further judicial views on the legality of boxing in terms of the English criminal law have been expressed (albeit *obiter dicta*) in some more recent reported judgments. In this regard, the court in *R v Barnes*[43] identified public policy as the rationale for why boxing, despite the fact that its participants

---

36 Anderson 2014 *New Criminal Law Review* 66. It is submitted that the *AG Reference* case for the first time opened the judicial door for consent to be recognised as a defence in *competitive* boxing.

37 Anderson (2014 *New Criminal Law Review* 68) expresses the view that the public interest is based "largely on the health benefits of participation in sport". Gunn *et al* (1995 *Legal Studies* 198) on the other hand, after considering all the arguments for and against professional boxing being in the public interest, conclude that professional boxing is not in the public interest.

38 Austin "An Assessment of the Legality of Mixed Martial Arts in the United Kingdom" (undated) https://www.academia.edu/12323728/An_assessment_of_the_legality_of_Mixed_Martial_Arts_in_the_United_Kingdom? (accessed 2023-06-06) 1; James *Sports Law* (2017) 154.

39 In October 2009, the Supreme Court replaced the Appellate Committee of the House of Lords as the highest court in the UK. See UK Supreme Court "The Court and Legal System" (undated) https://www.supremecourt.uk/about-the-court.html (accessed 2022-09-17).

40 *Brown* case *supra* 559.

41 *Brown* case *supra* 573. While these particular exceptions to the general rule on the limitations of consent in the criminal law were referred to by the court as being the "well known exceptions", the court indicated that they were not the only exceptions and that other exceptions could be added if there was "good reason" to do so. However, after further deliberation, the court found no good reason for adding sadomasochistic acts to the list of exceptions.

42 Anderson 2014 *New Criminal Law Review* 67. This failure to adequately define same is akin to the court's failure in the *AG Reference* case to define what it dubbed "properly conducted games and sports".

43 [2005] 1 WLR 910 (*Barnes*).

intend to hurt each other, is "ordinarily considered a lawful sport, whereas [its predecessor] prize fighting is not".[44] The court did, not, however, elaborate on why it could be said that boxing was justified by public policy.

The question whether consent provides a defence to an assault causing bodily harm came up again for consideration in the UK in two more recent cases, both of which were cited with approval in the *Brown* case.[45] One of these cases was heard in the Court of Appeal of England and Wales, namely *R v BM*,[46] while the other was heard in the Irish Supreme Court, namely *The Director of Public Prosecutions v Brown*.[47] Both these cases make an important contribution to the jurisprudence regarding the role of consent in English criminal law generally, including its role in relation to boxing specifically.

Although the court in the *BM* case acknowledged that boxing was "undoubtedly lawful when *organised properly as a sport* (but not otherwise)", the court referred with approval to Lord Mustill's *dictum* in *Brown* in which he stated that it was an impossible task "trying to arrive at an intellectually satisfying account of the apparent immunity of professional boxing from criminal process".[48] In a dissenting judgment in *Irish Brown*, McKechnie J too grappled with the jurisprudential rationale for boxing's immunity from the criminal law, ultimately concluding as follows: "Perhaps Lord Mustill [in *Brown*][49] is right: he simply posits that boxing is by now so well-entrenched in our sporting and cultural psyche as to occupy an anomalous position in our law".[50]

Anderson says that it is a futile exercise to endeavour to rationalise the legality of boxing in the context of the exceptions to the general threshold of consent in assault, and states that boxing's status should instead be

---

44 *Barnes* case *supra* 914.

45 Donnellan "The Limits of the Defence of Consent: *R v Brown* and Its Continued Application" (31 July 2019) https://criminaljusticeinireland.wordpress.com/2019/07/31/the-limits-of-the-defence-of-consent-r-v-brown-and-its-continued-application/ (accessed 2023-01-22).

46 [2018] EWCA Crim 560 (*BM* case). The *BM* case related to so-called body modification, which in this instance entailed the removal of an ear and nipple and the splitting of the tongue of three customers of a tattoo and piercing parlour owned by the appellant. The customers had each consented to the relevant procedure, which in each instance was performed by the appellant without anaesthetic. While tattooing and piercing is permissible in the UK in terms of specific legislation, no similar legislation exists in respect of body modification. The appellant, who had been charged and convicted of three counts of wounding with intent to do grievous bodily harm, contrary to s 18 of the Offences Against the Persons Act 1861, unsuccessfully appealed to the Court of Appeal on the ground that consensual body modification should be exempted from the criminal law in the same way that surgical procedures and boxing were exempted from the criminal law.

47 [2018] IESC 67 (*Irish Brown*). The *Irish Brown* case related to an appeal by a prisoner who had been convicted of assaulting a fellow prisoner contrary to s 3 of the Non-Fatal Offences Against the Person Act 1997. The appellant claimed that he had been asked by the fellow prisoner to attack him so that he could be transferred to another prison. The appellant argued that s 3 assault (which is silent on the defence of consent) was predicated upon s 2 assault (which explicitly permits the defence of consent), and accordingly the defence of consent should also apply in respect of s 3 assault.

48 *BM* case *supra* par 38.

49 *Brown supra* 592.

50 *Irish Brown supra* par 83.

regarded as *sui generis.*[51] The majority judgment in the *Brown* case similarly side-stepped having to provide a properly reasoned legal basis for boxing's immunity from the criminal law by simply stating that "rightfully or wrongly the courts [have] accepted that boxing is a lawful activity".[52]

Although this study generally concurs with Anderson's aforementioned view that the legality of professional boxing in the UK today should be regarded as *sui generis*, it is submitted that an alternative argument could be advanced that the legality of professional boxing can be attributed to it falling within the category of exemption which the court in *AG Reference* dubbed "*properly conducted games and sports*"[53] or "*organised sporting contests and games*", as that category was dubbed by the court in *Brown*.[54] This alternative argument appears to find support in the Court of Appeal's recent *dictum* in the *BM* case that "boxing [is], undoubtedly lawful when *organised properly as a sport* (but not otherwise)".[55] Although the Court of Appeal in the *BM* case did not elaborate on what was required in order for professional boxing to meet the standard of being "organised properly as a sport", it is submitted that the well-established and organised manner in which the British Boxing Board of Control (BBBC) (the universally accepted governing body of professional boxing in the UK) currently regulates professional boxing in the UK, stands it in good stead to be adjudged as having met the aforesaid standard, particularly if one has regard to the thorough medical-safety measures that the BBBC currently enforces to control and contain injuries and death in professional boxing in the UK.[56] Although McKechnie J in the *Irish Brown* case[57] expressed the view that he did consider this particular line of reasoning compelling, he did so in an *obiter dictum* and therefore his view in this regard would not be binding on the Court of Appeal, if and when it is called upon to consider *directly* the legality of professional boxing.

As in the case of professional boxing, MMA in the UK is also not currently regulated in terms of legislation.[58] However, unlike professional boxing whose legality in the UK has been confirmed by the English courts (albeit in the form of *obiter dicta*), the legality of MMA in the UK has as yet neither been scrutinised nor confirmed by the English courts, and as such its legality

---

51 Anderson 2014 *New Criminal Law Review* 72–73.

52 *Brown supra* 561.

53 *AG Reference supra* 719; Anderson 2014 *New Criminal Law Review* 68.

54 *Brown supra* 573. While referring to fighting sports generally, James (*Sports Law* 156) contends that for a fighting sport to be considered a lawful activity it needs to be "well-organised" or "properly conducted".

55 *BM* case *supra* par 38.

56 The Law Commission "Consent and Offences against the Person" (LCCP No 134, 1994) https://www.lawcom.gov.uk/app/uploads/2016/08/No.134-Criminal-Law-Consent-and-Offences-Against-the-Person-A-Consultation-Paper.pdf (accessed 2022-09-18) 27–28.

57 *Irish Brown supra* par 83.

58 It is thus the judiciary who must determine the legality of individual actions within these sports, with no guidance from the legislature. See Nelson "When, Where and Why Does the State Intervene in Sport? A Contemporary Perspective" 2005 *Sports Law and Governance Journal* 1 4. Although MMA in the UK has been brought within the ambit of the Licensing Act 2003, which in essence regulates event safety and crowd behaviour, that does not have a direct bearing on MMA's legality *per se*, nor the manner in which it is regulated as a combat sport in the UK.

in the UK remains uncertain. On the contrary, MMA's legality in the UK may even be considered questionable, if one accepts the view (as this study does) that the immunity from criminal law extended to boxing in the UK by the English courts is *sui generis* and specific to boxing.[59] If that be the case, it is unlikely that MMA in the UK can justifiably claim *ipso facto* to be entitled to the same immunity from the criminal law as boxing, particularly since MMA is perceived (rightly or wrongly) to be more violent and potentially more harmful than boxing, and also does not have the benefit of "well-planted, social and historical roots" like those of boxing in the UK.[60]

What remains then for MMA to do in order to confirm its legality in the UK is to endeavour to bring itself within the parameters of the so-called well-established exemptions to the general rule on consent in the criminal law, particularly the category that has been dubbed "properly conducted games and sports" by the court in the *AG Reference* case[61] and as "organised sporting contests and games" by the court in *Brown*.[62] However, as matters currently stand with regard to the unregulated and uncoordinated manner in which MMA is currently being conducted in the UK, it is submitted that it is likely to be a challenging task for MMA to do so successfully. Although the English courts have not defined the criteria for a sporting activity to qualify for these exemption categories, it is submitted that what would be required, at the very least, is a properly constituted and universally accepted regulatory authority for the sporting code in question. It is further submitted that in the case of a sporting code that is inherently dangerous, with a high risk to its participants of serious bodily injury or even death, there also need

---

59 Anderson 2014 *New Criminal Law Review* 75. The uniqueness of boxing's aforesaid immunity also resonates in Lord Mustill's dictum in *Brown supra* 592, where he remarked that boxing's immunity from the ordinary criminal law needs to be regarded "as being another *special situation* which for the time being *stands outside the ordinary law of violence because society chooses to tolerate it*''. On that basis, there is no legal justification for *ipso facto* extending boxing's immunity from the criminal law to MMA as well, a view that is shared by Foley 2002 *Irish Crim LJ* 27, where he states that "they [being, what he refers to as 'Full Contact Karate, Ultimate Fighting etc'] cannot claim legality by analogy with boxing".

60 King "A Ban on Mixed Martial Arts Would Miss the Point. The Debate in the Aftermath of Joao Carvalho's Death Is Based on a False Premise" (2016) https://www.irishtimes.com/opinion/a-ban-on-mixed-martial-arts-would-miss-the-point-1.2611080 (accessed 2022-09-20).

61 Lord Lane (*AG Reference supra* 719) stated that "properly conducted games and sports" are exempt from the normal operation of the law of assault because it is accepted as being needed in the public interest to keep and encourage such activities. Although Lord Lane provides no further explanation in this regard, he also places no restrictions on the types of games and sports that could qualify for this exemption. See Austin https://www.academia.edu/12323728/An_assessment_of_the_legality_of_Mixed_Martial_Arts_in_the_United_Kingdom? 1. It is accordingly submitted that it is theoretically possible for MMA also to qualify for this exemption, provided it can demonstrate that it is factually "properly conducted" and therefore deserving of the same exemption from the criminal law currently afforded to professional boxing in the UK.

62 Similarly, in *Brown supra* 573, Lord Jauncey, while referring to the exemption category that he dubbed "organised sporting contests and games", did not provide any further explanation nor did he put any restrictions on the types of sporting games to which this exemption applies. It is accordingly submitted that it is therefore theoretically possible for MMA also to qualify for this exemption, provided it can demonstrate that it is factually an "organised" sport.

to be properly enforceable contest rules and medical-safety measures to effectively control and contain that risk.

2 2 Consent to bodily harm in South African criminal law

As mentioned at the outset of this study, the South African legislature to date has failed to declare MMA to be either lawful or unlawful, and nor have the courts pronounced upon its legality in terms of the common law. Thus, in order to determine the legality of MMA in South Africa, one needs to examine the general legal principles of South African criminal law, both from a constitutional and common-law perspective. In doing so, the approach of the English criminal courts to the role of consent in boxing and sadomasochism, both of which, like MMA, entail the infliction of consensual bodily harm, provides an invaluable analogy from a comparative-law perspective.

The enquiry regarding the legality of MMA in South Africa needs, at the outset, to be determined with reference to the principle of legality – also known as the *nullum crimen sine lege* principle, which literally translated means "no crime without a law".[63] In this regard, the enquiry needs to determine whether the conduct of the combatants in an MMA bout constitutes the type of conduct that is currently recognised by South African law (statutory or common law) as a crime. In doing so, it is evident that the general nature of the combatants' conduct during an MMA bout (that is, intentionally inflicting bodily harm on each other by means of punching, kicking, choking and similar) complies *ex facie* with the definitional elements[64] of various established common-law crimes, most notably assault and assault with the intent to do grievous bodily harm (assault GBH), and also the common-law crimes of culpable homicide and murder, in the event that a combatant's conduct causes their opponent's death as a consequence of bodily harm inflicted during an MMA bout.[65] Owing to the reciprocal nature of combatants' conduct in an MMA bout (that is, each of them being both a giver and receiver of physical aggression), if a prosecution were to be instituted for a charge of assault or assault GBH (or an attempt to commit

---

63 The principle of legality is central to the rule of law under the Constitution of the Republic of South Africa 1996 (*Constitution*). See *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2006 (2) SACR 319 (CC) (*Veldman*); *Masiya v Director of Public Prosecutions* 2007 (5) SA 30 (CC) (*Masiya*) 37; Hoctor *Snyman's Criminal Law* (2020) 31; Mnguni and Muller "The Principle of Legality in Constitutional Matters With Reference to *Masiya v Director of Public Prosecutions* 2007 (5) SA 30 (CC)" 2009 *Law, Democracy & Development* 112 113.

64 According to Hoctor (*Snyman's Criminal Law* 26), the "definitional elements" of a crime are "the concise description of the type of conduct proscribed by the law and the circumstances in which it must take place in order to constitute [that specific] crime". It, however, excludes the general requirements that apply to all crimes, most notably the requirements of unlawfulness and culpability (i.e., fault, either in the form of intent or negligence). So, for example, in respect of assault, its definitional elements comprise applying or threatening to apply force to the person of another. However, for such conduct to constitute assault, it must also be done intentionally and unlawfully.

65 In a criminal prosecution, these crimes would normally be cited in the charge sheet in the alternative, depending on the particular circumstances of the case.

those offences), both combatants involved in the MMA bout in question would need to be prosecuted.[66] Furthermore, the conduct of the other role players (for example, the promoter and officials) is likely to render them liable for ancillary crimes, such as incitement and conspiracy, or perhaps even criminally liable for the aforementioned principal crimes, either on the basis of being accomplices to those crimes or being co-perpetrators in terms of the doctrine of common purpose.[67]

Notwithstanding that the combatants' conduct in an MMA bout may comply with all the definitional elements of the aforementioned common-law crimes, their conduct will not attract criminal liability unless it is also found to be both *unlawful* and *culpable* in the circumstances.[68] In this regard, the defences of *consent* and *putative consent*[69] play a pivotal role since if either of these defences is successfully raised by an accused it will have the effect of negating the element of unlawfulness or culpability, as the case may be, and thereby exonerate the accused from liability in respect of those crimes.

The role of consent as a ground of justification in South African criminal law (as well as in the South African law of delict) is often broadly expressed in terms of the maxim *volenti non fit injuria,* which literally translated means that a willing person is not wronged (*volenti* maxim).[70] The requirements of the *volenti* maxim in South African criminal law are, in essence, the victim's full knowledge and appreciation of the harm, coupled with their voluntary consent thereto.[71] While these requirements are determined subjectively, there is, in addition, an important external requirement that invalidates the victim's consent if that to which they have consented is regarded as unreasonable in terms of the prevailing *boni mores*.[72] While the former requirements of the *volenti* defence are determined subjectively with

---

66 *Coney supra* 554.

67 Hoctor *Snyman's Criminal Law* 224–237.

68 Hoctor *Snyman's Criminal Law* 79.

69 Consent has a bearing on the element of unlawfulness, whereas putative consent has a bearing on the element of culpability. In this study, only the former defence will be considered in further detail.

70 There are two forms of consent to injury in South African law, namely (i) consent to injury; and (2) consent to the risk of injury (sometimes also referred to as voluntary assumption of risk). In the former instance, the victim consents to a specific and guaranteed bodily harm (for example, to being punched by his opponent in an MMA bout), while in the latter instance, the victim consents to the assumption of the risk that an injury may occur (for example, that his opponent's punch in an MMA bout may cause him brain trauma). In the former instance, any harm caused by the perpetrator that deviates from the specific injury consented to will not be covered by the victim's consent (*Burger v Administrateur, Kaap* 1990 (1) SA 483 (C)), while in the latter instance, if the injury is caused outside the general scope of the activity consented to (or in sports-law parlance, outside the accepted limits and rules of the game), the consent will cease to provide a defence to the perpetrator (*Roux v Hattingh* 2012 (6) SA 428 (SCA) par 41–42). The *volenti* maxim is used as a common concept to describe both the aforementioned forms of consent. See Neethling and Potgieter *Law of Delict* 129. In this study, the term *volenti* is used in the generic sense, unless the context indicates otherwise.

71 Parmanand "The Consenting Plaintiff and the Boni Mores: The Proper Perspective" 1986 *JS Afr L* 338 340.

72 Parmanand 1986 *JS Afr L* 340; Burchell *Principles of Criminal Law* (2013) 207; Hoctor *Snyman's Criminal Law* 104.

reference to the particular victim's state of mind at the relevant point in time, the *boni mores* requirement is determined objectively, *ex post facto*.[73]

The debate regarding the validity of a victim's consent to a crime that infringes their bodily integrity (the so-called "consensual bodily harm" scenario) is ultimately a jurisprudential debate concerning, on the one hand, the philosophy of individualism (also referred to as individual human autonomy),[74] with which the *volenti* maxim has come to be associated, and on the other hand, the role of the aforementioned *boni mores* in limiting the individual's freedom of choice with regard to what bodily harm they may and may not consent to.[75]

The *boni mores* criterion in South African law, both from a criminal-law and delict perspective, has been described variously by the judiciary and legal commentators using different descriptors, as pointed out by Parmanand in the extract below:

> "The *boni mores* has been described as 'the prevailing conceptions in a particular community at a given time, or the legal convictions of the community.'[76] It is also true that the *boni mores* often purports to be an extension of that which is considered proper by right thinking members of the community.[77] The criterion itself has been regarded as one touching upon reasonableness,[78] the legal convictions of the community[79] or public policy."[80]

---

[73] For purposes of this study, only the *boni mores* requirement of the *volenti* defence will be examined in further detail since, unlike in the case of the other requirements of the *volenti* defence (which are all subjectively determined), the *boni mores* requirement is determined objectively and, as such, the outcome of that enquiry will therefore apply generally to all MMA bouts in South Africa. Furthermore, if the conduct of the combatants *inter se* is considered unlawful in terms of the *boni mores*, it then follows by necessary implication that MMA *per se* will be an unlawful activity in terms of South African criminal law.

[74] Arnold "Vagueness, Autonomy and R v Brown" 2015 *University of South Australia Law Review* 103.

[75] Parmanand 1986 *JS Afr L* 338. Hoctor (*Snyman's Criminal Law* 104) describes the role of the *boni mores* in relation to consent in crimes such as assault, as follows: "As far as this … group of crimes is concerned, it should be borne in mind that, unlike the law of delict, which in principle protects individual rights or interests, criminal law protects the public interest too; the state or community has an interest in the prosecution and punishment of all crimes, even those committed against an individual. The result is that, as far as criminal law is concerned, an individual's consent to impairment of her interests is not always recognised by the law … *It is difficult to pinpoint the dividing line between harm to which one may and harm to which one may not consent. The criterion to be applied in this respect is the general criterion of unlawfulness, namely the community's perceptions of justice or public policy."* Hoctor (at 103) points out, however, that there is a category of crimes in respect of which consent by the injured party is never recognised as a defence, such as murder.

[76] Parmanand 1986 *JS Afr L* 342, citing Van der Walt *Delict: Principles and Cases* (1979) 22; Van Wyk *Die Boni Mores as Toetssteen vir Toelaatbaarheid in die Bewysreg (doctoral thesis, University of the Free State)* 1983 1–40.

[77] Parmanand 1986 *JS Afr L* 342.

[78] *Ibid*, citing *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) 111–112. The *boni mores* was also described in these terms in *Clark v Hurst* 1992 (4) SA 630 (D) 787.

[79] Parmanand 1986 *JS Afr L* 342, citing *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597. It was also described in these terms in *Clark v Hurst supra* 787 and in *S v Fourie* 2001 (2) SACR 674 (C).

[80] Parmanand 1986 *JS Afr L* 342, citing *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 (3) SA 394 (A) 402–403.

Snyman is of the view that most descriptions used in relation to the determination of unlawfulness, including *inter alia* descriptors like "the *boni mores*", "the community's perception of justice" and "the legal convictions of society" are reconcilable and therefore "whether one speaks of the one or the other is a matter of a choice of words rather than the description of conflicting viewpoints".[81] Snyman submits that "the most acceptable viewpoint is the one according to which unlawfulness consists in conduct which is contrary to the community's perception of justice or with the legal convictions of society".[82] For the purposes of this study, the *boni mores* and legal convictions of society are used interchangeably as descriptors in the determination of unlawfulness.

When applying the *boni mores* test to the *volenti* defence in order to determine the lawfulness of combatants' conduct in an MMA bout from a criminal-law perspective, there is no existing South African judicial precedent that relates directly (or indirectly) to MMA, or for that matter to any other combat sports, that can be used for this purpose. It is accordingly necessary to draw analogies with: a) how South African criminal courts have applied the *boni mores* test in relation to the *volenti* defence in respect of other types of conduct involving consensual bodily harm;[83] and b) how the English courts[84] have applied the defence of consent in criminal matters relating to boxing and other activities that involve consensual bodily harm, such as sadomasochism.[85]

3 ANALOGIES WITH OTHER FORMS OF CONSENSUAL BODILY HARM IN SOUTH AFRICA

In *Sikunyana*,[86] the appellants, described as herbalists or witch doctors, were charged with assault GBH for burning the complainant on the head and body with hot coals in a ritual to remove an apparent evil spirit from her body. The appellants contended that the complainant's consent to their conduct negated any criminal liability that might otherwise have attached to

81 Hoctor *Snyman's Criminal Law* 81.

82 *Ibid*. In this regard, Snyman cites *inter alia Clark v Hurst supra* 652–653.

83 Since consent in the context of legitimate medical treatment and procedures has developed its own unique body of jurisprudence, for purposes of this study comparative analogies will rather be sought in case law and legal commentaries that relate to other forms of conduct that involve consensual bodily harm, to the extent that these exist.

84 In this regard, the UK is preferable as a comparative basis to the US since UK laws applicable to combat sports are rooted primarily in the English common law, which bears a close similarity to the common law applicable to MMA in South Africa. Unlike professional boxing in South Africa, there is no statutory law governing MMA in South Africa, hence the application of South African common law to legal issues pertaining to MMA.

85 As to whether reliance can be placed on the *Coney* case and other English-law cases discussed earlier in this chapter, the answer is found in the following *dictum* in *S v Collett* 1978 (3) SA 206 (RA) (*Collett*) 627: "Our law relating to assault is based on the English law, and to quote the words of Kotze JA in *R v Jolly* and Others 1923 AD 176 at 184: 'We can, therefore, have no hesitation in following the principles of English jurisprudence in regard to the question of assault.'" It is submitted that this principle will also apply in respect of the other common-law crimes in question, namely assault GBH, culpable homicide and murder.

86 *S v Sikunyana* 1961 4 All SA 59 (E) (*Sikunyana*).

it. The court rejected the complainant's consent as a ground of justification for the appellants' harmful conduct, for the reason *inter alia* that "[a] highly dangerous practice superstitiously designed to secure the exorcism of an evil spirit cannot be rendered lawful by the consent of the afflicted person".[87] In this finding, the court appears to have rejected *volenti* as a ground of justification for two main reasons, namely: a) the highly dangerous nature of the practice causing the bodily harm in question; and b) the superstitious nature of the relevant practice, which rendered its purpose questionable.[88]

In the course of its judgment, the court in *Sikunyana* cited with approval the following passage from Gardiner and Lansdown,[89] which explains when the consent of the victim of an assault can be raised as a valid defence by the perpetrator in a criminal trial:

> "The maxim *volenti non fit injuria* has, however, limited application in criminal law, and it may be said generally that, apart from medical operations, from those sexual affairs in which consent prevents any incidence of criminal liability, and from those *bodily contests which, by reason of the absence of any likelihood of anything more than mere trifling injury resulting, and of the absence from the minds of the contestants of any intention to cause harm, are not inimical to the interests of society,* no person can be excused on a charge of assault where actual injury is done, merely upon proof that the victim consented to the infliction of the injury."[90]

It is submitted that the "bodily contests" referred to by the court in the aforesaid passage, will, based on the manner in which they have been described therein, cover, for example, what the court in the *Coney* case referred to as "sparring with gloves" (that is, a friendly encounter intended to test the combatants' respective boxing skills rather than cause harm), but would not, on the other hand, cover competitive combat sports such as professional boxing and MMA, in which the combatants intend to cause each other bodily harm – a far cry from the "mere trifling injury" contemplated by the court in *Sikunyana*. Furthermore, although the purpose of competitive professional boxing and MMA (namely, to provide a livelihood for the combatants) is far less questionable than the purpose of the particular conduct that was before the court in *Sikunyana*, it is nevertheless also a "highly dangerous practice", which can cause serious bodily harm or even death to combatants and could thus face similar rebuke from a court. It is submitted, however, that such a rebuke may be averted if the court were persuaded that the medical-safety measures in place during a properly regulated MMA bout were sufficient to control and contain the risk of serious bodily harm arising in an MMA bout. This aspect is considered in further detail later in this study in relation to the need for MMA to be properly regulated in South Africa.

In the *Collett* case, a case in which the court held that the infliction of corporal punishment by a master on his servant, notwithstanding the

---

87 *Sikunyana supra* 63.

88 To use the corresponding terminology of the English courts in decisions such as *Brown* (*supra* 578), it could be said that the harm was inflicted "without good reason". In this regard, Lord Lowry in *Brown* (*supra* 578) stated: "for one person to inflict any injury on another *without good reason* is an evil in itself (*malum in se*) and contrary to public policy."

89 Gardiner and Lansdown *South African Criminal Law and Procedure* 6ed Vol II (1957) 1577.

90 *Sikunyana supra* 61.

servant's consent, was clearly contrary to public policy and *bonos mores*.[91] The court held in an *obiter dictum* that harm caused in so-called "lawful sporting contests" was an exception to the rule that consent is no defence to an assault that is likely or intended to cause bodily harm. Although the court did not define what was meant by "lawful sporting contests", the court was seemingly referring to the types of conduct that *Donovan*[92] (an earlier English case to which the court in *Collett* referred with approval) had held were well-established exceptions to the aforesaid general rule, namely: a) activities referred to as "manly diversions" that were intended to give strength, skill and activity, and fit people for public or personal defence, which although "capable of causing bodily harm … that bodily harm is *not* the motive on either side"; and b) "rough and undisciplined sport or play, where there is *no* anger and *no* intention to cause bodily harm".

It is submitted that MMA is unlikely to qualify for the so-called "lawful sporting contests" exception referred to by the court in *Collett*, owing to the fact that it is the intention of the combatants in an MMA bout to cause bodily harm to each other. For the same reason, it is submitted that MMA is also unlikely to qualify for the so-called "bodily contests" exemption referred to by the court in the *Sikunyana* case*,* particularly since the injuries normally associated with an MMA bout are by no means merely "trifling" injuries, as alluded to by the court. Thus, if MMA is to be exempt from the general rule that an act likely or intended to cause bodily harm is an unlawful act, the exemption will need to be sought on the basis of the general public-policy test, which both *Collett* and *Sikunyana* confirmed was the primary test to be used for that purpose. In the application of this latter test, *Sikunyana* makes it clear that there needs to be "good reason" for the harmful conduct in question, particularly where such conduct is highly dangerous. Whether the fact that MMA is undertaken for the purpose of earning a livelihood will suffice as "good reason" for the harm caused in an MMA bout remains to be judicially tested.

Save for *Sikunyana* and *Collett*, there is a dearth of other judicial precedents in South Africa to provide guidance on the types of conduct that the *boni mores* consider lawful if consented to, and those that are not considered lawful, even if consented to. One accordingly needs to seek further guidance (by way of analogy) from the English-law precedents pertaining to consensual bodily harm, as discussed earlier in this study.

4 ANALOGIES WITH THE UK'S JUDICIAL APPROACH TO CONSENSUAL BODILY HARM

When applying the *boni mores* test in relation to the *volenti* enquiry in a criminal matter involving combatants in an MMA bout, our courts are permitted to take cognisance of the approach that the English courts have taken in similar situations involving consensual bodily harm.[93]

---

91 *Collett supra* 628.

92 *Donovan supra* 508–509.

93 The relevant English cases are discussed earlier in this study.

If, however, one accepts the view (as this study does) that the immunity from the criminal law extended by the judiciary to boxing in the UK is specific to boxing or even *sui generis,* then the relevant English case law pertaining to the role of consent in boxing should be approached with caution when seeking to draw analogies for the current enquiry in respect of the legality of MMA in South Africa.

As pointed out, the exemptions granted by the English courts to so-called "manly diversions" and other similar "rough and undisciplined sport or play",[94] also have little or no relevance to the conduct of combatants in an MMA bout since those exemptions are premised on there being no motive or intent on the part of participants to cause each other bodily harm, which is clearly not the case in an MMA bout.

It is accordingly proposed that if and when a South African court is called upon to apply the *boni mores* test to determine the lawfulness of combatants' conduct in an MMA bout, the court should do so in the context of what the English courts have referred to as "properly conducted games and sports"[95] or "organised sporting contests and games".[96] Since the English courts have not explicitly distinguished the one from the other and nor are there apparent reasons for doing so, it is submitted that these two exemption categories are, for all intents and purposes, synonymous. In the ensuing discussion, only the former exemption category (namely, "properly conducted games and sports") will be referred to for purposes of expediency.

If the South African courts were to adopt the aforementioned approach to the *boni mores* enquiry, they would in effect be developing the common law (as they are empowered to do in terms of the Constitution)[97] by providing a judicial guideline to distinguish between those sports that public policy regards as socially acceptable and those sports that it does not.[98]

Although the English courts have provided no judicial guidelines or criteria for determining what constitutes "properly conducted games and sports", save for indicating that their exemption from the criminal law is based on public policy,[99] it is submitted that what is required, at the very least, is for these sports to have a properly constituted and universally accepted regulatory body, coupled with enforceable contest rules and medical-safety measures so as properly to control and contain the risk of injury and death inherent in the sport, particularly in combat sports such as MMA that have a relatively high risk of serious bodily injury or even death. As the concept of "properly conducted games and sports" evolves through South African case

---

94 *Donovan supra* 508–509.

95 See *AG Reference supra* 719.

96 See *Brown supra* 573.

97 S 173 of the Constitution provides: "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, *and to develop the common law*, taking into account the interests of justice." (emphasis added).

98 Although the Supreme Court of Appeal in *Roux v Hattingh supra* par 42 held that "public policy regards the game of rugby as socially acceptable", it unfortunately did not explain on what factual or legal basis it had arrived at that conclusion.

99 *Barnes supra* 913–914.

law over time, these guidelines or criteria can be further developed and refined by the courts into an acceptable set of guidelines or criteria that align with the prevailing *boni mores* in South Africa.

If the common law is developed by our courts along the lines proposed above, it is submitted that the Supreme Court of Appeal's *dictum* below, pertaining to rugby, could in due course also apply to MMA if it were to become properly conducted in terms of its organisational structure, contest rules and safety measures:

> "Since public policy regards the game of rugby as socially acceptable, *despite* the likelihood of serious injury inherent in the very nature of the game, it seems to me that conduct causing even serious injury cannot be regarded as wrongful if it falls within the rules of the game."[100]

However, as matters currently stand with regard to MMA – being a self-regulated sport in South Africa, without legally enforceable contest rules or medical-safety measures[101] – it is submitted that it will be difficult to argue that MMA is currently a "properly conducted sport" that "public policy accepts as socially acceptable", as it does in respect of rugby. It is submitted that these shortcomings could be overcome if MMA were instead to become state-regulated in terms of its own bespoke legislation, akin to what currently exists in respect of professional boxing in South Africa. A regulatory system of that nature would, as in the case of professional boxing, provide for legally enforceable contest rules and for medical-safety measures that properly control and contain the risk of injury and death in MMA bouts. A statutory body of that nature would also be subject to ultimate oversight from both the Minister of Sports, Arts and Culture and the parliamentary sub-committee on sports, arts and culture, and its financial affairs would also be subject to scrutiny pursuant to the provisions of the Public Finance Management Act.[102] In other words, MMA and the administration thereof would come under direct public scrutiny, both in terms of its regulation and accountability, as is currently the case with professional boxing in South Africa. It is submitted that these proposed changes would place MMA in good stead to be regarded by the South African judiciary as a "properly conducted sport" that "public policy accepts as socially acceptable" (akin to how the court viewed rugby in *Roux*), notwithstanding the likelihood of serious bodily injury or even death arising in an MMA contest.

---

100 *Roux v Hattingh supra* par 42. Although the Supreme Court of Appeal did not explain on what basis it can be said that "[P]ublic policy regards the game of rugby as socially acceptable", it is submitted that if the court had applied the proposed test of "properly conducted sporting contests and games" to rugby, then rugby's social acceptance could have been justified on the basis of its well-organised regulatory system, contest rules and medical-safety measures.

101 The disadvantages of self-regulation are that adherence to contest rules and safety measures is largely voluntary and the regulatory landscape is also open to potentially competing regulatory bodies, each with their own contest rules, safety measures and general standards. Transparency and accountability are also not as rigorous in self-regulation as they are in regulation by the State.

102 1 of 1999.

Furthermore, in a society in which violence is prevalent in so many facets and forms on a daily basis,[103] it is submitted that the prevailing *boni mores* in South Africa are unlikely to be offended by the violent nature of MMA as a combat sport, particularly since it is perceived to take place in a regulated environment (albeit currently a self-regulated environment) with medical-safety measures in place and also provides a much-needed source of income for combatants in an economy that is plagued by high levels of unemployment. The fact that local MMA tournaments are transparently conducted at reputable public establishments, and are usually televised by a mainstream television network, lends further credibility to the public image of MMA, thereby increasing the likelihood of its being regarded as socially acceptable the prevailing South African *boni mores.* Unlike in the case of MMA in its formative years in the US, MMA in South Africa has received no political, public or media criticism to date.

In addition, many of South Africa's well-entrenched cultural practices involve various forms of violence and bodily harm, and continue to be widely practised, with apparent social acceptance, notwithstanding that the introduction of the Bill of Rights has rendered many of these cultural practices *prima facie* unconstitutional. In this regard, one need look no further than traditional cultural practices such as ritual male circumcision and stick fighting, which are closely entwined with manhood and the display of masculinity, and which, despite the associated risks of serious bodily harm (or even death) are still common practices in modern-day South African society, particularly in the rural areas.

Even within the formal sporting sector, South African society is accepting of professional boxing[104] and other full contact sports such as rugby[105] that entail significant levels of physical contact, often culminating in serious bodily injury or even death in the case of professional boxing. In rugby, concussions have become a common occurrence, so too the sight of bloodied players being patched up on the field by medical attendants or being sent to the so-called "blood bin". South African rugby commentators are often heard lauding the Springboks' physical domination of their opponents during international rugby matches.[106]

---

[103] The current high level of crime in South Africa has prompted certain commentators to refer to South Africa as having "a 'culture of violence' – a society which endorses and accepts violence as an acceptable and legitimate means to resolve problems and achieve goals" (Hamber "Have No Doubt It Is Fear in the Land. An Exploration of the Continuing Cycles of Violence in South Africa" 2000 *Southern African Journal of Child and Adolescent Mental Health* 5 10, citing Vogelman and Simpson "Current Violence in South Africa"1990 *Sunday Star Review* 17).

[104] This is evident from the fact that it has been legalised by the South African legislature since 1923, with the advent of the 1923 Boxing Act. It is also a highly popular sport in South Africa.

[105] That public policy in South Africa regards the game of rugby as socially acceptable despite the likelihood of serious injury occurring during a game of rugby is well illustrated in the following *dictum* of the Supreme Court of Appeal in *Roux v Hattingh supra* par 42: "Since public policy regards the game of rugby as socially acceptable, *despite the likelihood of serious injury inherent in the very nature of the game*, it seems to me that conduct causing even serious injury cannot be regarded as wrongful if it falls within the rules of the game."

[106] Rugby is a popular South African sport, the national team of which is known as the Springboks.

For these reasons, it is submitted that the *boni mores* requirement of the *volenti* defence is unlikely to pose an insurmountable obstacle to *volenti* serving as a ground of justification for the conduct of combatants in an MMA bout if they were to be prosecuted for criminal offences such as assault or assault GBH – provided that their conduct and any ensuing bodily harm falls within the broad parameters set by the Supreme Court of Appeal in *Roux* for the *volenti* defence to apply within a sporting context.[107]

However, even if a court were to find that the *boni mores* do not condone the combatants' conduct in an MMA bout, thereby rendering their conduct unlawful for purposes of common-law crimes such as assault and assault GBH, it may nevertheless be open to the combatants either to raise the defence of putative consent as possible vitiation of the element of *mens rea* in respect of those crimes, or to challenge the constitutionality of those offences insofar as they pertain to MMA *per se*, on the grounds that they infringe the combatants' constitutional rights to *inter alia* dignity and economic freedom.

5 CONCLUSION

Thus, while the conduct of the combatants in an MMA bout complies *prima facie* with all the definitional elements of the relevant common-law crimes, their conduct may nevertheless be condoned, either on the basis of *volenti* or putative consent, or failing these, on the grounds that those common-law offences are unconstitutional in relation to the combatants in that they infringe their constitutional rights to *inter alia* dignity and economic freedom. Any of the aforementioned grounds would ultimately have the effect of decriminalising combatants' conduct in an MMA bout, which in turn would effectively legalise MMA as a sporting and economic activity in South Africa.

However, until a South African court finally rules on these legal issues, or the legislature clarifies MMA's legal position, the legality of MMA in South Africa remains uncertain and its participants accordingly remain at risk of being prosecuted for a range of criminal-law offences.

[107] The parameters of *volenti* set by *Roux* exclude bodily harm caused by conduct that constitutes a "flagrant contravention of the rules" (*Roux v Hattingh supra* par 41–42).

The Justiciability of Cabinet Appointments in South Africa*

Molefhi S Phorego
LLB LLM LLD
Postdoctoral Fellow, Faculty of Law, Public Law Department, Nelson Mandela University, Port Elizabeth, South Africa
https://orcid.org/0000-0002-7661-1911

Hendrik J van As
BIuris LLB LLD NDip (Pol)
Professor, Nelson Mandela University, Port Elizabeth, South Africa
https://orcid.org/0000-0002-5288-5344

SUMMARY

For most democracies, Cabinet appointments form part of a plethora of powers that are entrusted to the President alone. Courts are naturally cautious about interrogating the exercise of the power. In South Africa, courts confine themselves to the narrower legal question of how the power was exercised, not whether the President's decision was correct or incorrect. This is because the courts are wary of second-guessing the decisions of other branches of government, lest they fall foul of the doctrine of separation of powers. This article probes the President's power to appoint Cabinet members, and whether a court may set aside any unlawful exercise of the power without encroaching on the separation of powers. Owing to inadequate political oversight mechanisms over Cabinet appointments, the President's power is too broad and should be curtailed to enhance accountability for the exercise of the power. To this extent, the President's appointment of Cabinet members should be subject to parliamentary confirmation.

Keywords: Cabinet Appointments, Discretionary Powers, Justiciability, Separation of Powers

* This article is based on research undertaken by MS Phorego for his LLD thesis *Presidential Accountability for Cabinet Appointments in South Africa* (Nelson Mandela University) 2021, supervised by Professor HJ van As. Both authors contributed to the drafting of this article, which summarises part of the findings of the research.

1 INTRODUCTION

In South Africa, the President is the Head of State and head of the national executive.[1] As head of the national executive authority, he acts together with other members of the Cabinet,[2] which consists of the President, the Deputy President and Ministers.[3] The President appoints Cabinet members, assigns their powers, and may dismiss them.[4] He makes any appointment that the Constitution or legislation requires, other than as head of the national executive.[5] As a sovereign and democratic country, South Africa is founded on, *inter alia*, the principles of supremacy of the Constitution and the rule of law.[6] This means that law or conduct inconsistent with the Constitution is invalid, and the obligations imposed by it must be fulfilled.[7] While there are no express oversight mechanisms over the appointment of Cabinet members, the exercise of the power must be consistent with the precepts of the Constitution. The appointment of Cabinet members is part of a plethora of powers bestowed on the President as Head of State in section 84(2), read together with the applicable constitutional provisions.[8] Most of the powers conferred upon the President by the Constitution are discretionary and political in nature.[9] As Head of State, the President has more discretion than in his role as head of the national executive authority.[10] As head of the national executive, the President's discretion is limited by the constitutional obligation to consult other arms of the State such as Parliament. He exercises the executive authority together with the other members of the Cabinet.[11] The sweeping nature of the President's appointment powers has had several serious ramifications for South Africa, ranging from economic loss, opening the gates to perceptions of state capture, and threats to the doctrine of the separation of powers.

The President's decision to reshuffle the Cabinet in 2021 and appoint then-Speaker of the National Assembly Thandi Modise as the Minister of Defence illustrates the sweeping nature of his appointive powers as Head of

1 S 83(*a*) of the Constitution of the Republic of South Africa, 1996 (the Constitution).

2 S 85(2) of the Constitution.

3 S 91(1) of the Constitution.

4 S 91(2) of the Constitution.

5 S 84(2)(*e*) of the Constitution.

6 S 1(*c*) of the Constitution.

7 S 2 of the Constitution.

8 Slade "The Implications of the Public Protector's Remedial Action Directing the Exercise of Discretionary Constitutional Powers: Separation of Powers Implications" 2020 24 *Law Democracy and Development* 364 367.

9 De Vos "Why It Is Unlikely the Court Will Review and Set Aside the Cabinet Reshuffle" (5 May 2017) https://constitutionallyspeaking.co.za/why-it-is-unlikely-the-court-will-review-and-set-aside-the-cabinet-reshuffle/ (accessed 2022-06-20). See also Mufamadi "Constitutional Handbook for Members of the Executive" (July 1999) https://www.ndi.org/sites/default/files/1614_za_constPDF_5.pdf (accessed 2022-06-20).

10 International Institute for Democracy and Electoral Assistance (IDEA) "Non-Executive Presidencies in Parliamentary Democracies" (August 2014) https://constitutionnet.org/sites/default/files/non-executive_presidencies_0.pdf (accessed 2022-06-20).

11 S 85(2) of the Constitution. This the President does by implementing national legislation, developing and implementing national policy, co-ordinating the functions of state departments and administrations, preparing and initiating legislation and performing any other executive function provided for in the Constitution or in national legislation.

State.[12] While there is no law that prevents him from making such an appointment, it raises questions on whether the appointment does not impinge upon the separation-of-powers doctrine. It is undesirable that the President's powers be so broad that they allow him effectively to remove the head of Parliament without input from the legislative arm of government.

Similarly, the outcry against the December 2024 Cabinet reshuffle to move former Justice and Constitutional Development Minister Thembi Nkadimeng to the Department of Human Settlements is another useful illustration of the need to adequately oversee the power to assemble members of the national executive authority.[13] This is notwithstanding allegations that she received a R500 000 loan from Gundo Wealth Solutions, an entity said to have facilitated unlawful investments by the Polokwane municipality in the now defunct VBS Mutual Bank.[14] Without input from Parliament to test the veracity of the allegations, this leaves lingering doubt on the lawfulness of the appointment. In a reply to the National Assembly in September 2024, the Minister noted that she had repaid the loan to the lender.[15]

This article examines the President's power to appoint Cabinet members and the extent to which he may be held accountable in the process while preserving the essence of the separation-of-powers doctrine. A historical overview of the justiciability of executive powers is conducted in the first section, followed by an analysis of the controversies over separation of powers that have arisen from the exercise of judicial authority *vis-à-vis* executive powers over the years. The justiciability of the appointment of Cabinet members is discussed in the section that follows. Lastly, the article answers the question whether a court of law may interrogate the appointment of a Cabinet member, and whether such an order does not impinge upon the separation-of-powers doctrine. The central thesis of the article is that the President's power to appoint Cabinet members is too broad and should be curtailed to improve presidential accountability for the process and to protect the supremacy of the Constitution and the rule of law.

---

12 Merten "Speaker Modise's Surprise Move Is Good for Department of Defence, But a Blow for Parliament" (6 August 2021) https://www.dailymaverick.co.za/article/2021-08-06-speaker-modises-surprise-move-is-good-for-department-of-defence-but-a-blow-for-parliament/ (accessed 2022-05-18). See further Marais "Minister Modise Has Her Work Cut Out for Her to Restore Dysfunctional SANDF" (6 August 2021) https://www.da.org.za/2021/08/minister-modise-has-her-work-cut-out-for-her-to-restore-dysfunctional-sandf (accessed 2022-05-18).

13 TimesLive "Under-Fire Justice Minister Simelane Moved to Human Settlements as Ramaphosa Reshuffles Cabinet" https://www.timeslive.co.za/politics/2024-12-03-under-fire-justice-minister-simelane-moved-to-human-settlements-as-ramaphosa-reshuffles-cabinet/ (accessed 2024-12-05).

14 Politicsweb "Thembi Simelane New Minister of Human Settlements-Cyril Ramaphosa" (04 December 2024) https://www.politicsweb.co.za/documents/thembi-simelane-new-minister-of-human-settlements- (accessed 2024-12-04).

15 Daily Maverick "Thembi Simelane's Unexplained Cash (Part Three) – The Mystery Cash Used to Pay Back R849K for VBS-Linked Loan" (05 December 2024) https://www.dailymaverick.co.za/article/2024-12-05-thembi-simelanes-unexplained-cash-part-three/ (accessed 2024-12-05).

2 THE SEPARATION-OF-POWERS ARGUMENT AND THE POLITICAL-QUESTION DOCTRINE

The appointment of Cabinet members entails the exercise of political power. The power is also discretionary in nature. Cabinet members are appointed by the President in his capacity as Head of State, seemingly without a constitutional obligation to consult any public institution or functionary.[16] Any judicial probe of the power (if it results in setting aside the President's decision) will naturally lead to controversies over whether there has been an overreach by the courts into the autonomy of the executive branch of the State. In the formative years of South Africa's constitutional democracy, the Constitutional Court, in *De Lange v Smuts*,[17] held that

> "over time, the courts will develop a uniquely South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest."[18]

However, it is debatable whether the evolution of this "uniquely South African model of separation of powers" as envisioned by the court in *Smuts* has indeed taken place.[19] Over the years, there has been a view among scholars and politicians alike that the courts are increasingly overreaching in the domain of the executive branch of government, particularly in politically contentious disputes involving one or more of the elected branches of the State.[20] For instance, in advocating for the introduction of the political-

---

16 For a discussion of the distinction between the President's respective powers as Head of State and as head of the national executive, and the constitutional obligation to consult other public institutions or functionaries, see *Minister for Justice and Constitutional Development v Chonco* 2010 (1) SACR 325 (CC) par 20. Also refer to *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) par 11 and *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) par 117. Further, read the *dictum* in *President of the Republic of South Africa v Quagliani* 2009 (4) BCLR 345 (CC) par 12.

17 1998 (3) SA 785 (CC) (*Smuts*).

18 *Smuts supra* par 60.

19 Hodgson "The Mysteriously Appearing and Disappearing Doctrine of Separation of Powers: Toward a Distinctly South Africa Doctrine for a More Radically Transformative Constitution" 2018 34 *South African Journal on Human Rights* 1 2.

20 Sewpersadh "Judicial Review of Administrative and Executive Decisions: Overreach, Activism or Pragmatism"? 2017 21 *Law Democracy and Development* 201 208. Also refer to the *dictum* of the court in *Hugh Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) par 67. See also Ngang "Judicial Enforcement of Socio-Economic Rights in South Africa and the Separation of Powers Objection: The Obligation to Take Other Measures" 2014 14 *African Human Rights Law Journal* 655 657 (in reference to the increasing mistrust between politicians and the judiciary). Former ANC Secretary General, Gwede Mantashe, was, in July 2008, quoted accusing the judges of a conspiracy against former President, Jacob Zuma. See, in this regard, Letsoala, Rossouw and Alcock "ANC Boss Accuses Judges of Conspiracy Against Zuma" (4 July 2008) https://mg.co.za/article/2008-07-04-anc-boss-accuses-judges-of-conspiracy-against-zuma/ (accessed 2023-05-24).

question doctrine in South Africa, Mhango[21] ponders whether political questions should not find resolution in the political process. In terms of this doctrine, political questions are non-justiciable and require judicial deference from the courts if deciding them means that the judiciary will interfere with the autonomy vested in the elected branches of the State.[22] The political-question doctrine is premised on the understanding that certain controversies are essentially political and not legal.[23] In the main, the doctrine is a relic of US Supreme Court jurisprudence, in which the American courts' approach to politically contentious disputes was that such issues are not appropriate for judicial resolution.[24]

It is not clear whether the political-question doctrine has been embraced by the courts in South Africa. Judicial deference is a tactic used by the courts to minimise intrusion into the murky terrain of separation-of-powers violation. In *Doctors for Life v Speaker of the National Assembly*,[25] the court held that the exclusive jurisdiction of the Constitutional Court in politically contentious disputes "serves to preserve the comity between the judiciary and other branches of the State". According to the court, the exclusive jurisdiction of the Constitutional Court ensures that "only the highest court intrudes into the domain of the other branches of government".[26] However, the courts are increasingly engaging in judicial activism, in matters pertaining to impugned exercise of executive authority. For instance, while the Constitution entrusts the sphere of foreign policy to the national executive authority,[27] in *Law Society of South Africa v President of the Republic of South Africa*,[28] the court declared the President's decision to participate in the decision-making processes aimed at suspending the operations of the Southern African Development Community Tribunal unconstitutional, unlawful and irrational. The court accepted that as Head of State and of the national executive authority, the President must "of necessity wield enormous power for the effective and efficient coordination of government and State business".[29] Perhaps the court's approach to the interpretation of

---

21 Mhango "Is It Time for a Coherent Political Question Doctrine in South Africa?" 2014 7 *African Journal of Legal Studies* 457 459.

22 Brought to the fore by the *dictum* of the U.S. Supreme Court in *Marbury v Madison* 5 US 137 (1803). Also refer to Myers "Transatlantic Perspectives on the Political Question Doctrine" 2020 106 *Virginia Law Review* 1007 1015. The author argues that the foundation for the application of the political question doctrine in the United Kingdom is the same as that in the United States of America (USA). See *Baker v Carr* 369 US 186, 217 (1962), as relied on by the author, where the US Supreme Court provided six characteristics of non-justiciable political questions.

23 Rodriguez "The Political Question Doctrine in State Constitutional Law" 2013 43 *Rutgers Law Journal* 573 573.

24 *Ibid*. See for example *Colegrove v Green* 328 US 1 (1849).

25 2006 (6) SA 416 (CC) par 23.

26 *Ibid*.

27 S 231(1) of the Constitution.

28 2019 (3) SA 30 (CC) (*SADC Tribunal*).

29 SADC Tribunal *supra* par 1. Also refer to *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) par 77; *Premier, Province of Mpumalanga v Executive Committee Association of Governing Bodies of State Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC) par 41 (*Premier, Province of Mpumalanga*).

presidential powers by Mogoeng CJ can be summed up in the following words:[30]

> "[A] court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively. As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the executive to act efficiently and promptly."[31]

The court further cautioned that "this is not to be understood as an endorsement of, or a solicitation for a licence to exercise presidential or executive powers in an unguided or unbridled way".[32] According to the court, "all presidential or executive powers must always be exercised in a manner that is consistent with the Constitution and its scheme, as well as the spirit, purport and objects of the Bill of Rights, our domestic legislative and international law obligations".[33] The court held that the President does not have the leeway to exercise power that has not been assigned to him and that authority must be exercised within constitutional bounds and in the public interest.[34]

In South Africa, every exercise of public power is subject to the jurisdiction of the courts. This is because South Africa is founded on *inter alia* constitutional supremacy and the rule of law.[35] Law or conduct inconsistent with the Constitution is invalid, and the obligations imposed by it must be fulfilled.[36] In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,[37] the Constitutional Court held that "the legislature and the executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law". According to the court, the principle of legality is the mechanism to test the lawfulness of executive conduct.[38] *In Kaunda v President of the Republic of South Africa*,[39] the Constitutional Court affirmed the well-established principle that "all exercise of public power is to some extent justiciable under the Constitution". According to the court, the scope of the justiciability depends on various factors, including the nature of the impugned power.[40] In view of the *dicta* cited previously, the courts generally show deference to the President's discretionary power to appoint Cabinet members. However, where the President exercises the power in a manner that is not sanctioned by the Constitution, the courts should as a matter of law intervene to correct such conduct. However, the extent of the intervention will in all likelihood be contentious, as the appointment of Cabinet members is viewed to be a form of political power. In line with such

---

30 *SADC Tribunal supra* par 2.

31 *Premier, Province of Mpumalanga supra* par 41 n1.

32 *SADC Tribunal supra* par 3.

33 *Ibid*.

34 *Ibid*.

35 S 1(*c*) of the Constitution.

36 S 2 of the Constitution.

37 1999 (1) SA 374 (CC) par 58.

38 *Ibid*.

39 2004 (10) BCLR 1009 (CC) par 244. Also see Mhango "Chief Sandile Ngcobo's Separation of Powers Jurisprudence" 2017 32 *Southern African Public Law* 1 2.

40 *Ibid*.

reasoning, the resolution of disputes emanating from the exercise of power should engage the political organs of the State such as the National Assembly.

The intervention of the National Assembly should however be viewed against a backdrop of the legislative body, over years, lagging in its constitutional obligation to perform executive oversight. This is despite the fact that the President, together with the Cabinet, are accountable individually and collectively for the exercise of their powers and the performance of their functions.[41] Any assertion to the contrary would be ignorant of the finding in *Economic Freedom Fighters v Speaker of the National Assembly*[42] (*Nkandla 1*), where the Constitutional Court found that the National Assembly failed to hold the President accountable for failure to implement the Public Protector's remedial action that he must pay back the costs incurred in the renovation of his private homestead. In another sequel to the judgment, *Economic Freedom Fighters v Speaker of the National Assembly* (*Nkandla 2*),[43] the Constitutional Court found that the National Assembly's failure to enact rules governing impeachment proceedings against the President violated its constitutional obligation to hold the executive accountable.

Current scholarly debates on the justiciability of politically contentious disputes focus on the *ex post facto* resolution of politically contentious disputes. They do not provide insight into the mechanisms of oversight over the exercise of political power *ex ante*. For instance, in relation to Cabinet appointments, there is no legislative oversight over the exercise of the power. There are no proactive mechanisms to ensure that the President does not exceed the limits of the authority bestowed upon him to make Cabinet appointments. The only constitutional safeguards are the principles of constitutional supremacy and the rule of law, enshrined in the Constitution.

3 CABINET APPOINTMENTS IN SOUTH AFRICA: CONSTITUTIONAL PROVISIONS

In South Africa, the President has the powers entrusted by the Constitution and by legislation, including those powers necessary to perform the functions of Head of State and head of the national executive.[44] He is responsible for making any appointments that the Constitution or legislation requires, other than as head of the national executive.[45] This includes the appointment of Cabinet members. The South African Cabinet consists of the President, a Deputy President and Ministers.[46]

41 S 92(2) of the Constitution.
42 2016 (3) 580 (CC).
43 2018 (3) BCLR 259 (CC).
44 S 84(1) of the Constitution.
45 S 84(2)(*e*) of the Constitution.
46 S 9(1) of the Constitution.

The President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them.[47] He must select the Deputy President from among the members of the National Assembly.[48] He may select any number of Ministers from among the members of the National Assembly.[49] Whether this *proviso* also extends to the Speaker of the National Assembly is not entirely clear, as witnessed in former Speaker Thandi Modise's appointment's appointment.[50] The President is also empowered to appoint no more than two Ministers from outside the Assembly.[51] He must appoint a member of the Cabinet to be a leader of government business in the National Assembly.[52] The President may appoint any number of Deputy Ministers from among members of the National Assembly,[53] but he may appoint no more than two Deputy Ministers from outside the Assembly.[54]

An examination of the applicable constitutional provisions reveals that the President has two types of appointment powers. He makes unilateral appointments, including Cabinet members in his capacity as Head of State. The President also exercises his appointment authority on recommendation from *inter alia* Parliament, in his capacity as head of the national executive authority.[55] An example of the President's appointment powers as head of the national executive authority includes the power to appoint the heads of Chapter 9 institutions in terms of section 193(4) of the Constitution.

The law in South Africa is silent on whether the President's power to appoint Cabinet members may be fettered by an oversight institution such as a court of law or the Public Protector. Generally, only the President can exercise his powers as Head of State. However, in recent years, there were allegations that the President had outsourced the power to make Cabinet appointments to members of the Gupta family. Following an investigation by the Office of the Public Protector,[56] the institution took remedial action directing the President to probe the allegations further. The President took the report of the Public Protector on review, arguing that in terms of the Constitution, only the President is empowered to establish a commission of

47 S 91(2) of the Constitution.

48 S 91(3)(*a*) of the Constitution.

49 S 91(3)(*b*) of the Constitution.

50 *Ibid*.

51 S 91(3)(*c*) of the Constitution.

52 S 91(4) of the Constitution. In terms of s 91(5), the Deputy President assists the President in the execution of the functions of government. This means he only has power and authority in those functions performed by the President in his capacity as head of the national executive authority.

53 S 93(1)(*a*) of the Constitution.

54 S 93(1)(*b*) of the Constitution.

55 The appointment of judicial officers in terms of s 174(3) is one example. The President appoints the Chief Justice and the Deputy Chief Justice after consulting the Judicial Service Commission and the leaders of the parties represented in the National Assembly.

56 Public Protector South Africa *State of Capture: Report on an Investigation Into Alleged Improper and Unethical Conduct by the President and Other State Functionaries Relating to Alleged Improper Relationships and Involvement of the Gupta Family in the Removal and Appointment of Ministers and Directors of State-Owned Enterprises Resulting in Improper and Possibly Corrupt Award of State Contracts and Benefits to the Gupta Family's Businesses* Report No 6 of 2016/2017 (14 October 2016).

inquiry. In *President of the Republic of South Africa v Office of the Public Protector*,[57] the North Gauteng High Court upheld the lawfulness of the Public Protector's remedial action instructing the President to establish a commission of inquiry. The facts of the case were peculiar in that, as the repository of the power to establish a commission of inquiry, the President was also implicated in the allegations probed by the Public Protector. The correctness of this judgment is suspect, as only the President wields the power to establish a commission of inquiry. However, it must be understood in the context of inadequate legislative oversight mechanisms over the President's powers as Head of State. It suffices to say that gaps in the law are not an invitation to the courts to uphold what otherwise amounts to unlawful dictation.

4 THE JUSTICIABILITY OF CABINET APPOINTMENTS

In South Africa, judicial authority is vested in the courts,[58] which are independent and subject only to the Constitution and the law. They are obliged to apply the law impartially and without fear, favour, or prejudice.[59] No person or organ of state may interfere with the functioning of the courts.[60] In addition, organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.[61] An order or decision issued by a court binds all persons and organs of state to which it applies.[62] According to De Beer:[63]

> "a judge's authority is found in the rules of law which stipulate the types of cases a court may hear and decide (subject-matter authority) as well as the rules which specify the kinds of orders that the particular judge is empowered to make (court-order authority). The enquiry into whether a judge has authority for these purposes, concerns not whether she exercises her adjudicative powers appropriately. Rather, it implicates the antecedent question whether the relevant powers are possessed in the first place – a narrower legal question. Whether a court has authority, so defined, to issue an order can be determined simply with reference to the order itself and the law."

There are two schools of thought regarding the extent to which the judiciary may permissibly intrude into the domain of the other branches of the State. The debate weighs justiciability and non-justiciability. Some scholars refer to this divide as judicial activism *versus* deference. Lenta,[64] quoting Posner,[65]

---

57 2018 (5) BCLR 609 (GP). For further discussion on the Public Protector's remedial action, see Wolf "The Remedial Action of the State of Capture Report in Perspective" 2017 20 *Potchefstroom Electronic Law Journal* 1 1; Tsele "Observations on the State Capture Judgment" 2021 138 *South African Law Journal* 477 477 and Slade 2020 *Law Democracy and Development* 364 364.

58 S 165(1) of the Constitution.

59 S 165(2) of the Constitution.

60 S 165(3) of the Constitution.

61 S 165(4) of the Constitution.

62 S 165(5) of the Constitution.

63 De Beer "Invalid Court Orders" 2019 19 *Constitutional Court Review* 283 287.

64 Lenta "Judicial Restraint and Overreach" 2004 20 *South African Journal on Human Rights* 544 548.

supports the notion of the existence of a difference between "separation of powers, judicial self-restraint and prudential self-restraint". According to the author, "deference requires judges to be cautious about espousing their views in the course of adjudication and to limit the exercise of their discretion as far as possible".[66] According to Klaasen,[67] "deference recognises the need to protect the institutional character of each of the three arms of government in a manner that will prevent their ability to discharge their constitutional role being undermined". In this context, politically sensitive disputes are, what Mogoeng CJ in *Nkandla 1* described as, the determination of issues pertaining to the exercise of "raw state power".[68] Conversely, Thabo and Odeku[69] acknowledge that the Constitution entrusts enormous power to the judiciary, although they submit that "the judiciary cannot simply declare any constitutional act or action of the executive or Parliament invalid".[70] This averment should be interpreted to mean that the judiciary should not be a mere bystander and that it has proactive power where there is an *ex facie* violation of the Constitution. Fagbadebo and Dorasamy[71] state that a court can either be passive or active in its interpretation of statutes. They describe the viewpoint advanced by proponents of judicial self-restraint as calling for the courts to be reluctant in matters relating to policy issues of the executive branch of government.[72]

The foundational underpinnings of judicial deference cannot be over-emphasised, particularly if a constitutional democracy is to preserve the legitimacy of its judiciary. However, the manner in which the proponents of judicial deference formulate their argument does not provide a satisfactory answer to the following two instances. What should happen when the National Assembly is not willing to comply with its constitutional obligation to hold the executive accountable? Secondly, in the event of inadequate oversight mechanisms over the executive branch of government, what should be the role of the judiciary? It is not sufficient simply to argue that "any oversight in the abuse of power or violation of the Constitution should be an exclusive reserve of the people, through their votes", as suggested by the proponents of judicial self-restraint.[73] The exercise of the right to vote should be conducted subject to the assurance that there are adequate oversight mechanisms put in place by the Constitution to hold those who exceed the limits of their authority accountable, once they have been elected into office.[74]

---

65 Posner *The Federal Courts* (1996) 314.

66 *Ibid*.

67 Klaasen "Public Litigation and the Concept of Deference in Judicial Review" 2015 18 *Potchefstroom Electronic Law Journal* 1901 1901.

68 *Nkandla 1 supra* par 55.

69 Thabo and Odeku "Separation of Powers, Checks and Balances and Judicial Exercise of Self-Restraint: An Analysis of Case Law" 2021 42 *Obiter* 547 549.

70 *Ibid*.

71 Fagbadebo and Dorasamy "Judicial Review as an Accountability Mechanism in South Africa: A Discourse on the Nkandla Case" 2022 4 *African Journal of Inter/Multidisciplinary Studies* 126 128.

72 *Ibid*.

73 *Ibid*.

74 Proposals for reform to tackle these lacunae are advanced *infra*.

In order to answer the above questions, guidance can be sought from sections 167[75] and 172[76] of the Constitution. The former section governs the Constitutional Court and bestows the court with the power to decide disputes in the national or provincial sphere concerning the constitutional status, powers, or functions of any of those organs of the State.[77] Only the Constitutional Court may decide, *inter alia*, on any amendment to the Constitution,[78] or on questions relating to whether Parliament or the President has failed to fulfil a constitutional obligation.[79] The Constitutional Court makes the final pronouncement on whether conduct by Parliament or the President is constitutional.[80]

When entertaining a constitutional matter within its power, a court must declare that any law or conduct inconsistent with the Constitution is invalid to the extent of its inconsistency.[81] Pursuant to such a finding, the court may then make any order that is just and equitable.[82] This includes an order limiting the retrospective effect of the declaration of invalidity.[83] The court may also make an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.[84]

The court may therefore make an order limiting the retrospective effect of a finding that an impugned Cabinet appointment is unlawful. It may also suspend the declaration of such a finding for a specified period – to allow the President to remedy the appointment *ab initio*.

5 THE *CABINET RESHUFFLE* TRILOGY

5 1 The High Court decision

In *Democratic Alliance v President of the Republic of South Africa,*[85] the applicants sought to prevent the swearing-in ceremony of the newly appointed Cabinet ministers scheduled to take place on 31 March 2017. They argued that the President exercised his constitutional powers of selection and dismissal in an unlawful manner.[86] According to the applicants, the President took the decision to carry out the Cabinet reshuffle in an irrational manner and in bad faith.[87] They requested the Western Cape High Court to interdict the reshuffle and order the President to reinstate the

75 The provisions that govern the functioning of the Constitutional Court.
76 The powers of courts in constitutional matters.
77 S 167(4)(*a*) of the Constitution.
78 S 167(4)(*d*) of the Constitution.
79 S 167(4)(*e*) of the Constitution.
80 S 167(5) of the Constitution.
81 S 172(1) of the Constitution.
82 S 172(1)(*b*) of the Constitution.
83 S 172(1)(*b*)(i) of the Constitution.
84 S 172(1)(*b*)(ii) of the Constitution.
85 [2017] ZAWCHC 34 (*First Cabinet Reshuffle Case*).
86 *First Cabinet Reshuffle Case supra* par 5.
87 *Ibid*.

previous Cabinet.[88] The court acknowledged that as an exercise of public power, the appointment of Cabinet members may be the subject of judicial review proceedings on the ground of irrationality, having due regard to the purpose for which the power was conferred.[89] According to the court, the threshold at which a court will intervene must be sensitive to the nature of the power.[90] It also found that because the President's power to appoint Cabinet members is highly discretionary, the threshold for interference by a court is likely to be very high.[91] Consequently, the primary consequence of a decision to reshuffle Cabinet ministers, which the public may perceive as a bad decision, is political rather than legal.[92]

Relying on the *dictum* of the Constitutional Court in *National Treasury v Opposition to Urban Tolling Alliance*,[93] the court held that when courts are asked to intervene, in advance of review proceedings to restrain the exercise of statutory powers, there is an additional qualification over and above the conventional test for the granting of interim relief. The question turns to whether the circumstances are exceptional and whether the case for intervention is strong and clear.[94] According to the High Court, this is to prevent the danger of courts being drawn into political matters "in circumstances where the case for judicial interference is not clearly made out, in order to prevent the potential violation of the separation of powers".[95] The court therefore declined to entertain the matter.

Following the decision of the South Gauteng High Court in the *First Cabinet Reshuffle Case*, the question of whether the President can be legally compelled to disclose reasons for conducting a Cabinet reshuffle once again arose for consideration in the North Gauteng High Court. This judgment is discussed in the paragraph below.

5 2 The Second *Cabinet Reshuffle* case

In *Democratic Alliance v President of the Republic of South Africa,*[96] the applicants brought a review application in terms of rule 53 of the Uniform Rules of Court to compel the President to furnish documents containing reasons for the Cabinet reshuffle.[97] The North Gauteng High Court found

88 *First Cabinet Reshuffle Case supra* par 2.

89 *First Cabinet Reshuffle Case supra* par 6.

90 *Ibid*.

91 *First Cabinet Reshuffle Case supra* par 7.

92 *Ibid*.

93 2012 (6) SA 223 (CC) par 41 to 47. This approach was followed with approval by the Constitutional Court in *City of Tshwane Metropolitan Municipality v Afriforum* 2016 (6) SA 182 (CC) par 43.

94 *First Cabinet Reshuffle Case supra* par 15.

95 *Ibid*.

96 [2017] 3 All SA 124 (GP) (the *Second Cabinet Reshuffle Case*).

97 Adopted in terms of s 43 of the Supreme Court Act 59 of 1959. Rule 53(3) of the Uniform Rules of Court reads in relevant part: "The registrar shall make available to the applicant the record dispatched to him or her as aforesaid upon such terms as the registrar thinks appropriate to ensure its safety, and the applicant shall thereupon cause such copies of such portions of the record as may be necessary for the review to be made and shall furnish the registrar with two copies and each of the parties with once copy thereof, in each case certified by the applicant as true copies."

that the power to appoint Cabinet members is wide-ranging, but not as unfettered as the royal prerogatives of the British Monarch.[98] The court acknowledged that this power must be in line with sections 91(2) and 83(*b*) and (*c*) of the Constitution.[99] According to the court, the President's concession that the exercise of the power to appoint Cabinet members must meet the bounds of rationality was well made and in line with the law.[100] This is because it is settled law in South Africa that all exercises of public power must be consistent with the principle of legality.[101]

The court embarked on an exposition of the law relating to the applicability of rule 53 to the President's power to appoint Cabinet members. Relying on an earlier judgment in *Safcor Forwarding Johannesburg (Pty) Ltd v National Transport Commission*,[102] the court noted that the rule was devised in order to regulate the procedure to be followed in all cases of review on a national basis.[103] The High Court conceded that most of the earlier decisions involving the interpretation of rule 53 involved "decisions or proceedings of an inferior court, a tribunal, a board or an officer performing judicial, *quasi*-judicial or administrative functions and not executive decisions". On this point, the President contended that since an executive decision is not expressly referred to in rule 53, it could not fall within the scope of the provision.[104] The court found that rule 53 was promulgated at a time when executive decisions were not justiciable. With the adoption of the Constitution, a purposive and not literal interpretation of the provision had to be followed in order to subject it to the purview of justiciability.[105]

The court also followed with approval the *dictum* in *Democratic Alliance v Acting National Director of Public Prosecutions*,[106] where the Supreme Court of Appeal held that without the rule, a court cannot perform "its constitutionally entrenched review function". According to the Supreme Court of Appeal in the latter judgment, this would infringe on an applicant's right to have a justiciable dispute decided in a fair public hearing in terms of section 34 of the Constitution.[107] In light of the above, the High Court in the *Second Cabinet Reshuffle* judgment found that the President is legally compelled to

98 The *Second Cabinet Reshuffle Case supra* par 18.

99 *Ibid*.

100 The *Second Cabinet Reshuffle Case supra* par 19.

101 *Ibid*.

102 1982 (3) SA 660 (A) 667F–670A.

103 The *Cabinet Reshuffle Case supra* par 21.

104 *Ibid*.

105 *Ibid*.

106 2012 (3) SA 486 (SCA) par 37.

107 The *Cabinet Reshuffle Case supra* par 24. See further the ruling *in Helen Suzman Foundation v Judicial Service Commission* 2017 (1) SA 367 (SCA) par 13. In this case, the Supreme Court of Appeal described the purpose of the rule as being to facilitate and regulate applications for review "by granting the aggrieved party seeking to review a decision of an inferior court, administrative functionary or state organ, access to the record of the proceedings in which the decision was made, to place the relevant evidential material before court". According to the Supreme Court of Appeal, the rule is intended to probe the subject state of mind of the decision-maker at the time the decision was made. The applicant must be granted access to the record to enable the court to test the lawfulness of the decision sought to be reviewed, and whether it accords with the relevant constitutional prescripts. Also see *Turnbull-Jackson v Hibiscus Coast Municipality* 2014 (6) SA 592 (CC) par 37.

furnish the record containing the reasons that led to his decision to conduct a Cabinet reshuffle.

Dissatisfied with the outcome of the High Court, the President then took the matter on appeal to the Supreme Court of Appeal. However, the Supreme Court of Appeal declined to entertain the matter on the grounds of mootness.[108] The President then took the matter to the Constitutional Court in *President of the Republic of South Africa v Democratic Alliance*,[109] which is discussed below.

5 3 The Third *Cabinet Reshuffle* case

In this case, the Constitutional Court was asked to determine:

- whether the decision of the President to appoint and dismiss the Cabinet minister and his Deputy can be reviewed and set aside; and
- whether the President under rule 53 of the Uniform Rules of Court can be legally compelled to disclose the reasons for relieving Cabinet ministers and their deputies of their duties, or whether the arguably raw political character of that decision exempts him from doing so?

Part of the application pertaining to the first question was withdrawn, which means that the question of whether the court can review and set aside a Cabinet appointment and dismissal has not yet been tested before the courts. The President argued that extending the scope of rule 53 to executive decisions is an impermissible encroachment into the executive domain. He further asserted that there was a need for certainty in relation to the obligation to disclose reasons for future Cabinet reshuffles and the relevant part of the record upon which such decisions are taken.[110] The Constitutional Court held that all executive decisions are generally reviewable under the principle of legality or rule 53.[111] According to the court, it is inescapable that the merits would have to be traversed in order to give the President the needed guidance for future cases. The political character of section 91(2) and 93(1) decisions would have to be interrogated in-depth in order to address the President's concerns properly, amid the potentially serious questions of separation of powers.[112]

In the minority judgment, the Constitutional Court, per Jafta J, held that it is not open to the President to take the view that rule 53 is inapplicable and consequently ignore the rule. That is a function reserved exclusively to the courts.[113] He also held that if the President were to fail to dispatch the record after receipt of papers in future proceedings, he would then be violating the earlier judgment of the High Court in the same matter.[114] He would also be in

[108] *President of the Republic of South Africa v Democratic Alliance* [2018] ZASCA 79.
[109] 2019 (11) BCLR 1403 (CC) (*Third Cabinet Reshuffle Case*).
[110] The *Third Cabinet Reshuffle* Case *supra* par 21.
[111] *Ibid*.
[112] The *Third Cabinet Reshuffle* Case *supra* par 33.
[113] The *Third Cabinet Reshuffle* Case *supra* par 62.
[114] The *First Cabinet Reshuffle Case supra.*

violation of section 165(5) of the Constitution, which declares that an order or decision of a court binds organs of state to which it applies.[115]

The minority judgment also found that the President is not one of the functionaries identified in rule 53, nor does he perform one of the functions classified when he appoints or dismisses ministers. This is because, at the time the rule was enacted, the exercise of prerogative powers such as Cabinet appointments and dismissals was beyond the reach of judicial scrutiny. Jafta J also argued that the rule carefully delineates the nature of decisions and proceedings to which it applies, and the decision-makers it calls upon to despatch a record of proceedings to the registrar.[116] He also held that, when understood in its historical context, the rule was not intended to cover decisions taken by the President in the exercise of prerogative powers. Without changes to its language, there was no basis to give it a new meaning now. It has the same meaning regardless of the nature of the proceedings or decision challenged.[117] For the reasons adduced above, the minority judgment found that rule 53 does not apply to the President's decision to appoint and dismiss Cabinet members.[118]

It follows that since the *Third Cabinet Reshuffle Case*, rule 53 of the Uniform Rules of Court can be used to compel the President to disclose the rationale behind a Cabinet reshuffle. However, the courts have not yet pronounced on whether a court of law may set aside an unlawful Cabinet appointment. Equally, the courts are legally competent to enquire into the manner in which the President exercised the power to appoint a Cabinet member. However, the courts are limited to probing the means used to achieve the purpose of the appointment,[119] and not the merits of the President's decision. The identity of who is selected to Cabinet remains the responsibility of the President. The court examines the rationality of the decision itself, and the process used to arrive at the decision.[120]

6 PROPOSED REFORMS

6 1 The current *lacunae*

While the *dicta* above mean that rule 53 of the Uniform Rules of Court can be used to compel the President to furnish records relating to his decision to appoint Cabinet members, it is submitted that the legal framework relating to the President's duty to give reasons for that decision is inadequate because rule 53 is only applicable during litigation. The law should be reformed to enable other oversight institutions, such as parliamentary standing

---

115 The *Third Cabinet Reshuffle* Case *supra* par 65.

116 The *Third Cabinet Reshuffle* Case *supra* par 84.

117 The *Third Cabinet Reshuffle* Case *supra* par 85.

118 The Third *Cabinet Reshuffle* Case *supra* par 86.

119 The courts apply the rationality test to inquire into the lawfulness of the President's decision. See Eloff "The Rationality Test in Lockdown Litigation in South Africa" 2021 21 *African Human Rights Law Journal* 1157 1162, in reference to the *dictum in New National Party v Government of the Republic of South Africa* 1999 (5) BCLR 489 (CC).

120 *National Energy Regulator of South Africa v PG Group (Pty) Ltd* 2020 (1) SA 450 (CC) par 117.

committees, to invoke the rule in the performance of their functions. The uncertainty on whether the National Assembly may compel the President to furnish reasons for conducting a Cabinet reshuffle is absurd. This is because he is collectively and individually accountable to Parliament for the exercise of his powers and the performance of his functions.

The National Assembly has the constitutional mandate to provide mechanisms to maintain oversight over the exercise of national executive authority. It must provide mechanisms to ensure that all executive organs in the national sphere of government are accountable to it.[121] It must also provide for mechanisms to maintain oversight of the exercise of national executive authority,[122] including the implementation of national legislation and any organ of state.[123] The National Assembly or any of its committees may summon any person to appear before it to give evidence on oath or affirmation or produce documents.[124] Any person or institution may be required to report to the National Assembly.[125] It may compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons.[126] The National Assembly may therefore summon the President to appear before it, give evidence on oath or affirmation, and produce documents. This is clear from the use of the phrase "any person" in section 56(*a*) of the Constitution.

The National Assembly is also empowered to receive petitions, representations, or submissions from any interested persons or institutions.[127] If the National Assembly, with a vote supported by its members, passes a motion of no confidence in the Cabinet, the President must reconstitute the Cabinet.[128] Should the National Assembly, through a vote supported by a majority of its members, pass a motion of no confidence in the President, he together with his Cabinet and any Deputy Ministers must resign.[129] Although it seems that sufficient provision is made for instances where members of the Cabinet and the President are not performing, the reality is that it is a cumbersome process fraught with politics that is only available after the damage has been done.

It is recommended that the Constitution be amended to empower the National Assembly to participate in the appointment of Cabinet members. The basis for this statement is the Constitution itself. If the National Assembly is part of the process of appointing ministers, it will assist the President in promoting "that which will advance the Republic"[130] and ensure that all executive organs in the national sphere of government are accountable to it as required by section 55(2)(*a*) of the Constitution. In this way, it may also constitute a mechanism to maintain oversight of the

121 S 55(2)(*a*) of the Constitution.
122 S 55(2)(*b*)(i) of the Constitution.
123 S 55(2)(*b*)(ii) of the Constitution.
124 S 56(*a*) of the Constitution.
125 S 56(*b*) of the Constitution.
126 *Ibid*.
127 S 56(*c*) of the Constitution.
128 S 102(1) of the Constitution.
129 S 102(2) of the Constitution.
130 S 83(*c*) of the Constitution.

exercise of national executive authority,[131] including the implementation of national legislation and any organ of state.[132] There are multiple examples of poor appointments leading to a failure either to implement national legislation or to comply therewith. An example of a failure to implement national legislation is contained in a *dictum* in *#Unitebehind v Minister of Transport*.[133] In this case, the High Court held that the Minister of Transport's failure to appoint a Board of Control for the Passenger Rail Agency of South Africa (PRASA) in line with section 24 of the Legal Succession Act[134] was unlawful and should be reviewed and set aside. Similarly, his decision to appoint Mr Bongisizwe Mpondo as the Acting Group Chief Executive Officer in terms of section 12A(3)(*a*) of the Public Service Act[135] was declared unlawful and set aside by the High Court. The judgment of the Western Cape High Court in *Democratic Alliance v South African Broadcasting Corporation Soc Ltd*[136] also provides a useful illustration of the improper implementation of legislation. In this case, the High Court found that the appointment of Hlaudi Motsoeneng by the Minister of Communications as Group Chief Executive Officer was invalid and should be set aside. An invalid appointment of that nature would lead to improper implementation of the Broadcasting Act.[137]

In terms of the proposed reform, the President should make the initial selection, but his choice should be subject to parliamentary endorsement. It is conceded that in terms of the current constitutional framework, the presidency and the executive branch of government are made up of the majority party in the National Assembly. In practice, the President consults the political party he belongs to before finalising appointments to the Cabinet.[138] This means that the endorsement process is likely to be a mere rubber stamp of previously agreed-upon consultations in the governing party prior to the actual appointments. To mitigate against this possibility, there should be a select committee, representative of all the political parties, that deals solely with the endorsement of nominations to the Cabinet made by the President.[139]

In addition to the *lacuna* identified above, there is no constitutional provision or legislation dealing with the broader question of whether the President may be compelled to furnish reasons for making Cabinet appointments. In this light, the Constitution should be amended to state

131 S 55(2)(*b*)(i) of the Constitution.

132 S 55(2)(*b*)(ii) of the Constitution.

133 [2020] 4 All SA 593 (WCC).

134 9 of 1989.

135 Public Service Act, 1994.

136 [2017] 1 All SA 530 (WCC).

137 4 of 1999.

138 Sowetan Live "Cabinet Reshuffle in a Number of Days, Says Presidency's Vincent Magwenya" (01 March 2023) https://www.sowetanlive.co.za/news/south-africa/2023-03-01-cabinet-reshuffle-in-a-number-of-days-says-presidencys-vincent-magwenya/ (accessed 2024-12-05).

139 Other political parties such as the Democratic Alliance have proposed the establishment of an oversight committee over the presidency. See in this regard News24 "DA to Lobby Parliament to Have Oversight Over the Presidency" (10 December 2020) https://www.news24.com/news24/southafrica/news/da-to-lobby-parliament-to-have-oversight-over-the-presidency-20201210 (accessed 2022-07-04).

expressly the nature and extent of the President's duty to give reasons for making Cabinet appointments. Such an amendment is crucial in light of section 32 of the Constitution, which enshrines everyone's right of access to information that is held by the State. The amendment should detail the manner in which the National Assembly may summon the President and other witnesses to testify on oath or affirmation. It should specify the President's constitutional obligation to comply with an instruction to appear before the National Assembly in relation to allegations of unlawful or harmful conduct during Cabinet appointments. Owing to the discretionary nature of the power to appoint Cabinet members, the President may raise the argument that he is not compelled to divulge the reasons in Parliament. The amendment should also specify the nature of the record that may be asked for in the explanation of the rationale involved in the making of Cabinet appointments, and it should state the type of documents that may be exempt from disclosure in the National Assembly. This is due to the convention of Cabinet secrecy, which may prevent certain documents from being disclosed. The convention was recognised by the Constitutional Court in *President of the Republic of South Africa v SARFU*.[140] In this case, the Constitutional Court held that Cabinet secrecy is relevant for the protection of "robust and uninhibited debate of sensitive and important policy matters in Cabinet".[141]

The section below proposes a formulation of constitutional amendments to achieve the reforms discussed above.

6 2 Proposed constitutional amendments

Currently, section 91(2) of the Constitution reads as follows:

> "The President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them."

The provision should be amended to state:

(a) The President, as head of the national executive, after consultation with the National Assembly, and with a two-thirds majority vote in the National Assembly, appoints the Deputy President and Ministers.

(b) A select committee proportionately representative of all the political parties in the National Assembly must be established for purposes of the consultations and Cabinet endorsements envisaged in paragraph (*a*) of this provision.

(c) In selecting members of Cabinet, the President must have regard to gender and the competence of appointees.

(d) National legislation must provide for the assignment of powers and functions to Cabinet members. In assigning powers and functions to Cabinet members, the President must take into account good governance, the interests of the public, as well as his or her constitutional obligations in terms of section 83(*b*) of the Constitution.

---

[140] 1999 (10) BCLR 1059 (CC) par 243. See further Malan "To What Extent Should the Convention of Cabinet Secrecy Still Be Recognised in South African Constitutional Law?" 2016 49 *De Jure* 117 120.

[141] *President of the Republic of South Africa v SARFU supra* par 243. As quoted by Malan 2016 *De Jure* 120.

> *(e)* The President may not assign powers and functions to Cabinet members, other than in line with the provisions of the Constitution, and the relevant legislation. The interests of the public in terms of paragraph (*d*) include the public's interest in knowing the reasons behind Cabinet appointments and dismissals, as provided for in section 32 of the Constitution.
>
> *(f)* Whenever the need arises, including but not limited to occasions when a Cabinet appointment is disputed on account of unlawful conduct by the President, the President has the constitutional obligation to furnish the considerations taken into account in appointing members of Cabinet.
>
> *(g)* National legislation must provide for the President's duty to give reasons in line with the provisions in paragraph (*f*) and other prescripts of the Constitution including but not limited to the foundational principles of the Constitution.
>
> *(h)* National legislation must provide for the establishment of ministries, and the maximum number of Cabinet ministers who may be appointed to such ministries."

The obligation to give reasons for Cabinet appointments should be enshrined in the Constitution, and subsequently in legislation. In line with the National Assembly's power to develop mechanisms to hold the executive accountable for the exercise of national executive authority,[142] the institution should develop internal rules to govern the Cabinet endorsement process. Such rules should also govern the President's constitutional obligation to explain his actions for making Cabinet appointments, and the furnishing of documents detailing the record of the decision by the President. The National Assembly should develop rules to govern any failure to comply with the proposed reforms.

7 CONCLUSION

It is submitted that a court of law can intervene and set aside the unlawful, harmful (or potentially harmful) exercise of the power to appoint Cabinet members, despite its political and discretionary nature. This is because the President must promote "that which will advance the Republic", and the Constitutional Court's power to test the constitutionality of parliamentary or presidential conduct.[143] Similarly, setting aside an unlawful Cabinet appointment does not impinge on the doctrine of separation of powers, as unlawful conduct by any public functionary should have no legal consequence. It is, however, accepted that, when unlawful, harmful (or potentially harmful) conduct is perceived to have taken place during the appointment process, such a decision should remain in place until set aside by a competent court of law.[144]

---

142 S 55(2) of the Constitution.

143 S 83(c) of the Constitution.

144 *Oudekraal Estates (Pty) Ltd v The City of Cape Town* 2010 (1) SA 333 (SCA). See further Henrico "The *Functus Officio* Doctrine and Invalid Administrative Action in South African Administrative Law: A Flexible Approach" 2020 34 *Speculum Juris* 116 118.

Problems With Waiving the Handing-Over of the Bride in Customary Marriages

Siyabonga Sibisi
LLB LLM
Senior Lecturer, School of Law, University of the Witwatersrand, Johannesburg, South Africa
Attorney of the High Court of South Africa
https://orcid.org/0000-0002-2372-5173

SUMMARY

In the recent line of decisions on the validity of customary marriages where the bride had not been physically handed over to the groom's family, courts have repeatedly found that these marriages are valid and that the physical handing-over of the bride had been waived in favour of a symbolic handing-over. The reasoning behind these decisions is that customary law is a flexible legal system that does not always demand all the requirements of a marriage to be complied with. It is observed, in these decisions, that waiver of the handing-over is not based on any agreement to waive the requirement, but rather it is inferred by the court – largely based on the parties' partial compliance with the requirements, coupled with cohabitation. Not surprisingly, these decisions have received criticism for a number of reasons. The inference of waiver may cause problems with determining the date of the marriage and the requirements for customary marriages, as well as difficulties regarding the choice of matrimonial property system. It may also be discriminatory insofar as cohabitation plays a central role. This article seeks to lead a discussion on these potential problems. Case law is used to demonstrate some of these problems.

Keywords: waiver, handing over, matrimonial property, cohabitation

1 INTRODUCTION

In the recent line of decisions on the validity of customary marriages where the bride had not been physically handed over to the groom's family, courts have repeatedly found that the marriage in question is valid, and that the physical handing-over of the bride had been implied where the parties are already cohabiting, or had been waived in favour of a symbolic handover.[1] Researchers have criticised these decisions for ignoring the precedent set by previous decisions where courts have found that, in terms of living customary law, the physical handing-over of the bride is the most important step in a customary marriage as it leads to the integration of the bride into

[1] For example, *Mbungela v Mkabi* 2020 (1) SA 41 (SCA) (also reported [2020] 1 All SA 42 (SCA)) and *Mankayi v Minister of Home Affairs* [2022] ZAKZPHC 43 par 33.

her new family.[2] The decisions have also been criticised for distorting the living customary law that is actually observed, and for imposing rules and concepts that are foreign to it.[3] In this article, the overreliance on cohabitation of the parties is criticised with reference to case law.[4]

What must be emphasised about a waiver of the handing-over of the bride is that, to date, there has been no decided court case where the parties explicitly agreed to waive the physical handing-over of the bride. Instead, courts have inferred a waiver based on the conduct of the parties – usually their conduct in cohabiting following *ilobolo*[5] negotiations and at least partial delivery thereof. This inference is made by the courts at a time when the relationship between the parties has come to an end,[6] and when the parties have to bear consequences they never envisaged or contemplated at the time they decided to cohabit.

While there is significant literature on the handing-over of the bride and the waiver thereof, nothing has been written on the problematic potential consequences that the inference of waiver of the handing-over of the bride may have on the parties. This article is an exposition of some of these problematic consequences. An overview of the potential problems is set out first. This is followed by a brief discussion of the general requirements of a customary marriage. The handing-over of the bride is contextualised. Thereafter, the identified potential problems are fully discussed.

2 AN OVERVIEW OF THE POTENTIAL PROBLEMS

Before engaging in any significant discussion, it is convenient to set out the identified problems. The first is that, in arriving at a decision that the physical handing-over of the bride has been waived by the parties, some courts have misdirected themselves in their interpretation of the requirements of customary marriages in terms of section 3(1)(*b*) of the Recognition of Customary Marriages Act[7] (RCMA). Secondly, as a result of the misdirection, courts then conclude that the mere delivery of *ilobolo,* followed by cohabitation, concludes a customary marriage. This ignores the plethora

---

2 Osman "Precedent, Waiver and the Constitutional Analysis of Handing Over of the Bride [Discussion of *Sengadi v Tsambo* 2018 JDR 2151 (GJ)]" 2020 *Stell LR* 80 83; Manthwa "The Relevance of Handing Over the Bride in Contemporary South Africa: *Miya v Mnqayane* (3342/2018) [2020] ZAFSHC 17 (3 February 2020)" 2021 *THRHR* 403 409–410; Bapela and Monyamane "The 'Revolving Door' of Requirements for Validity of Customary Marriages in Action: *Mbungela v Mkabi* [2019] ZASCA 134" 2021 *Obiter* 186 189.

3 Bapela and Monyamane 2021 *Obiter* 189.

4 In *Mankayi v Minister of Home Affairs* (*supra* par 33), the court held that since the family of the applicant might have known and accepted that she was staying with the deceased as husband and wife, a customary marriage had been concluded.

5 *Ilobolo* refers to consideration given by the groom or his family to the family of the bride in view of marriage between the bride and groom. It may be given in the form of money or cattle. The Recognition of Customary Marriages Act 120 of 1998 spells it as *"lobolo*". In this article, the word *ilobolo* is used. The prefix "i" simply means "the".

6 The parties may end their relationship by agreement, or through the death of one of them. In the latter case, the family of the deceased usually disputes the marriage.

7 120 of 1998.

of decided cases that have stated authoritatively that *ilobolo* alone does not conclude a customary marriage.[8]

The third problem is that there is no clear event or principle used to determine the date of the marriage. As is explained below, the date of the marriage is important for a number of reasons. Fourthly, the parties do not get a proper opportunity to decide on the matrimonial property system they want to govern their marriage; it is only at the end of the relationship that such parties learn that they are married, and that their marriage is in community of property, or out of community of property in case of some new polygynous customary marriages where the parties do not comply with section 7(6) of the RCMA. Finally, basing the inference of waiver on the act of cohabitation is problematic, as it excludes people who decide not to cohabit for cultural and religious grounds. This is a form of indirect discrimination on the grounds of culture and religion.

3 THE REQUIREMENTS OF A CUSTOMARY MARRIAGE AND THE HANDING-OVER OF THE BRIDE

Since this article is not about the requirements of customary marriages or the handing-over of the bride *per se*, the cursory discussions in this part of the article are intended only to set the tone by placing the theme of this article in context.

3 1 The requirements of a customary marriage

The requirements for a customary marriage appear in section 3 of the RCMA. First, both the parties must be above the age of 18;[9] secondly, they must consent to be married to each other under customary law;[10] and thirdly, the marriage must be negotiated and entered into or celebrated in accordance with customary law.[11] The first two requirements are purely formalistic, whereas the third one is a formalistic requirement that makes way for living customary law. The first requirement is straightforward. If any of the parties is below the age of 18, the consent of the parents or guardian is required.[12] However, the second and third requirements are not as straightforward, and they have been the subject of ongoing academic literature. The second requirement requires specific consent to be married under customary law. Unless there is express consent, it is not always easy to establish if specific consent to be married under customary law has been

---

8 These decisions include *Mabena v Letsoalo* 1998 (2) SA 1068 (T) and *Road Accident Fund v Mongalo* 2003 (3) SA 119 (SCA) and *Nkabinde v Road Accident Fund* 2003 (3) SA 119 (SCA). Two things must be clarified. The first is that in all three decisions, there was cohabitation, to which the courts did not attach much significance. The second is that the *Mongalo* and *Nkabinde* cases are two distinct cases dealing with the same matter. The courts expedited matters by joining these cases. This should explain the same citation.

9 S 3(1)(*a*)(i) of the RCMA.

10 S 3(1)(*a*)(ii) of the RCMA.

11 S 3(1)(*b*) of the RCMA.

12 S 3(3)(*a*) of the RCMA.

given. Although this consent can be inferred from the conduct of the parties,[13] it cannot be lightly inferred from certain conduct such as the simple act of delivering *ilobolo*. This is because African people also deliver *ilobolo* when a civil marriage is intended.[14] It has been submitted that whenever there is a dispute about whether there was specific consent to be married under customary law, courts ought to make a proper finding of facts as to whether a customary marriage was intended.[15]

As stated above, the third requirement ushers in living customary law. It has drawn attention to the requirements of customary marriages. It has been pointed out that, by not prescribing any specific rituals and practices, the legislature has left this requirement open-ended to accommodate the various cultural groups in South Africa.[16] It is also accepted that this requirement accommodates *ilobolo* negotiations,[17] the consent of the first wife in cases of Tsonga polygynous customary marriages,[18] and the integration of the bride into the groom's family, as well as many other dispensable and non-dispensable practices.[19]

3 2 Integration of the bride

A customary marriage is not a once-off event, but a culmination of events. In addition to *ilobolo* agreement, the bride must be integrated into the groom's family. In turn, the integration comprises various events and practices. Some of these practices are optional and may be waived, whereas others cannot be waived.[20] In a Zulu customary marriage, for instance, after *ilobolo* agreement, the bride may deliver gifts called *umbondo* or *ingqibamasondo* (to obliterate cattle tracks).[21] This is her way of showing gratitude to her in-laws for considering her as their bride.

Thereafter, the groom may send gifts to his bride's family. This is called *ukwembesa* (to cover or dress somebody) or *izibizo* (demands/gifts).[22] In

---

13 Horn and Van Rensburg "Practical Implications of the Recognition of Customary Marriages" 2002 *JJS* 54 59.

14 Nkosi "A Note on *Mandela v Executors, Estate Nelson Mandela* 2018 (4) SA 86 (SCA) and the Conundrum Around the Customary Marriage Between Nelson and Winnie Mandela" 2019 *SAPL* 1 9.

15 Sibisi "Consent and Other Ancillary Matters as Requirements for a Valid Customary Marriage: *LNM v MMM* (2020/11024) [2021] ZAGPJHC 563 (11 June 2021)" 2023 *PELJ* 1 12.

16 Nkosi and Van Niekerk "The Unpredictable Judicial Interpretation of Section 3(1)(b) of the Recognition of Customary Marriages Act 120 of 1998: *Eunice Xoliswa Ngema v Sifiso Raymond Debengwa* (2011/3726) [2016] ZAGPJHC 163 (15 June 2016)" 2018 *THRHR* 345.

17 Himonga, Nhlapo, Maithufi, Weeks, Mofokeng and Ndima *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) 103.

18 Bakker "The Validity of a Customary Marriage Under the Recognition of Customary Marriages Act 120 of 1998 With Reference to Section 3(1)(b) and 7(6) – Part 2" 2016 *THRHR* 357.

19 Sibisi "Is the Handing Over of the Bride Optional in Customary Marriages?" 2020 *De Jure* 90 93.

20 Sibisi 2020 *De Jure* 96.

21 Mathonsi and Gumede "Communicating Through Performance: *Izigiyo Zawomame* as Gendered Protest Texts" 2006 *SALALS* 483 484.

22 White "The Materiality of Marriage Payments" 2016 *ASA* 297 304.

many cases, *izibizo* will be the last of the pre-marital ceremonies. However, in other Zulu families, the bride's family may perform further ceremonies for their daughter – such as the coming-of-age ceremony called *umemulo*.[23] Some families may perform *umemulo* for each of their daughters, whereas others may perform it only for the eldest daughter, before any betrothal.[24] If it was not done before betrothal, it may have to be done just before the marriage. However, if it is performed just before marriage, it is called *umkhehlo* and the groom's family has a hand in the ceremony.[25] However, this ceremony is performed at the bride's residence.

During the *umemulo* or *umkhehlo* ceremony, a beast is slaughtered, and the parent(s) thank(s) their daughter for how she has carried herself. They thank her for the respect she has shown them. Though rare these days, they also thank her for not having children out of wedlock.[26]

The ceremonies above are flexible. The final stage of a Zulu customary marriage is when the bride is integrated into her new family. On the wedding day, the emissaries will fetch the bride from her home before dawn. Her family will hand her over to the emissaries who represent the groom's family. She is accompanied by some members of her family. Upon her arrival, the *ukuqhoyisa* (welcoming) beast is slaughtered. The hide of this beast symbolises *isidwaba*, a traditional garment for married women and those who are about to marry.[27] The bride must give her in-laws gifts, reciprocating *ukwembesa* or *izibizo*, as referred to above. Finally, the bride must be introduced to the ancestors through burning incense and being smeared with gall bladder. During these processes, the bride is counseled by senior women in her new family regarding what is expected of her. This may be followed by celebrations.

3 3 Waiver of the handing-over of the bride

As noted above, generally the integration of the bride commences with the bride being handed over by her family to the groom's family. It goes without saying that without the bride being handed over, she cannot be integrated. Arguably, without integration, the marriage loses any semblance of being a customary marriage. To ignore integration and the attendant ceremonies and rituals is to ignore the fact that a customary marriage is not just a union

---

[23] Magwaza *Orality and Its Cultural Expression in Some Zulu Traditional Ceremonies* (unpublished MA dissertation, University of Natal) 1993 29.

[24] *Ibid*.

[25] Shange (*Indigenous Methods Used to Prevent Teenage Pregnancy: Perspectives of Traditional Healers and Traditional Leaders* (unpublished Master of Social Works dissertation, University of KwaZulu-Natal) 2012 58) points out that during this ceremony, the bride is gifted blankets and money by members of the community to assist her to shoulder the costs of gifting her in-laws on her wedding day.

[26] Magwaza *Orality and Its Cultural Expression* 30; Mntambo (*Umemulo and Zulu Girlhood: From Preservation to Variations of Ukuhlonipha Nokufihla (Respect and Secrecy)* (unpublished MA dissertation, Rhodes University) 2020 9) submits that nowadays, *umemulo* is usually performed when a daughter finishes university studies or when she turns 21.

[27] Nyawose *"Living in Two Worlds": Optimizing Our Indigenous Knowledge Systems to Address the Modern Pandemic, HIV and AIDS* (unpublished DTech thesis, Durban University of Technology) 2013 1.

between those who are living; it is also a union of ancestors.[28] There are beliefs that if the crucial aspects are not adhered to, the marriage will not be recognised as such by the ancestors and this could cause problems for the descendants of the couple.[29]

Arguably, in its current application, the waiver of the handing-over of the bride is a machination of the courts. This is to say that it emanates from court decisions and not from any rule or practice of living customary law. As pointed out above, in those decided cases finding that the handing-over of the bride had been waived, none was a case in which there had been an explicit agreement by the parties to waive the physical handing-over of the bride; instead, the waiver is inferred by the court from the conduct of the bride and groom in cohabiting, and not so much from the conduct of their families.

In summary, if a man and a woman agree to marry each other and then commence cohabitation after an agreement regarding *ilobolo* – without complying with further customary marriage requirements, courts are likely to find that a customary marriage has been concluded. In *Mbungela v Mkabi*,[30] the parties commenced cohabitation after *ilobolo*.[31] They did not comply with any further marriage requirements.[32] The court found that a customary marriage had been concluded.[33] Courts are also likely to arrive at the same decision even if the parties in question had cohabited before reaching an agreement to marry each other. This is what happened in *Tsambo v Sengadi*.[34] The problem with *Tsambo v Sengadi* is that the court-inferred waiver is based on the continuation of an existing cohabitation. The decisions mentioned hereunder have been followed in subsequent decisions. Nonetheless, they have drawn criticism for ignoring precedent,[35] failing to ascertain living customary law, and distorting living customary law under the guise of gender equality.[36] One such precedent that has never really been overturned is a decision of the SCA in *Southon v Moropane*,[37] where it was emphasised that the handing-over of the bride is the most

---

28 Rudwick and Posel "Contemporary Functions of *Ilobolo* (Bridewealth) in Urban South African Zulu Society" 2014 *JCAS* 118 122.

29 See Ngema ("The Enforcement of the Payment of *Ilobolo* and Its Impact on Children's Rights in South Africa" 2013 *PELJ* 405 407), who states that there is a belief that ancestors would not permit a woman for whom *ilobolo* has not been delivered to have children. Nevertheless, if the growing number of children born out-of-wedlock is anything to go by, this belief is brought into question. However, it must be stated that ancestors operate differently.

30 *Supra*.

31 *Mbungela v Mkabi supra* par 4.

32 *Mbungela v Mkabi supra* par 7.

33 *Mbungela v Mkabi supra* par 30.

34 [2020] ZASCA 46.

35 Osman 2020 *Stell LR* 83; Manthwa 2021 *THRHR* 409–410 and Bapela and Monyamane 2021 *Obiter* 189.

36 Radebe "Assessing the Insurmountable Challenge in Proving the Existence of a Customary Marriage in Terms of Section 3(1)(*b*) of the Recognition of Customary Marriages Act 120 of 1998 and the Misplacing of Gender Inequality: *Tsambo v Sengadi* (244/19) [2020] ZASCA 46 (30 April 2020); *Sengadi v Tsambo*; *In re Tsambo* (40344/2018) [2018] ZAGPJHC 666; [2019] 1 All SA 569 (GJ) (8 November 2018)" 2022 *De Jure* 77 81–83.

37 [2014] ZASCA 76.

crucial requirement of a customary marriage; without it, there can never be a valid customary marriage.[38]

Among the various ceremonies above, *ilobolo* and the integration of the bride are the most crucial. This is a common feature in African marriages. Without these two ceremonies, there can never be a valid Zulu customary marriage. It is not clear whether *izibizo* and *ukwembesa* are crucial aspects of a Zulu customary marriage. However, these gifting ceremonies are prevalent in Zulu communities. It is harder to picture a Zulu marriage without these in contemporary Zulu practices. However, all the other ceremonies, including *ingqibamasondo*, *umemulo* and *umkhehlo*, are optional.

As noted above, the integration of the bride is the final stage of customary marriage and it comprises various events, some of which may be waived.[39] At the conclusion of this stage, the bride is confirmed as a member of the groom's family. The first step towards integration is the handing-over of the bride by her family to the family of the groom. The family of the groom receives their bride. A beast is slaughtered to welcome her into the family. She then hands gifts to selected members of the groom's family.

3 4 Living-customary-law examples of waiver of handing-over

The idea that the handing-over of the bride could be waived is not altogether foreign to customary law. For obvious reasons, the handing-over of the bride could be waived in cases of *ukuthwala* (to carry away) and *ukungena* (sororate marriage). In *ukuthwala*, a suitor or lover carries the woman off to his family.[40] His family must then inform the family of the bride that they have carried the bride away. Without getting into burdensome details regarding *ukuthwala*, it suffices to point out that it is one of the ways of initiating marriage talks.[41] It was also a way to pressurise a reluctant guardian to consent to the marriage.[42] Since the woman was already with the lover's family, there was no need for her to be handed over should the negotiations succeed. It was a matter of integrating the bride into her new family in marriage.[43]

In *ukungena*, a male relative is assigned to "look after" a widow.[44] The male relative is also assigned to look after the children of the deceased. Whatever seed he raises is that of the deceased.[45] Because the widow is

[38] Some scholars may criticise the reliance on precedent in customary law because it stultifies the development of customary law.

[39] Sibisi 2020 *De Jure* 96.

[40] Simons "Customary Unions in a Changing Society" 1958 *Acta Juridica* 320 330.

[41] Matshidze, Lee and Decide "Human Rights Violations: Probing the Cultural Practice of *Ukuthwala* in KwaZulu-Natal Province, South Africa" 2017 *Gender & Behaviour* 9007.

[42] Simons 1958 *Acta Juridica* 330. The author also points out that a young couple could opt for *ukuthwala* in order to avoid an arranged marriage with someone they did not love. *Ukuthwala* could also be resorted to in order to avoid an expensive wedding.

[43] Simons 1958 *Acta Juridica* 330.

[44] Braatvedt "The Zulu Customs *Ukuvusa* and *Ukungena*" 1940 *THRHR* 111 112; Zungu and Siwela "Isiko Lokuzila: Umnyombo Wengcindezelo Ovezwa Emanovelini *Ifa Ngukufa* Nethi *Ifa Lenkululeko*" 2017 *SAJAL* 75 83.

[45] Braatvedt 1940 *THRHR* 112.

already married to the family, and thus integrated into the family, there is no need for her to be handed over and re-integrated. It is a matter of informing the deceased, who is now an ancestor, that his brother or cousin is looking after his wife. Culturally, any children that may be born of *ukungena* marriage are those of the deceased. Nonetheless, *ukungena* does raise some important contemporary issues, such as the right of the sororate wife and children to inherit intestate from the sororate husband and any parental responsibilities and rights in relation to sororate children. However, these issues are beyond the scope of this article.

4 POTENTIAL PROBLEMS WITH INFERRING WAIVER OF HANDOVER

The thesis of this article concerns the problems that may arise when the court infers a waiver of the handing-over of the bride based on cohabitation. As noted above, the word from recent court decisions is that the physical handing-over of the bride may be waived, a symbolic handing-over taking its place. Courts infer this waiver of the handing-over of the bride from the conduct of the parties and their families. This conduct includes cohabitation of the bride and groom,[46] failure by the families to admonish the parties for their cohabitation,[47] attending each other's funerals,[48] and other conduct such as referring to the bride as "*makoti*".[49] The word "*makoti*" is a generic word that could mean engaged or married.[50] The common thread is that, if the parties agree on *ilobolo* and thereafter the bride and groom cohabit, regardless of whether the parties had already cohabited before *ilobolo*, courts are more inclined to find that a customary marriage has been concluded. This part of the article therefore discusses the problems that may arise from an inference of waiver.

4 1 A misdirection on the part of the courts

When a court infers that the handing-over of the bride has been waived, it misdirects itself on at least two grounds. First, it paints the requirements of customary marriages of the different ethnic groups with the same brush without ascertaining the facts. In *Mankayi v Minister of Home Affairs*[51] (one of the decisions that has since endorsed *Tsambo v Sengadi* and *Mbungela v Mkabi*), the court recognised that different communities might differ on how they enter into a customary marriage. The court went on to acknowledge that some people may say that they are not married when, in fact, what they mean is that their marriage has not been celebrated.[52] It is argued that this is an example of a court imposing marriage on people who do not regard

46 *Sengadi v Tsambo* 2019 (4) SA 50 (GJ) par 8.
47 *Sengadi v Tsambo supra* par 17.
48 *Mbungela v Mkabi supra* par 26.
49 *Tsambo v Sengadi supra* par 5.
50 Dladla, Hiner, Qwana and Lurie "Speaking to Rural Women: The Sexual Partnerships of Rural South African Women Whose Partners Are Migrants" 2001 *Society in Transition* 79 80.
51 *Supra*.
52 *Mankayi v Minister of Home Affairs supra* par 29.

themselves as married. The correct position is that people who adhere to customary law will not regard themselves as married if they have not complied with what they consider to be crucial aspects of a customary marriage. It is therefore undesirable to impose marriage on such people when they do not regard themselves as married.

Secondly, the court also misdirects itself in interpreting the wording of section 3(1)(*b*) of the RCMA. The relevant portion of this provision is that a customary marriage must be "negotiated and entered into or celebrated" in accordance with customary law. Courts are prepared to find that a customary marriage exists even if it has only been negotiated. In *FM v NR*,[53] the court stated the following:

> "Where the parties have consented to the customary marriage and agreement has been reached at the negotiation stage by the two families for the beginning of such marriage, the handing over of the bride becomes superfluous. The bride is not like goods that need to be delivered to the marital home. The reading of section 3(1)(b) suggests that it is sufficient if the marriage is 'negotiated and entered into or celebrated' in accordance with customary law."[54]

Clearly, the court ignored the wording of section 3(1)(*b*), which in addition to negotiation, requires that the marriage must be entered into or celebrated. It is submitted that the court did not consider that the use of the word "and" means that, in addition to being negotiated, the marriage must be entered into or celebrated in accordance with customary law. In other words, the requirements that the marriage must be "negotiated" and "entered into" are cumulative; whereas the word "or" between "entered into" and "celebrated" suggests that the parties have a choice whether or not to have a celebration – that is, in the absence of a celebration, the marriage must still be "entered into". It is trite that a customary marriage does not have to be celebrated. The celebration may be summarised.

4 2 *Ilobolo* concludes a customary marriage

By inferring a waiver of the handing-over of the bride and, incidentally, integration of the bride, the court is essentially saying that *ilobolo* alone concludes a customary marriage. In *Mankayi v Minister of Home Affairs*,[55] the court held that "once there has been an agreement on *lobolo* and the bride allowed to join her husband or his family a customary marriage has been formed."[56] In other words, there was no need for the bride to be formally handed over and integrated into her new family. Despite acknowledging that the mere delivery of *ilobolo* does not, on its own, conclude a customary marriage,[57] the court nevertheless found the marriage valid, although only *ilobolo* was delivered. It is argued that the decision may be interpreted as endorsing the conclusion that the mere act of delivering *ilobolo* concludes a customary marriage. This is problematic because earlier

53 [2020] ZAECMHC 22.

54 *FM v NR supra* par 35.

55 *Supra.*

56 *Mankayi v Minister of Home Affairs supra* par 30.

57 *Mankayi v Minister of Home Affairs supra* par 32.

decisions held that *ilobolo* alone does not conclude a customary marriage; in addition to *ilobolo*, the bride must be integrated.[58] These decisions have never proved to be contrary to what is observed.

South Africa is a pluralistic legal system that changes along with the changing values of the society. But some things take longer to change. A survey of key decisions indicates that no litigant in a case concerning customary marriage has ever alleged that there has been a change in practice from a formal handing-over to a symbolic one. In fact, in the trailblazer case for the symbolic handing-over – *Sengadi v Tsambo*[59] – the applicant did not allege a change in practice. Her case was that a customary marriage had been entered into between her and the deceased on the same day as *ilobolo* negotiations. Thereafter, the parties resumed cohabitation.[60] The bride was never properly handed over.[61] Instead of deciding the matter based on its facts, the court held that the handing-over of the bride had not been given an opportunity to adapt to the "socio-economic conditions and constitutional values".[62] It also held that a customary-law wife had "no freedom of opinion, autonomy or control" over her marital affairs if her husband's family insist that she be handed over by her family even though she and her husband had complied with section 3(1) of the RCMA.[63] This was an incorrect assertion by the court: one of the requirements of section 3(1) is that the marriage be negotiated and entered into or celebrated in accordance with customary law. Whether the marriage had been entered into in accordance with customary law was not decided. Instead, the court assumed that the custom of handing over the bride had evolved, without ascertaining this for a fact. It then inferred a symbolic handing-over.[64]

Equally interesting is that other legal commentators have argued that *ilobolo* is not a legal requirement for a customary marriage to be valid.[65] Does this mean that a valid customary marriage will be concluded if people who are above the age of 18 simply consent to each other that they will conclude a customary marriage and thereafter cohabit without any *ilobolo* negotiations or any handing-over? It is submitted that this is incorrect. *Ilobolo* is a legal requirement of a customary marriage under living customary law. It distinguishes a customary marriage from other marital unions.[66] It is the

---

58 *Ndlovu v Mokoena* 2009 (5) SA 400 (GNP); Van Niekerk 2014 *SAPL* 504; *Ngema v Debengwa* [2016] ZAGPJHC 163 par 24 (also referred to as *N v D*); Manthwa "*Lobolo*, Consent as Requirements for the Validity of a Customary Marriage and the Proprietary Consequences of a Customary Marriage: *N v D* (2011/3726) [2016] ZAGPJHC 163" 2017 *Obiter* 438 439 and Mwambene "The Essence Vindicated? Courts and Customary Marriages in South Africa" 2017 *AHRLJ* 35 45.

59 *Supra* n45.

60 *Sengadi v Tsambo supra* par 9.

61 *Sengadi v Tsambo supra* par 16.

62 *Sengadi v Tsambo supra* par 33.

63 *Ibid*.

64 *Sengadi v Tsambo supra* par 19.

65 Race and Gender Research Unit *The Recognition of Customary Marriages in South Africa: Law, Policy and Practice* 2012 University of Cape Town http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/FactSheets/CLS_RCMA_Factsheet_2012_Eng.pdf (accessed 2022-06-22) 2.

66 South African Law Commission *The Harmonisation of the Common Law and the Indigenous Law: Report on Customary Marriages Project 90* (1998) 49.

bedrock upon which customary marriages rest.[67] It may not be an express requirement, but it is very much alive in the RCMA.[68]

4 3 Uncertainty regarding the date of marriage

When a court infers a waiver of the handing-over of the bride, it creates uncertainty regarding the date of marriage. Three scenarios illustrate this issue. The first is one where a bride and groom, after *ilobolo* agreement, cohabit without a formal handing-over and integration. The second scenario envisages a bride and groom who do not cohabit after negotiations. The third scenario concerns a bride and groom who cohabit after negotiations and, after a passage of time, finally perform the formal handing-over and integration of the bride. In the first scenario, like *Tsambo v Sengadi* and *Mbungela v Mkabi*, courts are likely to find that the date of cohabitation is the date of the marriage. In the second scenario, no customary marriage will exist. In *Khambule v Mazibuko*,[69] *ilobolo* agreement was concluded and partial delivery was effected. However, the bride was not handed over and she did not cohabit.[70] The court found that a customary marriage had not been concluded.[71] The third scenario presents a problem. Will the courts use the date of *ilobolo* negotiations, the date of cohabitation, or the date of the official handing-over and integration?

The date of marriage is important for a number of reasons. It is important for a home affairs official who registers a marriage.[72] It is also important when a marriage is dissolved, either through death or divorce. According to the Intestate Succession Act,[73] a spouse may inherit from the deceased if the latter dies without a will.[74] The date of marriage will assist in determining if a person was a spouse at the time of death. For example, if it is accepted that the date of *ilobolo* agreement is the date of the marriage, a person will be a spouse if the deceased dies after the *ilobolo* agreement. The date of marriage is also important in divorce proceedings. For instance, a court is required to consider the duration of the marriage in order to make an order regarding spousal maintenance[75] and forfeiture of patrimonial benefits.[76] Decisions on these issues are partially dependent on the duration of the marriage.

---

67 Mofokeng "The *Lobolo* Agreement as the 'Silent' Prerequisite for the Validity of a Customary Marriage in Terms of the Recognition of Customary Marriages Act" 2005 *THRHR* 277 282.

68 S 4(4)(*a*) of the RCMA requires a registering officer to record details of any *ilobolo* agreed to. Although the key word is "any", it is doubtful that any customary marriage has ever been registered in the absence of an agreement regarding *ilobolo*. Arguably, a person may have to litigate to achieve this.

69 [2022] ZAFSHC 152.

70 *Khambule v Mazibuko supra* par 3.

71 *Khambule v Mazibuko supra* par 26–28.

72 S 4(4)(*a*) of the RCMA requires a registering officer to record the date of the marriage.

73 81 of 1987.

74 There are various provisions of this Act that provide for spousal inheritance. See generally s 1.

75 S 7(2) of the Divorce Act 70 of 1979.

76 S 9(1) of the Divorce Act.

In light of the decisions above, the effect of a finding that the handing-over of the bride is unnecessary is that the date of *ilobolo* agreement will be the date of the marriage. The problem arises when the parties fully comply with all the requirements, including the handing-over and integration of the bride. If all the requirements of a marriage are complied with on the same day, the issue is simple. The date on which all the requirements were complied with will be the date of the marriage. However, what will happen in cases such as the third scenario? What will be the date of the marriage if *ilobolo* agreement and the handing-over of the bride do not take place on the same day? Will it be the date of the agreement or the later date of the handing-over? What will the date of the marriage be should such parties finally decide to comply with the physical handing-over of the bride and incidentally integrate her into the groom's family? This physical handing-over could be years after *ilobolo* agreement and cohabitation. Is it the date of *ilobolo* agreement, the date of cohabitation, or the date of the handing-over and integration?

In *LNM v MMM*, *ilobolo* agreement took place on 24 May 2019,[77] and the parties cohabited after that. On 28 and 29 June 2019, the bride was handed over to the groom's family;[78] she was integrated by informing ancestors that she was now part of the family.[79] The court held that the date of the marriage was 29 June 2019, which was the date on which she was finally integrated.[80] In *Mbungela v Mkabi*, the date of the negotiations was held to be the date of the marriage. In *Tsambo v Sengadi*, the date of the negotiations and resumption of cohabitation (these happened on the same day in this case) was seen as the date of the marriage. From this, one can deduce that where the bride has been formally handed over, the date of the handing-over, and incidentally integration, will be the date of the marriage. If there was no handing-over, the date of the negotiations would be the date of the marriage, provided that the parties cohabited. The problem with this approach is that it is not an established rule under living customary law. This being the case, a bride who has not been formally handed over has to resort to the court. The number of cases of this nature supports this claim.[81] It is submitted that court decisions that are not founded on living customary law only assist litigants financially; beyond this, one doubts whether such litigants get any meaningful acceptance into the families into which the court says they are married. Furthermore, in the absence of a court order, there is no certainty regarding the event in which one may say that a customary marriage has been concluded.

4 4 Choice of matrimonial property system

The inference of waiver does not give parties an opportunity to choose a matrimonial property system. It is submitted that (because of different cultural practices) some people do not intend, by negotiating and delivering

77 *LNM v MMM* [2021] ZAGPJHC par 7.

78 *LNM v MMM supra* par 9.

79 *Ibid*.

80 *LNM v MMM supra* par 34.

81 This assertion is based on the author's reading of the Southern African Legal Information Institute www.saflii.org (accessed 2023-03-16).

ilobolo, to conclude a customary marriage. It is well known that African people do deliver *ilobolo* even where they intend to conclude a civil marriage.[82] Because of this well-known practice, one cannot loosely infer that the mere act of delivery of *ilobolo* is consistent with a customary marriage. Therefore, when a court infers waiver of the handing-over of the bride based on cohabitation before or after *ilobolo* agreement, the parties will automatically be married in community of property. (In terms of section 7(2) of the RCMA, a new monogamous customary marriage is by default in community of property.)

If the parties to this monogamous customary marriage are not happy with the default community of property, they may change it through a stringent process set out in section 21 of the Matrimonial Property Act (MPA).[83] This section provides for changing the matrimonial property system. The parties must first bring a joint application to change the matrimonial property system.[84] This requirement alone may prove difficult, especially when the relationship between the parties has become sour, which is usually the time when parties approach the court for orders declaring their marriages valid. Secondly, the parties must satisfy the court that there are sound reasons for the proposed change.[85] Thirdly, sufficient notice must have been given to all their creditors.[86] Finally, no other person must be prejudiced by the proposed change.[87] The court may order that the default matrimonial property system no longer applies and authorise the parties' entry into an antenuptial contract.[88] If the monogamous customary marriage was purportedly entered into before the commencement of the RCMA, the parties should move this application in terms of section 7(4)(*a*) of the RCMA.[89]

The position is a bit complicated in the case of a polygynous customary marriage. It suffices to say that the parties will not get the opportunity to conclude a court-approved contract as required by section 7(6) of the RCMA. This provision requires a husband who wishes to enter into a subsequent marriage with another woman to make a court application to approve a written contract regulating their future matrimonial property system. The existing and potential wife must be joined in this application. If this requirement of a court-approved contract is not complied with, the marriage between the husband and the second wife will be valid, but it will be out of community of property.[90] Unfortunately, there is nothing in the RCMA that suggests that the matrimonial property system in polygynous customary marriages may be changed. Section 7(5) of the RCMA specifically provides that section 21 of the MPA does not apply to these

---

82 Knoetze "The Modern Significance of *Lobolo*" 2000 *JSAL* 532 536.

83 Matrimonial Property Act 88 of 1984.

84 S 21(1) of the MPA.

85 S 21(1)(*a*) of the MPA.

86 S 21(1)(*b*) of the MPA.

87 S 21(1)(*c*) of the MPA.

88 *Ibid*.

89 The requirements under this provision are similar to s 21 of the MPA, save that the notice must be served to all creditors of the spouses who are owed amounts exceeding R500 or such amount that may be determined by the Minister of Justice in the *Gazette*. See generally s 7(4)(*a*).

90 See generally *MM v MN* 2013 (4) SA 415 (CC).

marriages. It is also doubtful whether the parties may approach the courts in terms of section 7(6) of the RCMA. This provision only applies before the subsequent marriage, but not after.

Perhaps the biggest impediment in section 21 of the MPA is that it requires litigation in a high court. This is problematic as many people are not in a position to afford litigation.

4 5 Cohabitation as the basis for implied waiver and potential discrimination

It has been pointed out that the basis on which courts rely to infer that parties have waived the handing-over of the bride is cohabitation, and that a study of *Mbungela v Mkabi*, *Tsambo v Sengadi* and like decisions[91] shows that courts are more inclined to find that a customary marriage has been concluded where the parties have cohabited. In so doing, courts attach more meaning than the parties may have anticipated their cohabitation would bear. In *Tsambo v Sengadi*, the court *a quo* attached too much credence to the cohabitation. It held that by allowing the cohabitation, the father of the deceased had waived the need for the handing-over of the bride and had opted for a symbolic delivery of the bride. This conclusion is problematic because the parties had cohabited before the *ilobolo* agreement; after this agreement, they simply resumed cohabitation.[92] In addition, the families were not involved in the decision to cohabit. In *Mbungela v Mkabi*, the court propelled the idea that negotiations followed by cohabitation conclude a customary marriage.[93]

In light of the above decisions, would courts find in favour of the existence of a customary marriage in the absence of cohabitation after negotiations? In some communities, after negotiations, the woman remains at her homestead. She awaits the day when she will be officially handed over to her new family and integrated. In the unfortunate event of death or the relationship becoming sour, will the court decide that a valid customary marriage has been concluded? It is submitted that this is highly unlikely. As noted above, in *Khambule v Mazibuko,*[94] the parties concluded the *ilobolo* agreement and partial delivery was effected. However, the bride was not handed over, and neither did she cohabit.[95] The court found that a customary marriage had not been concluded.[96]

It should be noted that some people decide not to cohabit on cultural and religious grounds. Consequently, a person who decides not to cohabit out of strict adherence to culture or religion risks courts not finding in their favour. It is submitted that, unless the courts provide another basis (other than cohabitation) for inferring a waiver of the handing-over, there is a risk that decisions that do not favour persons who decide not to cohabit on cultural or

91 Such as *FM v NR supra* and *Mankayi v Minister of Home Affairs supra*.
92 *Tsambo v Sengadi supra* par 26.
93 *Mbungela v Mkabi supra* par 27.
94 *Supra*.
95 *Khambule v Mazibuko supra* par 3.
96 *Khambule v Mazibuko supra* par 26–28.

religious grounds could be seen as indirect discrimination on cultural or religious grounds. This is clearly untenable and possibly unconstitutional.

Alternatively, the courts could just declare that the mere act of concluding an *ilobolo* agreement and at least partial delivery thereof concludes a customary marriage. However, this will be problematic because of its discord with lived realities, and others will also argue that the declaration is not supported by living customary law. A one-size-fits-all decision is undesirable in certain instances. Nonetheless, it is submitted that by failing to ascertain the contents of living customary law, courts are already making one-size-fits-all decisions.

5 CONCLUSION

In addition to *ilobolo*, it is essential that the bride be handed over to her new family where she will be integrated. Integration of the bride involves ancestors being informed that the bride is a new member of the family. Without the handing-over, there is no bride to integrate into the new family. Nonetheless, the courts have found that the handing-over of the bride is not mandatory. Without recourse to any empirical evidence, some court decisions simply infer that the parties had waived the handing-over of the bride. To reach this decision, the courts have often relied on cohabitation between the parties. The effect of these decisions is that without the handing-over, *ilobolo* alone concludes a customary marriage. This is, in turn, problematic in light of some arguments that *ilobolo* is not a requirement of a customary marriage.

This article has discussed the different cultural practices regarding marriage. It has shown that decisions such as *Mbungela v Mkabi* and *Tsambo v Sengadi* do not find support in living law. These decisions have the potential to distort customary law and create a number of problems. These problems include misdirection on the part of the court. They also include difficulty in determining the date of marriage. The article has also shown that an inference of waiver does not afford parties the opportunity to choose their own matrimonial property system; instead, they find that they are suddenly married in community of property. The decision in *LNM v MMM* bears testimony to this. Finally, it has been argued that implied waiver based on cohabitation may discriminate against those who decide not to cohabit on the grounds of culture or religion. A case in point in this regard is *Khambule v Mazibuko.*

Critiquing South Africa's General Intelligence Laws Amendment Bill: Drawing Lessons from Germany's Comprehensive Surveillance Oversight[1]

Casper Lötter
BProc MA, PhD
School of Philosophy, North-West University, Potchefstroom, South Africa
https://orcid.org/0000-0001-7787-1419

SUMMARY

Governments have a responsibility to manage intelligence surveillance oversight without overreach as a fundamental principle of democracy. This delicate equilibrium can only be achieved through collaboration with civil society and a strong allegiance to the rule of law. The article delves into and underscores the chasm that has opened between a weak oversight function and an unchecked, inadequately regulated overreach in South African intelligence surveillance, a remnant of the Zuma era. It commences with an overview of South Africa's General Intelligence Laws Amendment Bill 40 of 2023 and goes on to provide a synopsis of Germany's oversight function. A comparative analysis of the German intelligence oversight model is undertaken, examining its strengths and vulnerabilities. Principled, measured and calibrated recommendations are proposed, based on best practices related to the German oversight model.

> "South Africa faces no significant threats to national security, especially terrorist threats, although the presence of terrorists in the country has been an enduring source of speculation. So, it could be assumed that the region should have little reason to invest in the building of surveillance states. Evidence is emerging that suggests this assumption is incorrect."
>
> *Jane Duncan*[2]

---

[1] This contribution is dedicated to Amanda Emmanuel, whose guidance and mentorship were instrumental in the development of the author's first three papers on the regulatory frameworks for cyber criminology – viz. the Cybercrimes Act, the Social Media Bill and GILAB ([General Intelligence Laws Amendment Bill], the focus of this article). The author is profoundly grateful for her patient and insightful guidance.

[2] Duncan *Stopping the Spies: Constructing and Resisting the Surveillance State in South Africa* (2018) 12.

> "With this reform [the 2021 reform of the BND Act], it [Germany] cements its position among the few democracies in the world that offer comprehensive legislation and important safeguards regarding the use of bulk powers for foreign intelligence collection."
>
> *Thorsten Wetzling*[3]

> "Those who cannot remember the past are condemned to repeat it."
>
> *George Santayana (1863–1952), contemporary Spanish philosopher*

1 INTRODUCTION

In the preface to her informative book, *Stopping the Spies: Constructing and Resisting the Surveillance State in South Africa*, Duncan poses the question whether surveillance technology in South Africa is "being used for the democratic purpose of making people safer, or for the repressive purpose of social control, to pacify citizens and to target those considered to be politically threatening to ruling interests?"[4] In continuing her research trajectory, this article examines the background to the General Intelligence Laws Amendment Bill[5] (GILAB) and the rationale behind its (recent) tabling in Parliament some five years after the publication of her book. Although the author of this article set out to consider GILAB, it became clear early on that looking only at this one legislative instrument would not suffice, as legislation on digital surveillance and its oversight is spread across multiple Acts of Parliament and even presidential proclamations. In this respect, South Africa mirrors the situation in Germany.

Duncan suggests that her book "should therefore be considered a single case study of surveillance in South Africa, rather than a comparative study of several countries".[6] In contrast, this article's contribution is precisely what hers is not – a comparative study of the German case aimed at gauging what lessons South Africa might draw from the German experience to achieve a fair and legitimate balance between oversight and overreach. As justification, the article refers to Wetzling's contention, written within a European context, that "there still remains a notable dearth of comparative research on intelligence oversight".[7] The reason Germany is chosen is that research suggests that the G10 Commission and parallel agencies (which oversee and approve all the German intelligence community's telecommunications surveillance measures)[8] represent a best-in-class

---

3 Wetzling "Intelligence Oversight Collaboration in Europe" in Bigo, McCluskey and Tréguer (eds) *Intelligence Oversight in Times of Transnational Impunity: Who Will Watch the Watchers?* (2024) 247 253.

4 Duncan *Stopping the Spies* Preface xvii.

5 40 of 2023.

6 Duncan *Stopping the Spies* 16.

7 Wetzling in Bigo *et al Intelligence Oversight* 248.

8 Miller "Intelligence Oversight – Made in Germany" in Goldman and Rascoff (eds) *Global Intelligence Oversight: Governing Security in the Twenty-First Century* (2016) 257 259.

model.[9] The next step is to introduce Germany's oversight function (G10 and related agencies).

Miller summarises the salient features of Germany's G10 (a quasi-judicial body that controversially excludes the jurisdiction of the ordinary courts), saying that this commission "provides a comprehensive framework for the German intelligence community's efforts to collect telecommunications information".[10] This framework is sometimes challenged in the Constitutional Court to ensure its effectiveness in achieving an appropriate balance between public safety, personal autonomy and privacy, and guarding against abuse of power. The initial motivation for this article stemmed from the thought that the G10 Commission and Parliamentary Control Panel define levels of pre-approval and monitoring of surveillance that may be lacking in South Africa. Accordingly, South Africa may find value in adopting Germany's proportionality-driven oversight model in oversight mandates in order to guard against excessive monitoring under GILAB. This implies that justification of surveillance measures is sought on a case-by-case basis rather than bulk monitoring.

Although intelligence agencies are loath to admit that surveillance should be balanced with the public's need for privacy, the danger inherent in self-censorship is not new. Duncan observes wisely:

> "Being watched, or the fear of being watched, has a chilling effect in that it may dissuade people from expressing their innermost thoughts, and, when they do, they may alter what they have to say to please those who they think may be watching."[11]

Against this background, a brief roadmap for this contribution provides first, an overview of GILAB and similar legislation dealing with digital surveillance and its oversight, commenting on key provisions of these Acts, which may or may not be subject to the amendment; and secondly, an overview of Germany's oversight function. This will prepare the groundwork for a comparison between GILAB and Germany's oversight model (G10) to identify and consider critically the gaps in GILAB. Before proffering a conclusion, this contribution examines a wide range of thoughtful recommendations to fortify GILAB and (bearing in mind President Zuma's legacy) achieve the necessary balance between oversight and overreach.

2 OVERVIEWS OF GILAB

Recent legislative developments in South Africa have created a mosaic of legislation dealing with cybercrimes, social media and intelligence, generally. The author refers to the Cybercrimes Act,[12] the Films and Publications Act[13] and the General Intelligence Laws Amendment Bill[14] (GILAB), respectively. The Cybercrimes Act criminalises acts such as identity theft, hacking and

9 Wetzling in Bigo *et al Intelligence Oversight* 253.
10 Miller in Goldman and Rascoff *Global Intelligence Oversight* 265.
11 Duncan *Stopping the Spies* 9.
12 19 of 2020.
13 11 of 2019.
14 40 of 2023.

malicious code, while the Films and Publications Act restricts the distribution of certain online content. Finally, GILAB permits monitoring of online content and networks for national security purposes. In this respect, intelligence oversight legislation in South Africa certainly resonates with the situation in Germany, which is fragmented in nature,[15] as noted above. For example, GILAB attempts to consolidate or amend no less than 12 Acts of Parliament.[16] The more-than-thirty Acts that Germany is looking to consolidate are referred to later in the article.

What interests the author in this contribution is the overlap between these different legislative instruments in respect of the interests they aim to protect or advance. It would be worth considering how these three laws align or conflict, and to examine the discrepancies and synergies that exist in their interaction. However, this contribution restricts its examination to what GILAB (and related instruments) can gain from a comparative investigation with Germany's intelligence oversight legislative framework. For instance, apart from Nigeria and Kenya (in the shape of Boko Haram or al-Shabaab, respectively), no sub-Saharan country (save for Mozambique) has been subject to terror threats.[17] Accordingly, the question pursued in this contribution makes the justification of more stringent provisions of GILAB (and related legislation) questionable. As for the rationale for the Bill, it "is meant to respond to major criticisms of the State Security Agency during Zuma's presidency".[18]

Nevertheless, Duncan reports:

> "In 2005, abuses of the NCC's [National Communications Centre's] surveillance capacities were confirmed by the statutory intelligence watchdog, the Inspector General of Intelligence, who found that the country's bulk scanning facilities had been used to keep South Africans under surveillance during the country's bruising presidential succession battle, including senior members of the ruling party, the opposition, businessmen and officials in the public service. So, the organ of state that has the greatest capacity to conduct mass surveillance is also the one that is least regulated by law. *This capacity is so intrusive that its use should be authorised by primary legislation*."[19] (own emphasis)

The last observation by Duncan, in the passage quoted above, is important since it refers to the fact that President Zuma centralised the four intelligence agencies in 2009 by *presidential proclamation* rather than by way of primary legislation that is subject to debate by and approval of Parliament.[20] It is criticism such as this by Duncan (widespread unlawful mass surveillance of the public's digital communications) that constitutes the rationale behind the

---

15 Wetzling in Bigo *et al Intelligence Oversight* 250.

16 Duncan "South Africa's New Intelligence Bill Is Meant to Stem Abuses – What's Good and Bad About It" (11 January 2024) https://theconversation.com/south-africas-new-intelligence-bill-is-meant-to-stem-abuses-whats-good-and-bad-about-it-220473 (accessed 2024-03-10).

17 Duncan *Stopping the Spies* 12.

18 Duncan https://theconversation.com/south-africas-new-intelligence-bill-is-meant-to-stem-abuses-whats-good-and-bad-about-it-220473.

19 Duncan *Stopping the Spies* 13.

20 Engelbrecht "SSA Takes Shape, Legislation To Follow" (6 June 2011) https://www.defenceweb.co.za/security/national-security/ssa-takes-shape-legislation-to-follow/ (accessed 2024-03-18).

proposed amendments to GILAB. This is so even though the National Communications Centre (NCC)'s unlawful activities overlap with the lawful interception function of the Regulation of Interception of Communications and Provision of Communication-Related Information Act[21] (RICA).

Duncan makes a valuable differentiation between a set of three related concepts and it is worth understanding these differences at an early stage to be able to gauge the discussion that follows. First, she explains the difference between human intelligence and signals intelligence (SIGINT): the former refers to physical intelligence gathering (such as shadowing suspects or infiltrating criminal or terrorist organisations); the latter relates to "intelligence gathered from the surveillance of electronics networks, including telemetry intelligence, electronic intelligence and communications intelligence (or COMINT)".[22] In this contribution, the focus lies on the latter phenomenon.

Secondly, Duncan also draws a careful distinction between targeted surveillance and mass, untargeted surveillance.[23] The former involves a reasonable suspicion that a particular individual or group has committed a crime or is in the process of committing a crime or intends to commit a crime in the future, while the latter is self-explanatory.

Thirdly, she also makes a clear distinction between monitoring and surveillance:

> "Monitoring involves the intermittent observation of communications over a period of time without specific pre-defined objectives. Surveillance, on the other hand, involves much closer continuous and systematic observation for analysis with specific objectives in mind, and may involve the collection and retention of communications for these purposes."[24]

Like Duncan, this article is also more concerned with the surveillance of communications than with monitoring. The reason is that surveillance is more likely to be unregulated (as is the case with the NCC) than monitoring and carries with it the inherent risks associated with a lack of accountability.

In the case of the NCC, unlawful surveillance activities overlapping the lawful functions permitted under RICA seems to have been the norm in the run-up to the introduction of GILAB. Duncan comments on this phenomenon with the terse observation: "This capacity is so intrusive that its use should be authorised by primary legislation."[25] As a result of this and other criticism (notably the 2018 High-Level Review Panel on the State Security Agency (SSA) and the Zondo Commission of Inquiry into State Capture),[26] GILAB and the preceding concept Bill were introduced.

Five key features (critically considered) of the Bill (the General Intelligence Laws Amendment Bill[27] [GILAB]) are reviewed below.

---

21 70 of 2002.

22 Duncan *Stopping the Spies* 5.

23 Duncan *Stopping the Spies* 9.

24 Duncan *Stopping the Spies* 10.

25 Duncan *Stopping the Spies* 13.

26 These are discussed at greater length and in detail below.

27 [B40-2023].

1. The Bill streamlines and refurbishes the National Strategic Intelligence Act,[28] the Intelligence Services Act[29] and the Intelligence Services Oversight Act[30] by undoing the State Security Agency.
2. The Bill "reconfigure[s] the intelligence services into the South African Intelligence Agency, the South African Intelligence Service, the National Communications Centre and the South African National Academy of Intelligence".[31]

Segell suggests that

> "[t]he uncovering of the misuse of state funds is known as the Infogate scandal. All subsequent reforms, including those to suit new operational environments and democratization, were all influenced by the trauma of this gross misconduct. The following reforms had the transparency in the use of state funds as their key element and aimed to make the intelligence sector more accountable for its actions and activities."[32]

By the same token, it is argued that President Zuma's misuse and repurposing of the SSA since 2009[33] was the primary mover for the reforms that resulted in GILAB. The SSA is the successor to the National Intelligence Service (NIS), which for its part succeeded the notorious Bureau of State Security (BOSS). BOSS was founded in 1968 and was accused of torture, assassinations and underhand tactics during the apartheid era.[34] As News24 reported in September 2021, the SSA came about in 2009 after a fusion of four government entities, namely the National Intelligence Agency, the Domestic Intelligence Service, the South African Secret Service and the Foreign Service.[35] In her assessment of the findings of the Zondo Commission of Inquiry into State Capture, insofar as these are relevant for intelligence oversight, Duncan argues:

> "In my view, the Zondo report is a globally significant example of radical transparency around intelligence abuses. But it lacks the detailed findings and recommendations to enable speedy prosecutions. It also fails to address the broader threats to democracy posed by unaccountable intelligence." [36]

---

28 39 of 1994.

29 65 of 2002.

30 40 of 1994.

31 Paterson and Pretorius "South Africa: Controversial Intelligence Legislation Finally Introduced to Parliament" (23 November 2023) https://bowmanslaw.com/insights/data-protection/south-africa-controversial-intelligence-legislation-finally-introduced-to-parliament/ (accessed 2024-03-04).

32 Segell "Infogate Influences on Reforms of South Africa's Intelligence Services" 2021 20(1) *Connections QJ* 61 62 https://doi.org/10.11610/Connections.20.1.04.

33 Friedman "Zuma's Abuse of South Africa's Spy Agency Underscores Need for Strong Civilian Oversight" (3 February 2021) https://theconversation.com/zumas-abuse-of-south-africas-spy-agency-underscores-need-for-strong-civilian-oversight-154439 (accessed 2024-03-10).

34 Segell 2021 *Connections QJ* 64 68.

35 Felix "Merger of Spy Agencies Led to Cabinet Ministers Giving SSA Operatives 'Illegal Instructions'" (15 September 2021) https://www.news24.com/news24/southafrica/news/merger-of-spy-agencies-led-to-cabinet-ministers-giving-ssa-operatives-illegal-instructions-20210915 (accessed 2024-03-18).

36 Duncan "Zondo Commission's Report on South Africa's Intelligence Agency Is Important But Flawed" (12 July 2022) https://theconversation.com/zondo-commissions-report-on-south-africas-intelligence-agency-is-important-but-flawed-186582 (accessed 2024-03-11).

Considering Duncan's remarks, the question still to be answered is whether GILAB manages to avoid the pitfalls of the intelligence (and intelligence oversight) legislation that has preceded it. In another words, is GILAB fit for purpose?

3. The definition of "national security" is amended but remains vague and potentially open to abuse by government. "National security" is defined as:

> "the capabilities, measures and activities of the State to pursue or advance – (*a*) any threat; (*b*) any potential threat; (*c*) any opportunity; (*d*) any potential opportunity; or (*e*) the security of the Republic and its people …"[37]

This mandate is so broad that, as Duncan aptly puts it: "[It] allows the intelligence services to undertake any activity that could advance South Africa's interests. This is regardless of whether there are actual national security threats."[38] This said, GILAB nevertheless represents a paradigm shift from state security (protecting those in power) to a human-security definition of national security (encompassing such threats as poverty, underdevelopment, deprivation[39] and freedom from marginalisation as well as unjustified discrimination).[40]

4. The right to citizens' privacy remains compromised.

Similar to what happened in Germany in May 2021, South Africa's Constitutional Court[41] ruled in February 2021 that sections of RICA were unconstitutional, and gave the government three years to rectify the flaws in the legislation. Once again, weaknesses in the RICA legislation were exploited by rascal elements in the intelligence community.[42]

The Constitutional Court judgment, referred to above, highlighted six serious concerns about RICA, namely:

a) Suspects under surveillance need not be told that they have been under surveillance[43] – that is, there is no so-called "post-surveillance notification regime". The position in Denmark and Germany is to notify the subject after the surveillance is concluded provided such notification

---

37 Parliament of the Republic of South Africa "General Intelligence Laws Amendment Bill" (2023) B40_2023_General_Intelligence_Laws_Bill.pdf (parliament.gov.za) (accessed 2024-03-16).

38 Duncan https://theconversation.com/south-africas-new-intelligence-bill-is-meant-to-stem-abuses-whats-good-and-bad-about-it-220473.

39 Newman "Critical Human Security Studies" 2010 36(1) *Review of International Studies* 77–94, in general.

40 MacFarlane and Khong *Human Security and the UN: A Critical History* (2006), in general.

41 *Amabhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services*; *Minister of Police v Amabhungane Centre for Investigative Journalism NPC* [2021] ZACC 3; 2021 (4) BCLR 349 (CC); 2021 (3) SA 246 (CC).

42 Duncan "South Africa's Surveillance Law Is Changing But Citizens' Privacy Is Still at Risk" (8 October 2023) https://theconversation.com/south-africas-surveillance-law-is-changing-but-citizens-privacy-is-still-at-risk-214508 (accessed 2024-03-10).

43 *Amabhungane supra* par 45. The court held that "[b]ecause of its likely outcomes, post-surveillance notification will go a long way towards eradicating the sense of impunity which certainly exists. The concomitant will be a reduction in the numbers of unmeritorious intrusions into the privacy of individuals."

is viable under the circumstances.[44] Internationally, the test is whether such notification will jeopardise the purpose of the investigation.

b) The designated RICA judge lacks independence insofar as their appointment and renewal are concerned.[45]

c) The application process is skewed in favour of the surveillance and intelligence authorities: only one side is heard before the order is granted.[46] Amabhungane suggested during argument that a public advocate (with the necessary security clearance) be appointed to represent the unrepresented respondent during the proceedings.[47]

d) RICA cannot guarantee safe management of the data intercepted,[48] or the so-called issue relating to the "management of information". This is a reference to the way the surveillance data (or the data obtained through surveillance) is handled (examined, copied, shared, sorted through and used), stored, and eventually destroyed.

e) Lawyers and journalists have a duty to keep their sources and/or communications private and confidential, but this professional obligation is not recognised nor protected by the legislation.[49]

f) The State's use of section 205 of the Criminal Procedure Act[50] to access metadata (data about a person's communication),[51] is permissible as RICA allows for the use of procedures other than those provided for in the Act.[52] Section 205 of the CPA reads as follows:

> *"205 Judge, regional court magistrate or magistrate may take evidence as to alleged offence*
>
> (1) A judge of a High Court, a regional court magistrate or a magistrate may, subject to the provisions of subsection (4) and section 15 of the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002, upon the request of a Director of Public Prosecutions or a public prosecutor authorized thereto in writing by the Director of Public Prosecutions, require the attendance before him or her or any other judge, regional court magistrate or magistrate, for examination by the Director of Public Prosecutions or the public prosecutor authorized thereto in writing by the Director of Public Prosecutions, of any person who is likely

---

44 § 5 read with § 12(2) of the [German] Act on Restrictions on the Secrecy of Mail, Post and Telecommunications, June 26, 2001, BGBL. I at 1254, 2298.

45 *Amabhungane supra* par 92–94.

46 S 16(7)(a) of RICA provides that "[a]n application must be considered [,] and an interception direction issued without any notice to the person or customer to whom the application applies and without hearing such person or customer." In *Amabhungane supra,* the court held at par 96: "[T]he designated Judge is not in a position meaningfully to interrogate the information. For that reason, as evidenced by the example of the surveillance of Mr Mzilikazi wa Afrika and Mr Stephen Hofstatter, surveillance directions may be issued on unadulterated lies."

47 *Amabhungane supra* par 99.

48 *Amabhungane supra* par 107–108. The court emphasised that "there is a real risk that the private information of individuals may land in wrong hands or, even if in the 'right' hands, may be used for purposes other than those envisaged in RICA."

49 *Amabhungane supra* par 119.

50 51 of 1977.

51 Hunter *Cops and Call Records: Perspectives on Privacy, Policing and Metadata in South Africa* (2020) https://www.mediaanddemocracy.com/uploads/1/6/5/7/16577624/cops_and_call_records_web_masterset_26_march.pdf.

52 *Amabhungane supra* par 129–135.

> to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: Provided that if such person furnishes that information to the satisfaction of the Director of Public Prosecutions or public prosecutor concerned prior to the date on which he or she is required to appear before a judge, regional court magistrate or magistrate, he or she shall be under no further obligation to appear before a judge, regional court magistrate or magistrate.
>
> [Sub-s. (1) substituted by s. 59 of Act 70 of 2002.]
>
> (2) The provisions of sections 162 to 165 inclusive, 179 to 181 inclusive, 187 to 189 inclusive, 191 and 204 shall mutatis mutandis apply with reference to the proceedings under subsection (1).
>
> (3) The examination of any person under subsection (1) may be conducted in private at any place designated by the judge, regional court magistrate or magistrate.
>
> (4) A person required in terms of subsection (1) to appear before a judge, a regional court magistrate or a magistrate for examination, and who refuses or fails to give the information contemplated in subsection (1), shall not be sentenced to imprisonment as contemplated in section 189 unless the judge, regional court magistrate or magistrate concerned, as the case may be, is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order.
> [S. 205 substituted by s. 11 of Act 204 of 1993.]"

The point to grasp is that section 205 of the Criminal Procedure Act contains a much lower privacy threshold than does RICA and is thus more susceptible to abuse. The key question is whether section 36(1) of the Constitution justifies the invasion and hence limitation of the rights to privacy and dignity mandated by RICA.[53] Unaccountable and unjustified intelligence poses a serious threat to democracy.

5. GILAB "seeks to broaden intelligence powers drastically but fails to address longstanding weaknesses in their oversight"[54] despite being intended as a response to the criticism levelled at the SSA under the tenure of Zuma. Abuses of intelligence mandates for illegal and nefarious motives motivated Duncan to recommend curtailing these mandates as well as trimming the powers allocated to exercise them.[55]

Against the backdrop of the foregoing, there exist several gaps or disconnects in both GILAB and RICA that need to be addressed. This is highlighted in the discussion under heading 5 where proposed enhancements to bolster GILAB and related legislation concerning digital intelligence gathering and the oversight cluster are explored. Before proceeding with a comparative analysis of the German digital surveillance and oversight framework vis-à-vis South Africa, the German oversight function is considered.

---

53 *Amabhungane supra* par 37.

54 Duncan https://theconversation.com/south-africas-new-intelligence-bill-is-meant-to-stem-abuses-whats-good-and-bad-about-it-220473.

55 *Ibid*.

3 OVERVIEW OF GERMANY'S OVERSIGHT FUNCTION

The G10 Act[56] (the so-called *Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses* enacted by the *Bundestag* in 1968) authorises the BND, the *Verfassungsschutzämter*, and the Military Counterintelligence Service (MAD) to participate in targeted telecommunications monitoring.

Even though article 10 of the Basic Law[57] (which serves as Germany's Constitution) guarantees that "the privacy of correspondence, posts and telecommunications shall be inviolable", the G10 Commission both constrains as well as permits the State's intrusion into telecommunications privacy. On top of this, the German Constitution may also, as is the case under section 36 of the South African Constitution,[58] curb the right to telecommunications privacy. For purposes of national security, this entails two further advantages afforded to the State.

First, there is no need to alert a subject to the fact that they were subjected to surveillance, and secondly, these surveillance activities may be conducted by "agencies and auxiliary agencies appointed by the legislature" and need not be carried out by members of the judiciary.[59] Miller argues, persuasively in the author's view, that the German Constitutional Court's 1970 ruling, which legitimised the G10 Commission, is in urgent need of reconsideration and possible overturning because of the singularity of "the digital-wireless era of pervasive telecommunication".[60]

Two Acts authorise the mass programmatic surveillance efforts of the BND. First, the *Gesetz über den Bundesnachrichtendienst*[61] (Law on the Federal Intelligence Service) does not permit any primary oversight by a "court" for foreign-to-foreign communications[62] – as we understand the concept of a court as an independent judicial forum under South African law. After the Federal Constitutional Court's ruling on 19 May 2020 that the foreign interception of communication must be split up into an administrative and a judicial arm, the *Unabhängiger Kontrollrat* (UKR)[63] (which has been in operation since January 2022) was born. In the words of Wetzling: "The Federal Government and the majority in Parliament saw in a unitary body a

---

56 Federal Republic of Germany "Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses" (2001) G 10 – Act restricting the secrecy of letters, posts and telecommunications (gesetze-im-internet.de) (accessed 2024-03-17).

57 Federal Republic of Germany "Basic Law for the Federal Republic of Germany" (2022) https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0058 (accessed 2024-03-13).

58 The Constitution of the Republic of South Africa, 1996 (the Constitution).

59 Art 10[2] of the Basic Law https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0058.

60 Miller in Goldman and Rascoff *Global Intelligence Oversight* 284.

61 German Department of Justice, "Act on the Federal Intelligence Service" (1990) https://www.gesetze-im-internet.de/bndg/ (accessed 2024-03-11).

62 Felz "Judicial Redress and Foreign Intelligence Surveillance: The German Approach" (14 February 2022) https://www.crossborderdataforum.org/judicial-redress-and-foreign-intelligence-surveillance-the-german-approach/ (accessed 2024-03-11).

63 An independent oversight council.

better precondition for successful international cooperation."[64] Perhaps this model is workable in democratic post-war Germany, but, as is argued below, the legacy of intelligence abuse during the Zuma era has rendered this model inapplicable to post-Zuma democratic South Africa, at least for the time being.

In fact, oversight in Germany is exercised by so-called "auxiliary agencies", permitted by the German Constitution. Until 2016, no effective oversight whatsoever existed. Between 2017 and 2022, this function was in the hands of an "Independent Panel". The UKR mentioned above, once again a quasi-judicial body, took over this oversight function, limited as it was, in January 2022. The latter comprises six judges and, as an independent federal agency, has the legal authority and the requisite jurisdiction, to consider briefs submitted by and to the BND regarding foreign surveillance. In addition, there is considerable overlap in the review function of data protection by the German Data Protection Authority (which is legally authorised to investigate data processing and the establishment of databases) and the UKR.

Concerns raised centre on the UKR's lack of a public reporting obligation[65] and the *ex parte* proceedings (only the government is represented when the order is sought) habitually entertained by the panel, as well as the fact that the UKR's rulings are not published.[66] Since these bodies operate in parallel with one another, Wetzling has expressed reservations about their ability to form "a holistic understanding of the totality of surveillance activities" and foresees "unhelpful 'turf wars'".[67] Furthermore, individuals are not entitled or permitted to lodge complaints with the UKR, and there is no requirement for public transparency reporting. The Federal Constitutional Court held that the so-called third-party rule may not hinder or impede the UKR's effective and comprehensive oversight.[68] As is argued below, this consideration should not be applicable (which might well be the case in South Africa at this juncture) in the absence of a national security threat, either internally or externally. Intelligence agencies are fond of fueling the flames of imaginary threats to secure funding for their operations and to further their own vested interests.[69]

Secondly, primary oversight over surveillance (all collection, processing, and use of personal data of Germany-to-foreign or foreign-to-Germany communications relevant to statutorily identified "threat areas") authorised by the G10 Act[70] is indeed exercised by the "G10 Commission".[71] This is not an

---

64 Wetzling in Bigo *et al Intelligence Oversight* 252.

65 Wetzling in Bigo *et al Intelligence Oversight* 250.

66 Felz https://www.crossborderdataforum.org/judicial-redress-and-foreign-intelligence-surveillance-the-german-approach/.

67 Wetzling in Bigo *et al Intelligence Oversight* 250.

68 Wetzling in Bigo *et al Intelligence Oversight* 252.

69 Friedman https://theconversation.com/zumas-abuse-of-south-africas-spy-agency-underscores-need-for-strong-civilian-oversight-154439.

70 German Department of Justice "Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses" (2001) https://www.gesetze-im-internet.de/g10_2001/ (accessed 2024-03-11).

71 Felz https://www.crossborderdataforum.org/judicial-redress-and-foreign-intelligence-surveillance-the-german-approach/.

independent body but is instead an arm of the executive. As is the case with the UKR, individuals who might be affected by its decisions are not given the opportunity to be present when the body hears the government's case for surveillance. Even though its decisions are not published (in tandem with the practice of the UKR), unlike the former, individuals are allowed to lodge complaints regarding G10 surveillance with the Commission. However, it operates in secret and there is no avenue of appeal to a higher court.[72] Finally, Germany's Parliamentary Oversight Panel publishes limited transparency reporting on the Commission's activities, which is at least an improvement on the situation created by the *Gesetz über den Bundesnachrichtendienst* (Law on the Federal Intelligence Service), which, as noted above, allows no such transparency.

In the overview of the German intelligence oversight system, this article attempts to focus on both its strengths and weaknesses as seen from a South African constitutional perspective. Wetzling suggests that the reason for Germany's almost 30 laws and several by-laws on intelligence surveillance and oversight lies in its attempt to "obfuscate a dense web of provision from too much external scrutiny".[73] The author (Wetzling) highlights the fact that civilians almost certainly have a vested interest in shaping/inputting into policy, as the G10 and similar legislation/institutions have been successfully challenged before the German Federal Constitutional Court[74] (BVerfG). According to Wetzling, the court "had found several provisions in the previous legal framework unconstitutional".[75] This happened as recently as 2021. In a good assessment of the German intelligence oversight scene following the 2021 constitutional court ruling, Wetzling suggests that "[g]enerally, as regards delegated oversight, Germany to date has still the most fragmented landscape for intelligence oversight by comparison with France and the UK".[76]

Despite the drawbacks of the German model (secrecy, fragmented legal framework and lack of effective redress for foreigners, among other concerns), the lessons that the German experience holds for a post-Zuma, democratic South Africa are still valuable and worth considering.

4 COMPARATIVE ANALYSIS

Duncan argues that it is possible to change the current conditions of surveillance if such are deemed to be unacceptable:

> "A world in which privacy is truly respected will be impossible without successful struggles for justice and equality, as the ability to enjoy rights such as privacy will remain the preserve of a select few. Owners of the means of production will continue to define the conditions under which this right is enjoyed on a widespread basis. We must not resign ourselves to thinking that a world where privacy is invaded on a routine basis is the way things necessarily are and cannot be changed […] What is needed to mount an

72 *Ibid*.
73 Wetzling in Bigo *et al Intelligence Oversight* 250.
74 German Federal Constitutional Court – 1 BvR 2835/17 – (pronounced 19 May 2020).
75 Wetzling in Bigo *et al Intelligence Oversight* 251.
76 Wetzling in Bigo *et al Intelligence Oversight* 250.

> effective fightback is a thorough understanding of why the world looks the way it does at this current conjuncture."[77]

To complement Duncan's astute observations on the possibilities of change in an ISA (intelligence and security agency) setting or context, Wetzling argues:

> "[G]iven the widely shared observation that 'accountability now seems to flow from a globalised network of activists and journalists, not from parliamentary oversight committees' (Richard Aldrich), our IOI distinguishes between two primary subsets of oversight practice, namely, delegated and civic oversight."[78]

Miller suggests that Germany's *Bundesnachrichtendienst's* SIGINT mandate (BND or Federal Intelligence Service), which performs an analogous function to the US's Central Intelligence Agency (CIA), is the most appropriate forum and "likely of greatest comparative interest to non-German scholars of intelligence oversight because they can include foreign surveillance"[79] and most closely approximates the controversial NSA programmes of the recent past. The BND's SIGINT operations constitute the central concern of the G10 Commission. The latter is "neither fully parliamentary nor fully judicial in character",[80] but is, in fact, a quasi-judicial body.

Having elaborated on the substantial shortcomings and failings of the G10 Commission and UKR, the strength of this model is now highlighted, which also suggests the potential for a rational reconstruction of the South African model. This is made possible by using the technique of rational reconstruction made famous by the Frankfurt School for Critical Theory.[81] This technique rests on the idea of reshaping a theory (addressing the weaknesses of the G10 and UKR in question) by identifying the healthy, helpful elements and incorporating additional aspects suggested by parallel critiques to enhance its functioning. One exponent of this method is the well-known German philosopher Jürgen Habermas. For Habermas (as quoted in McCarthy),[82] rational reconstruction means

> "that one takes a theory apart and puts it back together in a new form, in order better to achieve that goal which it set for itself. This is the normal (in my opinion, normal also for Marxists) way of dealing with a theory that requires revision in many respects, but whose potential for stimulation has not yet been exhausted."[83]

As the German G10 potential and the South African digital surveillance government agencies have presumably not yet been fully realised, the author aims to combine them in a new form "in order better to achieve that goal which it set for itself". This contribution attempts to apply Habermas's rational reconstruction method to the South African surveillance framework in conjunction with the lessons learned from Germany. In fact, even the goal

---

77 Duncan *Stopping the Spies* 17.
78 Wetzling in Bigo *et al Intelligence Oversight* 248.
79 Miller in Goldman and Rascoff *Global Intelligence Oversight* 260.
80 Miller in Goldman and Rascoff *Global Intelligence Oversight* 264.
81 Roderick *Habermas and the Foundations of Critical Theory* (1986).
82 Original source not available to me.
83 McCarthy *The Critical Theory of Jürgen Habermas* (1978) 233.

can be reformulated. Several problems are evident with the German model. Duncan, for example, contends, within the South African context, that "[a]s a matter of principle, findings should be made public. Secrecy cannot be used to hide illegality".[84] In *Amabhungane,* this idea was expressed as "facilitat[ing] the abuse of the process under the cloak of secrecy".[85] A former inspector-general of intelligence, Xolile Ngcakani (the incumbent from 2004 to 2009), created a worthwhile precedent by releasing a summary of findings periodically.[86] A provision requiring similar transparency, entrenched in primary legislation for South Africa going forward, cannot be recommended strongly enough.

Transparency equates to accountability, which is why the principle of proportionality (ensconced in German surveillance oversight law) may have to be adjusted for the South African situation. In light of this overview of German surveillance oversight legislation and practice, several recommendations to strengthen oversight in South Africa are made.

5 PROPOSALS FOR REFORM OF INTELLIGENCE LAWS IN SOUTH AFRICA

It is argued that, considering the shortcomings of so-called "state-mandated oversight" or delegated oversight, there is a definite need to build robust and resilient civic structures of intelligence surveillance oversight.[87] Wetzling defines civic oversight as "the scrutinising practices by the media, CSOs, and citizens who complement *delegated oversight* through an oftentimes more adversarial and more public mode of oversight"[88] (emphasis in the original). Three issues reported by civilian oversight practitioners/actors are lack of funding, the threat of becoming subject to surveillance themselves, and lack of trust in the judicial and technical safeguards of intelligence surveillance. In view of the valuable distinction between delegated oversight and civic oversight over mass, digital surveillance practices, it is recommended that civil society make an effort to build a robust and resilient civic oversight structure. This is because the former (state-mandated oversight functions) are absent or at least weak in South Africa, particularly considering past abuses during the Zuma administration. This perspective aligns with Duncan's suggestion, namely the notion of "a thorough understanding of why the world looks the way it does at this current conjuncture"[89] Segell suggests:

---

84 Duncan "South Africa's Intelligence Watchdog Is Failing Civil Society. How to Restore Its Credibility" (30 November 2022) https://theconversation.com/south-africas-intelligence-watchdog-is-failing-civil-society-how-to-restore-its-credibility-195121 (accessed 2024-03-11).

85 *Amabhungane supra* par 44.

86 Office of the Inspector-General of Intelligence *Executive Summary of the Final Report on the Findings of an Investigation into the Legality of the Surveillance Operations Carried Out by the NIA on MR S Macozoma* (2006) https://www.scribd.com/document/424117688/Executive-Summary-of-the-final-report-on-the-findings-of-an-investigation-into-the-legality-of-the-surveillance-operations-carried-out-by-the-NIA-on (accessed 2024-03-08).

87 Wetzling in Bigo *et al Intelligence Oversight* 248–249.

88 Wetzling in Bigo *et al Intelligence Oversight* 249.

89 Duncan *Stopping the Spies* 17.

> "From the first non-military intelligence agency created in 1968, the Bureau of State Security, it was clear that the nature of intelligence requires striking a fine balance between security, secrecy, transparency, and accountability."[90]

This is of course easier said than done. Even after GILAB's introduction in 2023 to allay past concerns, substantial concerns about the weak oversight function remain. In this regard, Friedman identifies the media and citizen organisations participating in the debate as being not sufficiently critical of the security services' ability to pose a threat to democracy:

> "None of this is backed by a shred of evidence – security agencies are in the business of exaggerating both the threats to the country and their importance in thwarting them. But, since the default position of many journalists and campaigners is to believe the spies, loud voices will again insist that they be allowed to keep their secrets."[91]

This observation ties in with Duncan's reasoning, highlighted at the opening of this article.[92] Friedman also argues that weak governmental oversight is precisely the reason that civic oversight (underscored by the surprise and shock of the media at these revelations) is so vital and important to complement official failures (especially while the ANC is still the governing party):

> "Testimony shows that the State Security Agency, which is meant to provide the government with intelligence on domestic and foreign threats, was used to fight factional battles in the governing African National Congress (ANC) and to engage in corrupt activity. *The agency, the evidence suggests, served former president Jacob Zuma and his allies, not the country.*"[93] (own emphasis)

It would appear from this extract of Friedman's work that, within the context of the South African intelligence framework (perhaps distinguishable from the German template), there happen to be four interests worth weighing and balancing – namely, security, secrecy, transparency, and accountability. These arise out of government's security needs, privacy concerns and government's tendency to cover up wrongdoing. In the more sanitised German case, presumably, only the first two interests are at stake.

A further factor worth considering regarding the proposed reforms in the volatile, uncertain, complex and ambiguous (VUCA) world we live in, is the pace and motivation behind such initiatives. Segell contends in this regard that "errors can be avoided by not making uncoordinated, piecemeal changes".[94] However, the broad method proposed is of course easier said than done. Duncan, for her part, suggests: "The [Zondo] commission found that the [State Security Agency] project destabilised opposition parties and

---

90 Segell 2021 *Connections QJ* 73.

91 Friedman https://theconversation.com/zumas-abuse-of-south-africas-spy-agency-underscores-need-for-strong-civilian-oversight-154439. Consider, for example, the devastating findings of the Mufamadi Commission's Inquiry into the State Security Agency (completed in December 2018 but only released to the public in March 2019 by Ramaphosa) "Inquiry Into the State Security Agency" (2018) [electronic link not available to the author].

92 Duncan *Stopping the Spies* 12.

93 Friedman https://theconversation.com/zumas-abuse-of-south-africas-spy-agency-underscores-need-for-strong-civilian-oversight-154439.

94 Segell 2021 *Connections QJ* 62 74.

benefited the Zuma faction in the ruling African National Congress."[95] Even more important, or as important, is her recommendation that the agency's infiltration (by SSA's so-called "special operations unit" planting agents who masqueraded as activists) and illegal surveillance of civil society organisations[96] should not go unexposed and unprosecuted. Duncan contends that if these concerns are not addressed, these abuses will persist into the future, as has been observed with certainty in other parts of the world.[97] This observation remains true for the revamped office (October 2022) of South Africa's Inspector-General of Intelligence, Imtiaz Fazel, who has not heeded the urgent need to investigate a range of civil-society complaints regarding illegal and unlawful surveillance as well as intelligence abuses in general. The latter (Fazel) was appointed by Ramaphosa on a five-year contract and his task is to "monitor the crime intelligence division of the police, the State Security Agency, and the intelligence division of the national defence force".[98]

It was pointed out by the High-Level Review Panel that having separate agencies for domestic and foreign intelligence is a non-negotiable as well as *avoiding centralisation of these agencies at all costs*.[99] Duncan remarks regarding the former consideration:

> "The fact that the State Security Agency has been absorbed into the presidency – which is also accumulating other government entities and functions – could be a gift to any president intent on repeating the abuses of the Zuma administration."[100]

This flaw (the high centralisation of the security agencies) led to South Africans being disappointed at every turn. Examples are the July 2021 civil unrest[101] in KwaZulu-Natal and Gauteng (ironically in the lead-up to Zuma's incarceration for a fairly petty crime) and the inability of crime intelligence to combat rising organised crime groups.[102] A further important issue Duncan

---

95 Duncan https://theconversation.com/zondo-commissions-report-on-south-africas-intelligence-agency-is-important-but-flawed-186582.

96 Metelerkamp "Civil Society Organisations Release Boast Report, Demand Accountability for 'Rogue' Spying" (01 July 2022) https://www.dailymaverick.co.za/article/2022-07-01-civil-society-organisations-release-boast-report-demand-accountability-for-rogue-spying/ (accessed 2024-03-18); High-Level Review Panel on the State Security Agency (2018) https://www.gov.za/sites/default/files/gcis_document/201903/high-level-review-panel-state-security-agency.pdf (accessed 2024-03-19).

97 Choudry (ed) *Activists and the Surveillance State: Learning from Repression* (2019), in general.

98 Duncan https://theconversation.com/south-africas-intelligence-watchdog-is-failing-civil-society-how-to-restore-its-credibility-195121.

99 High-Level Review Panel on the State Security Agency https://www.gov.za/sites/default/files/gcis_document/201903/high-level-review-panel-state-security-agency.pdf.

100 Duncan "South Africa's Intelligence Agency Needs Speedy Reform – Or It Must Be Shut Down" (24 February 2023) https://theconversation.com/south-africas-intelligence-agency-needs-speedy-reform-or-it-must-be-shut-down-200386 (accessed 2024-03-10).

101 Africa "South Africa's Deadly July 2021 Riots May Recur If There's No Change" (9 July. 2022) https://theconversation.com/south-africas-deadly-july-2021-riots-may-recur-if-theres-no-change-186397 (accessed 2024-03-18).

102 Haffajee "South Africa's Organised Crime Climbs to Italy's Levels, Racing Past Mexico, Somalia and Libya" (21 September 2022) https://www.dailymaverick.co.za/article/2022-09-

stresses is the fact that "[d]uring the Zuma years, the focus on protecting the president led to the intelligence agency prioritising domestic intelligence by spying on citizens at the expense of foreign intelligence".[103] The integration of both intelligence arms in Germany (even after the 2020 Federal Constitutional Court judgment on surveillance oversight) is plagued by this same problem. To quote Duncan yet again: "The Zuma administration merged the two branches and abused the centralised model to protect the president from criticism."[104] Weak governmental oversight (even if these are well-funded and independent) demands strong civilian oversight, as both Friedman[105] and Wetzling[106] point out.

The following measures to strengthen GILAB and related legislation in the intelligence gathering, data collection and surveillance oversight cluster are suggested.

a) Intelligence overreach in South Africa, Africa and abroad has prompted the following recommendation: "These abuses mean intelligence mandates should be narrowed and state intelligence power should be reduced."[107] It is suggested that the astute remark is well conceived. Given that South Africa is not under pressing foreign threats, unlike the case with Islamic extremists in Nigeria and Kenya, these mandates should urgently be narrowed and state intelligence power be reduced accordingly. Failing this, the danger of repurposing intelligence surveillance for nefarious purposes becomes a real possibility.
b) From a procedural standpoint, as highlighted in the Constitutional Court judgment on RICA oversight,[108] legal difficulties exist in obtaining surveillance orders without notifying the suspect, who is then unaware of their surveillance and unable to participate in automatic review proceedings.[109] However, this problem is not restricted to South Africa; it is also a problem in several other African countries.[110] Even if there are compelling reasons for the suspect not to be apprised of their surveillance, Duncan's suggestion that they be given an opportunity to address the judge on automatic review proceedings[111] is supported. In *Amabhungane*, it was held: "[I]t is purely fortuitous that some subjects of surveillance do become aware of their surveillance. In the vast majority of cases they never do. That must surely incentivise or facilitate the

21-south-africas-organised-crime-climbs-to-italys-levels-racing-past-mexico-somalia-and-libya/ (accessed 2024-03-18).

103 Duncan https://theconversation.com/south-africas-intelligence-agency-needs-speedy-reform-or-it-must-be-shut-down-200386.

104 *Ibid*.

105 Friedman https://theconversation.com/zumas-abuse-of-south-africas-spy-agency-underscores-need-for-strong-civilian-oversight-154439.

106 Wetzling in Bigo *et al Intelligence Oversight* 248.

107 Duncan https://theconversation.com/south-africas-new-intelligence-bill-is-meant-to-stem-abuses-whats-good-and-bad-about-it-220473.

108 *Amabhungane supra* par 50–52.

109 *Amabhungane supra* par 50–52.

110 Roberts https://theconversation.com/surveillance-laws-are-failing-to-protect-privacy-rights-what-we-found-in-six-african-countries-170373.

111 Duncan https://theconversation.com/south-africas-new-intelligence-bill-is-meant-to-stem-abuses-whats-good-and-bad-about-it-220473.

abuse which we know does take place."[112] Only the suspect has an abiding interest in bringing relevant matters to the judiciary's attention, which the State may be reluctant to disclose to the presiding review judge for undisclosed reasons. This elucidates the need for the vital principle of the "proportionality analysis", as identified by Madlanga J in the *Amabhungane* judgment.[113]

c) The potential for abuse arises because RICA permits surveillance procedures beyond those provided for in RICA – such as those envisaged in section 205 of the Criminal Procedure Act. Once again, the evidence is that this also occurs in several other African countries.[114] It is recommended that RICA, and/or GILAB be amended to disavow the avenues that allow for surveillance approval outside of RICA or GILAB. There is no point in oversight protection if the safeguards provided for in RICA are overridden without proper justification.

d) The independence of the RICA judge or judges should be strengthened by perhaps appointing them solely under the authority of the Chief Justice. In terms of the concept Bill, at present, the RICA judge is appointed by the justice minister in consultation with the Chief Justice. The proposed change would remove any suspicion that the executive is interfering with or influencing the appointed judges' vocation and commitment to fairness and impartiality.

e) Duncan has expressed reservations at the appointment of a single judge to consider RICA warrants and reviews.[115] The German case proves instructive: no less than six judges consider and decide surveillance oversight cases. Since Germany has a population of roughly 83 million people and at least six judges in the UKR to decide and review target surveillance matters, having only one judge to service South Africa's roughly 60 million people appears woefully inadequate. A complement of three or four judges (judged by the German template) would ensure a more sustainable approach.

f) The ruling in the *Amabhungane* case, which held that RICA cannot guarantee the safe and secure storage of intercepted data, could be readily addressed by looking at the German experience. The German Data Protection Authority and the UKR, as noted above, both have a review function regarding data protection (focusing on data processing and the establishment of databases). It is submitted that a similar data protection agency authority be legislated into existence to review the handling and safeguarding of data intercepted by the South African authorities, a measure that would contribute significantly to closing regulatory and oversight gaps.

g) Secrecy in the activities of the intelligence community is strongly discouraged, especially while the national psyche is still recovering from the detrimental impact of abuses perpetrated during the Zuma years.

---

112 Par 43.

113 Par 42.

114 Roberts https://theconversation.com/surveillance-laws-are-failing-to-protect-privacy-rights-what-we-found-in-six-african-countries-170373.

115 Duncan https://theconversation.com/south-africas-surveillance-law-is-changing-but-citizens-privacy-is-still-at-risk-214508.

Similarly, while the intelligence abuses of the Zuma era are still fresh and vivid in the nation's psyche, every effort should be made to ensure that rogue elements are fully removed from the intelligence cluster.

h) GILAB must mandate the public disclosure of all complaints filed and resolved by the Office of the Inspector-General of Intelligence to uphold the guardrails of transparency and accountability. Germany may have a case for limiting published reporting. However, given the abuses (committed even after Zuma's exit in February 2018, exemplified by the events leading to the *Amabhungane* case), there is no justification for such mollycoddling or opacity in the South African context. In fact, the opposite is applicable.

i) Professionals who are bound by a duty to maintain confidentiality (such as lawyers and journalists) concerning their data sources should be given an exemption to ensure that such data cannot be surveilled or collected unless in specific cases there be compelling reasons to the contrary. This was one of the interim orders in the *Amabhungane* matter (pending the government's overhaul of RICA considering the findings of unconstitutionality) on which the department failed to act.

j) The German experience (where more than 30 laws and other regulations govern intelligence oversight) illustrates the value of legislative simplicity. Wetzling suggests that Germany's having "the most fragmented landscape for intelligence oversight" is partially an attempt to obscure its provisions "from too much external scrutiny".[116] This approach might be effective in Germany under German conditions but would certainly not be feasible for South Africa, considering the Zuma fiasco. Furthermore, this is an ongoing problem in many African countries, including Egypt, Kenya, Nigeria, Senegal, and Sudan.[117] Roberts comments: "[P]iecemeal provisions, spread across multiple pieces of legislation, can conflict with each other. This makes it impossible for citizens to know what law is applicable."[118]

k) For precisely this reason, it is submitted that every effort should be made to avoid replicating the German set-up, and instead all matters relating to surveillance should be dealt with in one or, at most, two Acts.

l) Legislative changes are required as an initiative to bolster democracy. Perhaps the most important lesson to be learnt from Germany's experience during its inter-war years (1919–1939) is that if people become disillusioned with democracy, authoritarian measures such as the abolition of privacy, manifesting in mass, unregulated surveillance without adequate oversight, will follow shortly thereafter.[119]

---

116 Wetzling in Bigo *et al Intelligence Oversight* 250.

117 Roberts "Surveillance Laws Are Failing to Protect Privacy Rights: What We Found in Six African Countries" (21 October 2021) https://theconversation.com/surveillance-laws-are-failing-to-protect-privacy-rights-what-we-found-in-six-african-countries-170373 (accessed 2024-03-21).

118 Roberts https://theconversation.com/surveillance-laws-are-failing-to-protect-privacy-rights-what-we-found-in-six-african-countries-170373.

119 Dyzenhaus "Political Atmosphere in the United States: Here's What We Can Learn About Germany in the Interwar Period" (29 January 2024) https://theconversation.com/atmosphere-politique-aux-etats-unis-voici-ce-quon-peut-apprendre-de-lallemagne-de-lentre-deux-guerres-222140 (accessed 2024-03-05).

m) Every effort must be made to strengthen civil oversight, including institutional support for oversight mechanisms and state funding. This article endorses Wetzling's valuable distinction between civil and delegated oversight.[120] This is important, especially at this critical juncture in our nation's history, given the substantial erosion of public trust in surveillance oversight and a lack of assurance from the government regarding any future safeguards for such oversight.

n) Finally, in the words of Roberts, nothing can beat raising "public awareness of privacy rights and surveillance practices".[121]

Appreciating how South Africa arrived at its surveillance framework and delegated oversight (as suggested by Duncan), in conjunction with an application of Habermas's rational reconstruction model, are two useful ways to reformulate and reshape our intelligence laws. It is hoped that lawmakers will find these suggestions to strengthen laws helpful and practical enough to implement in the proposed legislation.

6 CONCLUSIONS

Germany's comprehensive intelligence oversight function for mass digital gathering is indeed helpful to those who wish to defend democracy, even in post-colonial Africa. That said, it should immediately be noted that the South African context differs substantially from the German situation.

While Germany's democratic situation appears to be more stable when compared to South Africa's post-colonial proto-democratic instability, recent intelligence abuses during the Zuma administration (May 2009–February 2018) created a multifaceted and notorious legacy of state security protecting those in power. This legacy extended to shielding Zuma's former business associates (such as the Guptas) from investigation and prosecution. Whereas in Germany, authorities might seek to find a balance between oversight and overreach, it is argued that the position is considerably more complex in South Africa. Since 2009, the South African intelligence agencies have developed a troubling legacy of unchecked abuses, as detailed by the 2018 High-Level Review Panel on the State Security Agency[122] and the Zondo Commission of Inquiry into State Capture.[123] This observation suggests that while the governing party (the ANC) has any influence in the running of this country, public confidence in the operations of intelligence agencies will remain fragile. This poses the inherent risk of eroding trust in the democratic process. In this regard, as

120 Wetzling in Bigo *et al Intelligence Oversight* 248.

121 Roberts https://theconversation.com/surveillance-laws-are-failing-to-protect-privacy-rights-what-we-found-in-six-african-countries-170373.

122 High-Level Review Panel on the State Security Agency "Investigation into the State Security Agency" (2018) https://www.gov.za/sites/default/files/gcis_document/201903/high-level-review-panel-state-security-agency.pdf (accessed 2024-03-19).

123 Zondo Commission of Inquiry into State Capture "Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State Report: Part V, Vol. 1: State Security Agency, and Crime Intelligence" (undated) https://www.saflii.org/images/state-capture-commission-report-part-5-vol1.pdf (accessed 2024-10-09).

noted above, Duncan refers to "the broader threats to democracy posed by unaccountable intelligence".[124]

Setting aside the contextual difference, there appears to be significant overlap or similarities between German intelligence oversight of mass data interception and the situation in South Africa. Examples include persistent weaknesses such as overlapping mandates among multiple agencies, lack of judicial independence, secrecy and the use of *ex parte* application procedures (motions without notice). The most pressing recommendation seems to be Duncan's notion (quoted above): "These abuses mean intelligence mandates should be narrowed and state intelligence power should be reduced."[125]

Despite the considerable weaknesses still apparent in the legislation governing mass data collection and its intelligence oversight in South Africa, several suggestions for improvement have been proposed. This article has employed an additional extra-judicial resource from Germany, namely Habermas's idea of rational reconstruction, which has resulted in several innovative recommendations. These include the annual publication of a summary of complaints lodged with the intelligence watchdog; the abolition of secrecy surrounding the operation of the intelligence community until public confidence in its mandate is restored; providing a suspect under surveillance with an opportunity to respond to allegations during automatic review proceedings; and the appointment of permanent staff to head separate foreign and domestic intelligence-gathering divisions. These suggestions should significantly strengthen the provisions in GILAB, and similar intelligence-gathering legislation, thereby restoring public confidence in the activities of our intelligence community. Given the volatile, uncertain, complex and ambiguous (VUCA) postmodern world we navigate, the presence of an intelligence community that can strike a balance between safeguarding national security interests and upholding civil liberties is essential in an open, democratic society committed to values of human dignity and freedom.

GILAB appears to represent a transformative paradigm shift, moving from prioritising state security to embracing a broader concept of security that includes human security as a component of national security. This is a positive development flowing from the Zuma debacle. However, considering the intelligence community's history of abuses, it is important, as Friedman and Wetzling observe, for civil society to remain vigilant in monitoring the activities of these entities, which are inherently inclined towards clandestine and covert operations. For this perspective to offer significant value, another lesson from Germany's interwar period (1919–1939) needs to be heeded: maintaining public confidence and trust in the very idea of democracy – under increasing pressure in the twenty-first century – is crucial to preventing our descent into authoritarianism. As Duncan states:

---

[124] Duncan https://theconversation.com/zondo-commissions-report-on-south-africas-intelligence-agency-is-important-but-flawed-186582.

[125] Duncan https://theconversation.com/south-africas-surveillance-law-is-changing-but-citizens-privacy-is-still-at-risk-214508.

> "In grappling with the tasks set for them by their Constitutional Courts, South Africa and Germany may well set the bar for other countries for democratic oversight of these highly invasive powers, and let us hope that they set a high bar indeed."[126]

Indeed, COMINT surveillance is the spymaster of the twenty-first century. However, privacy should not and cannot be the preserve and privilege of a few, as this would pave the way for (what Duncan calls) an instrument "target[ing] those considered to be politically threatening to ruling interests".[127]

[126] Duncan "The Global Significance of South Africa's Mass Surveillance Ruling" (2021) https://aboutintel.eu/south-africa-surveillance-ruling/ (accessed 2024-10-09).

[127] Duncan *Stopping the Spies* Preface xvii.

Global Minimum Corporate Tax – Developing Countries Beware

Thabo Legwaila
BIuris LLB LLM PG Dip Tax Law LLM LLD
Professor of Law, School of Law
University of the Witwatersrand, Johannesburg, South Africa
https://orcid.org/0000-0002-6915-7853

SUMMARY

In July 2021, under the auspices of the Organisation for Economic Co-operation and Development and the Group of Twenty Countries (the G20), a group of 130 countries reportedly representing more than 90 per cent of global gross domestic products joined in establishing a two-pillared package. This package aims to curb base erosion and profit shifting and ensure that large Multinational enterprises (MNEs) pay taxes where they operate and earn profits. The aim was to add much-needed certainty and stability to the international tax system. Pillar One relocates some MNE profits to the user or market jurisdiction. Pillar Two proposes a global minimum corporate tax which is intended to neutralise the incentives to shift profits based solely on tax outcomes. The author finds that despite its global impact, the global minimum tax has been designed by, and for only a small number of wealthy countries. As a result, the benefits thereof can only be viewed from the perspective of those benefitting countries, before one considers any residual benefits for the unintended participants, the developing countries. This article explores the effects and disadvantages of the proposed minimum tax, with a specific focus on developing countries, and concludes that the benefits of minimum tax for developing countries are not patent, clear, or determinable. The disadvantages of the global minimum tax for developing countries include challenges to fiscal sovereignty, depriving developing countries of the ability to use taxes to compete with developed countries as well as the high cost of implementation. The article explores alternatives to the minimum tax and concludes by proposing various options that developing countries should consider to curb international tax avoidance.

1 INTRODUCTION

In 2021, in an attempt to address base erosion and profit shifting (BEPS) the Organisation for Economic Co-operation and Development (OECD) in conjunction with The Group of Twenty Countries (the G20) developed the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (Inclusive Framework) that proposed and later resulted in the adoption of a global minimum tax. It is proposed that the minimum tax be adopted by all countries, developing and developed countries alike. There are, however, potential challenges specifically for developing countries, and such countries may rapidly and blindly adopt the minimum tax without proper analysis of peculiar disadvantages for those countries. Regardless of the various oft-

advertised anecdotal benefits of the minimum tax globally, to developed high-income countries and developing low-income countries alike, the reality of such benefits to developing countries is scant. This article explores the effects and disadvantages of the proposed minimum tax, with a specific focus on developing countries. The article then explores alternatives to the minimum tax and concludes by proposing various options that developing countries should consider.

2 BACKGROUND

Multinational enterprises (MNEs) have over the years been making foreign investment decisions by placing a disproportionately major focus on the tax regimes of, and, in particular, the tax rates imposed by, potential host countries.[1] While the key determinants of such an investment decision should be economic, social, and political factors, the tax tail has been wagging the business dog publicly and unashamedly. Tax avoidance strategies in terms of which profits are moved to low tax jurisdictions and expenses to high tax jurisdictions, thereby depriving high tax jurisdictions of their full taxing rights have been rampant. It is reported that these BEPS strategies have over the years cost countries between $100 to $240 billion in lost revenue annually.[2]

The Inclusive Framework project was undertaken in an effort to tackle tax avoidance; develop and improve the coherence of international tax laws/rules; ensure a more transparent tax environment; and address the tax challenges that arise as a result of the digitalisation and globalisation of the economy.[3] In July 2021, a group of 130 countries reportedly representing more than 90 per cent of global gross domestic products joined in establishing a two-pillared package. This package aims to ensure that large MNEs pay tax where they operate and earn profits while adding much-needed certainty and stability to the international tax system.[4]

3 INCLUSIVE FRAMEWORK

The Inclusive Framework package consists of Pillar One and Pillar Two.

3 1 Pillar One

Pillar One comprises a set of proposals to revisit tax allocation rules in a digitalised and globalised economy. It suggests that a portion of

---

1 Cho "Sustainable Tax Behavior of MNEs: Effect of International Tax Law Reform" 2020 *MDPI* 1–2; International Monetary Fund "International Corporate Tax Avoidance: A Review of the Channels, Magnitudes, and Blind Spots" 2018 *Working Paper* 18/168 6–8; Oguttu *International Tax Law: Offshore Tax Avoidance in South Africa* (2015) 8–10.

2 Organisation for Economic Co-operation and Development "International Collaboration to End Tax Avoidance" (2021) https://www.oecd.org/tax/beps/ (accessed 2023-07-26).

3 *Ibid*.

4 OECD "130 Countries and Jurisdictions Join a Bold New Framework for International Tax Reform" (2021) https://www.oecd.org/tax/beps/130-countries-and-jurisdictions-join-bold-new-framework-for-international-tax-reform.htm (accessed 2023-07-15).

multinationals' residual profit (generated by capital, risk management functions, and/or intellectual property) should be taxed in the jurisdiction where revenue is sourced.[5] Thus, Pillar One relocates some MNE profits to the user or market jurisdiction. This aims to address the concerns that MNEs generate value from market jurisdictions through interaction with consumers and access to user data but the associated revenue is subject to minimal tax in those jurisdictions due to the lack of physical nexus required under current rules.[6]

3 2 Pillar Two

Pillar Two contains model rules that provide governments with a precise template for taking forward the two-pillar solution to address the tax challenges arising from digitalisation and globalisation of the economy.[7] Pillar Two proposes a global minimum corporate tax (minimum tax) which is intended to neutralise the incentives to shift profits based solely on tax outcomes. It is trite that countries competing to attract inward investment may offer tax incentives or lower tax regimes.[8] In addition, differences between domestic tax rules often create opportunities for multinationals (particularly those that derive significant value and profit from intangibles) to move income and profit to low-tax jurisdictions. This creates inappropriate tax competition and results in a "race to the bottom".[9]

Pillar Two applies where, even after the effect of Pillar One (if any), multinationals are regarded as undertaxed by reference to an agreed minimum level of taxation. It applies a minimum effective tax rate of at least 15 per cent at the jurisdictional level. The minimum tax will apply to MNEs with revenue above EUR 750 million and is estimated to generate around USD 150 billion in additional global tax revenues annually.[10]

Pillar Two addresses BEPS challenges and is designed to ensure that large MNEs pay a minimum level of tax regardless of where they are headquartered or the jurisdictions they operate. It achieves this through a number of interlocking rules that seek to (i) ensure minimum taxation while

---

5 KPMG "The OECD Pillar 1 and 2 Blueprints" (2020) https://home.kpmg/ky/en/home/insights_new/2020/10/the-oecd-pillar-1-and-2-blueprints-on-a-page0.html (accessed 2023-09-23).

6 Geiger "Global Minimum Tax: An Easy Fix?" (2021) https://home.kpmg/xx/en/home/insights/2021/05/global-minimum-tax-an-easy-fix.html#:~:text=At%20a%20global%20minimum%20tax%20rate%20of%2012.5%25%2C,to%2021%25%20would%20have%20changed%20this%20dynamic%20significantly (accessed 2023-07-14).

7 OECD "OECD Releases Pillar Two Model Rules For Domestic Implementation of 15% Global Minimum Tax" (2021) https://www.oecd.org/tax/beps/oecd-releases-pillar-two-model-rules-for-domestic-implementation-of-15-percent-global-minimum-tax.htm (accessed 2023-07-15).

8 Geiger https://home.kpmg/xx/en/home/insights/2021/05/global-minimum-tax-an-easy-fix.html#:~: text=At%20a%20global%20minimum%20tax%20rate%20of%2012.5%25%2C,to%2021%25%20would%20have%20changed%20this%20dynamic%20significantly.

9 *Ibid*.

10 OECD https://www.oecd.org/tax/beps/oecd-releases-pillar-two-model-rules-for-domestic-implementation-of-15-percent-global-minimum-tax.htm.

avoiding double taxation or taxation where there is no economic profit; (ii) cope with different tax system designs by jurisdictions as well as different operating models by businesses; (iii) ensure transparency and a level playing field; and (iv) minimise administrative and compliance costs.[11]

The principal mechanism to achieve this outcome is a set of rules guiding countries on how to treat amounts that are prone to BEPS. These rules are the income inclusion rule (IIR),[12] the undertaxed payments rule (UTPR),[13] the switch-over rule (SOR),[14] and the subject to tax rules (STTR).[15]

4 GENERAL EFFECT OF MINIMUM TAX

Pillar two endorses the creation of a globally agreed-upon minimum tax that would ensure countries tax corporate income at least at a base level.[16] Governments could still set whatever local corporate tax rate they want. However, if companies pay lower rates in a particular country, their home governments could "top-up" their taxes to the minimum rate, eliminating the advantage of shifting profits.[17] Inevitably a minimum tax will put pressure on those countries who have headline rates below the global minimum to increase their domestic rates, especially if not doing so will effectively export tax revenues.[18]

One of the main driving forces behind a minimum tax is to ensure that countries do not lure multinational corporations with low tax rates. The implementation and full functionality of a global tax is to ensure that countries are on the same footing in terms of the levying of tax. This will also combat the shifting of profits and tax revenues by multinationals as a result of low tax rates.[19] "A global approach would allow a multinational to blend

---

11 OECD "Tax Challenges Arising From Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS" (2020) https://assets.kpmg/content/dam/kpmg/uk/pdf/2020/10/pillar-two-global-minimum-taxation.pdf (accessed 2023-07-14) par 8.

12 OECD "The Pillar Two Rules in a Nutshell" (2021) https://www.oecd.org/tax/beps/pillar-two-model-rules-in-a-nutshell.pdf (accessed 2022-09-20) 4; OECD "Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS: Income Inclusion and Switch over Rules" (2022) https://www.oecd-ilibrary.org/sites/86a05393-en/index.html?itemId=/content/component/86a05393-en (accessed 2023-07-23).

13 OECD https://assets.kpmg/content/dam/kpmg/uk/pdf/2020/10/pillar-two-global-minimum-taxation.pdf 1.

14 OECD https://assets.kpmg/content/dam/kpmg/uk/pdf/2020/10/pillar-two-global-minimum-taxation.pdf 1; KPMG "Pillar Two: Global Minimum Taxation" (2020) https://assets.kpmg/content/dam/kpmg/uk/pdf/2020/10/pillar-two-global-minimum-taxation.pdf (accessed 2023-07-14) 1.

15 KPMG https://assets.kpmg/content/dam/kpmg/uk/pdf/2020/10/pillar-two-global-minimum-taxation.pdf 1.

16 Mboweni, Indrawati, Scholz, Yellen and Gutiérrez "Why We Support A Global Minimum Tax Rate of 15%" (2021) https://www.news24.com/fin24/opinion/mboweni-yellen-why-we-support-a-global-minimum-tax-rate-of-15-20210610 (accessed 2023-07-23).

17 Schoeman-Louw "A Global Minimum Tax? What Could It Mean?" (2021) https://www.golegal.co.za/global-minimum-tax/ (accessed 2023-07-03).

18 Geiger https://home.kpmg/xx/en/home/insights/2021/05/global-minimum-tax-an-easy-fix.html#:~: text=At%20a%20global%20minimum%20tax%20rate%20of%2012.5%25%2C,to%2021%25%20would%20have%20changed%20this%20dynamic%20significantly.

19 *Ibid*.

high tax and low tax profits, effectively allowing taxes paid in higher tax jurisdictions to shield lower taxed income."[20] The hope is that as a result, multinational corporates will no longer engage in profit shifting and will limit the shopping of lower rates by multinationals in low-tax countries. In effect, a minimum tax will ensure that multinationals will pay a standardised tax rate and will ensure that multinationals are not taking advantage of the tax incentives of certain countries.[21]

The undeniable truth is that, despite the question of whether minimum tax is a sound policy to be adopted and that the agreement between the 140 countries to implement it "represents a once-in-a-generation accomplishment for economic diplomacy,"[22] the minimum tax gained momentum and popularity during the time that countries sought to boost their revenues following the effects of the COVID-19 pandemic. Whether explicitly stated or not, this global phenomenon must have played a substantial role in the individual decision-making considerations of the countries' representatives. Thus, whether the policy is sound or not, the primary purpose remains higher tax collections globally.[23]

5 ADVANTAGES OF MINIMUM TAX

Some of the key advantages of the minimum tax are the following:

(a) Curb the race to the bottom;[24]

---

20 *Ibid*.

21 See OECD/G20 Base Erosion and Profit Shifting Project "Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy" (2021) https://www.oecd.org/tax/beps/brochure-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf (accessed 2023-07-23) 1–2.

22 See US Department of the Treasury "Statement from Secretary of the Treasury Janet L Yellen on the OECD Inclusive Framework Announcement" (2021) https://home.treasury.gov/news/press-releases/jy0394 (accessed 2023-07-17).

23 See Laffitte, Martin, Parenti, Souillard and Toubal "International Corporate Taxation after COVID-19: Minimum Taxation as the New Normal" (2020) https://voxeu.org/article/minimum-effective-tax-rate-global-multinational-profits (accessed 2022-02-17); Sheffrin "A Minimal Role for Minimum Taxes" 2002 *Tulane Economics Working Paper Series* http://repec.tulane.edu/RePEc/pdf/tul2002.pdf (accessed 2023-07-22) 1–39 21.

24 Goldstein "The Case for a Global Minimum Corporate Tax" (2021) https://www.atlanticcouncil.org/blogs/new-atlanticist/the-case-for-a-global-minimum-corporate-tax/ (accessed 2023-08-01); Oxfam "Tax Battles: The Dangerous Global Race to the Bottom on Corporate Tax" (2016) https://www-cdn.oxfam.org/s3fs-public/bp-race-to-bottom-corporate-tax-121216-en.pdf (accessed 2023-07-23) 5–7; Johannesen "The Global Minimum Tax" 2022 *CESifo Working Paper* 1–22; Ocampo and Faccio "A Global Tax Deal for the Rich, Not the Poor Project Syndicate" (2021) https://www.projectsyndicate.org/commentary/g7-corporate-tax-agreement-unfair-todeveloping-countries-by-jose-antonio-ocampo-and-tommaso-faccio-2021-06 (accessed 2023-07-28); ATAF "The Inclusive Framework's Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy" 2021 *Technical Note* CBT/TN/08/21 8; Oguttu "Preventing International Tax Competition and the Race to the Bottom: A Critique of the OECD Pillar Two Model Rules for Taxing the Digital Economy – A Developing Country Perspective" 2022 76 *Bulletin for International Taxation* 1–19 14; Ehl "Why African Nations Doubt OECD Tax Plan" (2021) *Deutsche Welle*

(b) Provide certainty of tax rates;[25]
(c) Encourage MNEs to engage in sound business practices;[26]
(d) Inspire countries to focus on real economic improvement;[27]
(e) Raise additional tax revenue;[28]
(f) Address the challenges of the fourth industrial revolution;[29] and
(g) Modernise the double taxation agreements' spectrum.[30]

6 DISADVANTAGES OF A MINIMUM TAX

The key disadvantages of the global minimum tax are the following:

6 1 Challenge to tax sovereignty

A minimum tax would threaten the flexibility of the tax structures used by some countries to attract foreign direct investment. Some countries have used their freedom to set corporation tax rates as a way to attract such

https://www.dw.com/en/why-african-nations-doubtoecd-tax-plan/a-59653146 (accessed 2023-07-28).

25 Aslam and Coelho "The Benefits of Setting a Lower Limit on Corporate Taxation" (2021) https://blogs.imf.org/2021/06/09/the-benefits-of-setting-a-lower-limit-on-corporate-taxation/ (accessed 2023-07-29); Bunn "A Global Minimum Tax And Cross-Border Investment: Risks & Solutions" (2021) *Fiscal Fact* https://files.taxfoundation.org/20210616153028/A-Global-Minimum-Tax-and-Cross-Border-Investment-Risks-Solutions.pdf (accessed 2023-08-01) 1–2.

26 Business Day Live TV "Global Minimum Tax Proposal Misses the Mark" (2023) https://www.youtube.com/watch?v=VYj12nn2C1E (accessed 2023-07-04).

27 *Ibid*.

28 Thomas "136 Countries Have Agreed to a Global Minimum Tax Rate. Here's What it Means" (2021) https://www.weforum.org/agenda/2021/11/global-minimum-tax-rate-deal-signed-countries/ (accessed 2023-07-06); Haldenwang and Laudage "What the Global Tax Reform Means for Developing Countries" (2021) *Deutsches Institut fur Entwicklungspolitik* (*DIE*) https://www.die-gdi.de/en/the-current-column/article/what-the-global-tax-reform-means-for-developing-countries/ (accessed 2023-07-15); Barake, Neef, Chouc and Zucman "Collecting the Tax Deficit of Multinational Companies: Simulations for the European Union" (2021) *EU Observatory* https://www.taxobservatory.eu/wp-content/uploads/2021/06/TaxObservatory_Report_Tax_Deficit_June2021.pdf (accessed 2022-09-21); see also Financial Transparency Coalition "G7 Agrees to a Global Corporate Minimum Tax – But Developing Countries Don't Appear to Have Much to Gain" (2021) *Financial Transparency Coalition* https://financialtransparency.org/g7-agrees-minimum-global-corporate-tax-developing-countries-dont-appear-much-gain/ (accessed 2023-07-06); Parada "Global Minimum Taxation: A Strategic Approach for Developing Countries" (2022) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4280669 (accessed 2023-07-27).

29 NADA "NADA Pleads to the SARB to Consider Lowering Interest Rates" (2019) https://cover.co.za/global-minimum-corporate-tax-rate-has-benefits-for-sa/n (accessed 2023-07-27); Monsellato, Pritchard, Hatherel and Young "Tax Governance in the World of Industry 4.0: Adapting Global Tax Regulation for Connected Enterprises" (2018) https://www2.deloitte.com/us/en/insights/focus/industry-4-0/why-global-tax-governance-is-critical-for-industry-4-0.html (accessed 2023-07-02).

30 Arnold and McIntyre International *Tax Primer* (2002) 104–106; SARS and National Treasury "Overview of International Agreements" (2014) https://static.pmg.org.za/140827sars.pdf (accessed 2023-07-15) 1.

businesses.[31] There are examples of low corporation tax regimes around the world, from Ireland (12.5 per cent) to Moldova (12 per cent), from Paraguay (10 per cent) to Uzbekistan (7.5 per cent).[32] In a world where there are huge disparities in the income levels of different countries, a minimum tax rate could crowd out those who are not especially attractive but for the fact that they can offer lower rates.[33]

More generally, a minimum tax would remove the flexibility for different countries to pursue policies that best suit them.[34] This would limit the country's sovereignty in the name of updating a global taxing framework.[35] In addition, this may result in raising the cost of doing international business for some corporations. For example, with the minimum rate of 15 per cent a corporation that is not resident, but has a presence, in Ireland, would have to pay 2.5 percentage points more corporation tax on trading in Ireland than it does at present.[36] This will not only possibly make Ireland (or any low-tax jurisdiction) less attractive, but it also means that the costs will be passed on to other stakeholders involved such as the company's suppliers or its customers.[37] Adopting the minimum tax will, the argument continues, not discourage corporations from aggressive tax planning nor will it help with tax evasion.[38]

6 2 Resistance to a minimum tax

The proposal of a minimum tax has not been starved of resistance: of the world's 195 countries, only 137 have so far signed the framework. Developing countries such as Nigeria, Hungary, and Kenya did not sign the framework.[39] The resistance has been due to several reasons from different countries and in consideration of each country's corporate tax rates and circumstances.

A minimum tax will change the reality of what the corporate tax of a single country is and would further challenge the reality of what tax is as we know it. The amount of influence that a minimum tax would have on a country will

---

31 Mboweni *et al* https://www.news24.com/fin24/opinion/mboweni-yellen-why-we-support-a-global-minimum-tax-rate-of-15-20210610.

32 Khalid "Commentary: Why the Call for Global Minimum Corporate Tax is a Bad Move" (2021) https://www.channelnewsasia.com/commentary/global-minimum-corporate-tax-rate-yellen-evasion-haven-digital-217306 (accessed 2023-08-01).

33 *Ibid*.

34 *Ibid*.

35 *Ibid*.

36 Applying this logic to the selected low-tax countries mentioned above the additional tax percentage for Moldova would be 3 per cent, Paraguay 5 per cent, and Uzbekistan 7.5 per cent.

37 Khalid https://www.channelnewsasia.com/commentary/global-minimum-corporate-tax-rate-yellen-evasion-haven-digital-217306.

38 *Ibid*.

39 Henney "Global Minimum Tax Spurned by 9 Countries, Complicating New Deal" (2021) *Foxi Business* https://www.foxbusiness.com/economy/global-minimum-tax-rejected-nine-countries (accessed 2023-08-02).

entail that a country's ability to make tax policies would be limited.[40] The intricate process of drafting, approving, and implementing tax policies considers several factors and is usually tailored to the needs of a specific country. The limitation to exercise such a right limits the sovereignty of a state[41] and the limitation may negatively impact the tax climate of a state and may have a harmful effect on the influence of taxation on investments.[42] Each country creates domestic tax rules in consideration of the tax climate and overall circumstances of that specific country. A minimum tax is a one-size-fits-all instrument that is not considerate of individual countries' circumstances and may therefore disadvantage developing countries.

A challenge with implementing such a proposal pertains to those countries that act as havens with lower tax rates and how they will be required to adopt the policy.[43] For the proposal to work, it will be important for countries adopting the policy to pressure those countries which do not want to become part of the agreement.[44] Otherwise, partial implementation would result in investment destinations being made exclusively based on countries that do not implement.

As observed with the introduction of the BEPS Action Plan, many developing countries chose to be silent and reluctant participants.[45] That was because BEPS implementation processes sought to meet the specific needs of developing countries not by lowering standards for them but rather by helping them meet the standard.[46] The implementation of minimum tax is taking the same approach of neglecting, deliberately or inadvertently, the interests and concerns of developing countries. In addition, there are currently many immeasurable impacts including that of complexity in the tax system that must be considered simultaneously by developing countries before they could implement minimum tax.[47] As a result, developing countries are well within their rights to take a cautiously optimistic stance to

---

40 Investec "Implications of a Global Minimum Tax Rate" (2022) *Investec South Africa* https://www.investec.com/en_za/focus/money/what-plans-for-a-global-minimum-tax-rate-mean.html (accessed 2023-08-01).

41 See Ring "Democracy, Sovereignty, and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Cooperation" (2009) *Florida Tax Review* 555.

42 OECD "Policy Framework for Investment User's Toolkit" (2015) *Organisation for Economic Co-operation and Development* https://www.oecd.org/en/topics/investment.html (accessed 2024-07-29).

43 Business Day Live TV https://www.youtube.com/watch?v=VYj12nn2C1E.

44 *Ibid*.

45 Christensen, Hearson and Randriamanalina "At the Table, Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations, International Center for Tax and Development" (2020) https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15853/ICTD_WP115.pdf?sequence=9&isAllowed=y- (accessed 2023-08-28).

46 Shaheen "Pascal Saint-Amans Defends OECD's Common Reporting Standard Despite Loopholes Identified by TJN" (2014) *International Tax Review* https://www.internationaltaxreview.com/article/2a698wtf6493d5ki4iwap/exclusive-pascal-saint-amans-defends-oecds-common-reporting-standard-despite-loopholes-identified-by-tjn (accessed 2023-07-26).

47 Tandon "Policy Note: Assessing the Impact of Pillar Two on Developing Countries" 2022 50 *Intertax* 923–935 924.

not adopt the minimum tax, regardless of the threats of being punished for not doing so.

6 3 Tax as a distinguishing and competition tool – what's wrong with the "race to the bottom"?

One of the biggest factors for resistance and a major disadvantage for the implementation of a minimum tax is the possible eradication of tax incentives and the undermining of investment incentives that countries have put in place to offer low tax rates to attract some of the biggest multinational corporations. Tax havens allow multinationals to operate in countries that impose lower tax rates which will allow the companies to operate in a favourable tax position. The implementation of a minimum tax will disadvantage countries that rely on low tax regimes to mostly attract multinational companies and benefit from the financial gains of implementing such regimes.[48]

In most instances, tax incentives allow smaller and developing countries to compete with developed countries in terms of attracting multinational corporations to conduct business in smaller and developing countries which simultaneously allows tax competition and possible growth. The possible complete eradication of tax competition will place some countries in a disadvantaged position and would mean that countries would have to deploy other means of attracting such corporations such as favourable trade and tariff provisions, subsidised utility rates, and exceptions to other regulations to offer competitive incentives to potential investors.[49] Indeed "global minimum tax will limit appropriate tax competition between nations and that this will have massive ramifications for smaller nations who may now no longer be able to compete with larger nations that have inherent economic advantages".[50] It will place developing countries that rely heavily on tax incentives in a disadvantaged position because it will eradicate tax as a factor when multinationals decide where to conduct business. Developed countries already have resources and additional incentives that will attract multinationals in the absence of tax competition whereas developing countries would have to employ further incentives at additional costs.

Where an MNE may seek to invest in a developing country not solely based on a tax incentive and which tax incentive seeks to reduce the tax rate, the MNE will still be required to pay the top-up tax thus leaving the country in a worse-off state in which it has effectively subsidised another country's revenue collection, the latter generally being a developed country.

Tax competition is disadvantageous to tax collections in the countries that would otherwise collect taxes and not to those that would not have any tax to

---

48 Williams "Developing Countries Refuse to Endorse G7 Corporation Tax Rate" (2021) *Forbes* https://www.forbes.com/sites/oliverwilliams1/2021/06/30/developing-countries-refuse-to-endorse-g7-corporation-tax-rate/?sh=20291b0c4f0c (accessed 2023-08-01).

49 Kritz "The Pros and Cons of a Global Corporate Tax Rate" (2021) *The Manila Times* https://www.manilatimes.net/2021/05/20/business/columnists-business/the-pros-and-cons-of-a-global-corporate-tax-rate/874138 (accessed 2023-08-01).

50 *Ibid*.

collect anyway. Tax competition is not harmful to taxpayers, be it corporate or individual taxpayers. Like competition in many other spheres (like prices, goods, services), competition improves the quality of the offerings while at the same time keeping the cost of the goods and services low. When corporates pay less tax, they can reduce the price of their goods and services, which translates to lower costs for the end consumers.

The race to the bottom is undesirable to the developed economies. While it might not necessarily be advantageous to developing countries, in the main, the benefits of using tax as a competition tool might outweigh the disadvantages. After all, in many instances, many developing economies have no other bargaining tool than tax. Their economies are disadvantaged by colonialism by the very developed countries, most of them are politically, economically, and socially unstable and their infrastructure is nowhere near capable of enabling them to compete with the developed economies. Thus, for these developing economies, the race to the bottom means no harm especially since they are already at the bottom in respect of every other economic attribute anyway. In any event, Sheffrin argues that alternative minimum taxes are particularly problematic because they tend to stray from their true purpose to become a destabilising factor in the overall tax system.[51] As stated earlier, the low rate of 15 per cent would likely cause a new race to the bottom in Africa where the average tax rates are much higher.[52]

As Tandon avers, regulatory competition exists not just exclusively in tax law but there are instances of these in other areas of law, such as insolvency law, securities regulation, contract law, and corporate law. Fair competition in other counts fundamentally assumes recalibrating other legal frameworks of all jurisdictions involved, the developed and developing alike. The outcome of such fair competition would only be credible and relevant if one assumes that tax competition creates welfare losses that exceed other forms of regulatory competition.[53]

6 4 Cost of implementation of a minimum tax

The negotiations of a minimum tax are seemingly simple and reaching an agreement has been the core issue up to now. However, the implementation of such a global tax with its overwhelming mandate is likely going to be an administrative catastrophe.[54] The implementation of a minimum tax will need a rigorous restructuring and compliance process. It will impact domestic tax legislation with regard to tax rates, base, collection, compliance, management, and incentives. The process of fully implementing a minimum tax across the world will involve countries readjusting their current taxes to

---

51 Sheffrin (2002) *Tulane Economics Working Paper Series* http://repec.tulane.edu/RePEc/pdf/tul2002.pdf (accessed 2023-08-01) 1–39.

52 Ehl (2021) *Deutsche Welle* https://www.dw.com/en/why-african-nations-doubtoecd-tax-plan/a-59653146 (accessed 2023-08-01).

53 Tandon 2022 *Intertax* 929.

54 Jianguo "Global Minimum Tax Should Think of Benefits of Developing Countries" (2021) *Global Times* https://www.globaltimes.cn/page/202107/1227972.shtml (accessed 2023-07-17).

bring them in line with the global tax. Furthermore, countries will have to selectively repeal current tax incentives in their respective domestic tax laws to ensure they are in line with the global minimum rate. The issues that will arise are in line with the repealing of such tax incentives which may be done unilaterally but, in some cases, may be subject to the stabilisation provisions[55] and may entail the revision of bilateral treaties. The implementation of a minimum tax is the first of its kind which means that compliance and administrative procedures will be complex and demanding. This might require further compliance costs, and this might take a longer period to ensure that all countries are compliant and adhering to the minimum tax rules.[56]

The adoption of the minimum tax per developing country may be costlier from a financial point of view as well as from an administrative efficiency perspective. Wamuyu, Liotti, and Owens suggest that when such African countries choose to adopt the global minimum tax they should do so as a regional approach.[57] Titus adds that countries of the East African Community could adopt such a conditional minimal tax as a regional bloc of seven countries. In this way, she proposes, the countries would be able to share the administrative burden placed upon their staff and resources across the seven revenue authorities in the region.[58] According to Wamuyu, Liotti, and Owens, "a regional approach to addressing the recent changes in the international tax arena has the potential to ensure the development of a region as a whole and intensify economic integration."[59]

6 5 Smaller economies would be hit inordinately

With the implementation of a minimum tax and therefore in the absence of tax-rate differentials, large countries would become more attractive to investors than small countries due to market-size effects. Overall, the

---

55 Readhead, Lassourd and Mann "The End of Tax Incentives: How Will a Global Minimum Tax Affect Tax Incentives Regimes in Developing Countries?" (2021) *Investment Treaty News* https://www.iisd.org/itn/en/2021/06/24/the-end-of-tax-incentives-how-will-a-global-minimum-tax-affect-tax-incentives-regimes-in-developing-countries/ (accessed 2023-07-26).

56 Knowledge@Wharton "Will a Global Minimum Corporate Tax Work?" (2021) https://knowledge.wharton.upenn.edu/article/blouin-g7-corporate-tax/ (accessed 2023-07-30); Jones "Switzerland Plans Subsidies to Offset G7 Corporate Tax Plan" (2021) https://www.swissinfo.ch/eng/switzerland-plans-subsidies-to-offset-g7-corporate-tax-plan/46696800 (accessed 2023-07-30). Other aspects to consider pertain to the administration part of actually paying the taxes by an MNE should the policy be implemented as well as the type of assurances to be put into place to prevent circumventing such policy. In planning for the implementation of such a policy, MNEs located in Switzerland have already begun consulting on developing methodologies to offset any changes which will be brought about by an adjustment in the tax rate. It would appear that policymakers view the collection of taxes above that of investment and growth.

57 Wamuyu, Liotti and Owens "Challenges at the Intersection Between Investment Provisions in Regional Trade Agreements and Implementation of the GloBE Rules under Pillar Two Transnational Corporations" (2023) https://unctad.org/system/files/official-document/diaeia2023d1a2_en.pdf (accessed 2023-07-06).

58 Titus "Pillar Two and African Countries: What Should Their Response Be? The Case for a Regional One" 2022 *Intertax* 711–720.

59 Wamuyu *et al* https://unctad.org/system/files/official-document/diaeia2023d1a2_en.pdf (accessed 2023-07-30).

elimination of tax-rate differentials would undermine small countries' attractiveness to international businesses and induce domestic businesses to relocate to larger countries with the gravity of larger markets. Therefore the implementation of a minimum tax would have detrimental effects on smaller countries with more open economies.[60] As a result, MNEs may no longer view smaller countries as being attractive and in essence lose out on the presence of an MNE to a larger country.[61] The crux of the disadvantages pertains to small countries no longer being able to seem attractive for MNEs together with domestic businesses based therein to rethink their approach and perhaps move to a larger country where larger markets exist.[62] Where MNEs house entities in small countries that are geared towards research and development and innovation, negative effects may result in the form of future investment in such activities being halted and relocated to another jurisdiction.[63]

The author concurs with Magalhães that despite its global impact, the global minimum tax has been designed by, and for only a small number of wealthy countries.[64] As a result, the benefits thereof can only be viewed from the perspective of those benefiting countries, before one considers any residual benefits for the unintended participants, the developing countries. While it is clear that the benefits of the global minimum tax will largely be sowed by developed countries, there is a rhetoric that urges the proposition that developing countries would also benefit. Be that as it may, those suggested benefits may not apply to all developing countries or equally to developing countries. Parada suggests that whether a developing country will benefit depends on the elasticity of investment in such a country. Developing countries with less elastic investment and more competitive advantage are more likely to benefit from imposing a domestic minimum tax.[65]

One other main reason why a global minimum tax would not benefit developing countries is that developing countries are subject to international agreements, private contracts, and national laws that will frequently prevent them from removing tax incentives promised to investors. Any attempt at collecting top-up tax in terms of the minimum tax may violate the agreement and expose the country to costly international arbitration. This creates a two-edged sword situation because if the developing country does not collect the

---

60 Bauer "Why a Global Minimum Corporate Tax Rate May Never Be Implemented" (2021) *Brussels Report* https://www.brusselsreport.eu/2021/07/13/why-a-global-minimum-corporate-tax-rate-may-never-be-implemented/ (accessed 2023-07-30).

61 Bauer "Unintended and Undesired Consequences: The Impact of OECD Pillar I and II Proposals on Small Open Economies" (2021) *ECIPE Occasional Paper* https://ecipe.org/wp-content/uploads/2020/07/ECI_20_OccPaper_04_2020_LY05.pdf (accessed 2023-07-30).

62 *Ibid*.

63 *Ibid.*

64 Magalhães "What Is Really Wrong with Global Tax Governance and How to Properly Fix It" 2018 10 *World Tax Journal* 511.

65 Parada "Tailoring Developing Country Advice: A Response to Noam Noked" 2022 105 *Tax Notes International* 783–784.

minimum tax, the home country of the corporate parent must collect and keep the tax. [66]

On the issue of international agreements, some developing countries have treaties that include tax-sparing provisions, in terms of which the residence country allows their residents to retain the advantages of tax incentives by pretending that tax was levied and thus sparing the taxation of foreign source income of such residents. Minimum tax provisions would impact these tax-sparing provisions because spared taxes are not considered to be covered taxes for calculating the effective tax rate of the constituent entity. This may result in tax disputes, which will impact the ability of developing countries to use tax-sparing provisions to encourage foreign direct investment. To implement the minimum tax, such countries would have to renegotiate and remove tax-sparing provisions from their tax treaties.[67]

6 6 Transparency in competition, or lack thereof

It is advocated that the implementation of a minimum tax would curb or reduce international tax competition.[68] International competition for low effective corporate tax rates will not be eliminated completely. Short of that, international tax competition is likely to continue but in a less transparent manner. A minimum tax rate would result in much more complex corporate tax laws globally, severely undermining transparency and government accountability. It would become close to impossible for outsiders, including government officials and elected politicians, to objectively assess fiscal flows and tax justice in and beyond the corporate world.

France and China are formidable examples of the hypocrisy in the current debate about corporate tax avoidance. For example, the French government is pushing for a minimum tax, but at the same time, it has a fiscal arrangement in place that provides for a 10 per cent maximum tax on income from intellectual property rights.[69] With this exemption, the French government explicitly aims to encourage technical innovation by supporting technological development and R&D activities in France. It is concerning when large countries are in the process of introducing incentives at a time when they should be preparing their tax regimes to operationalise the minimum tax. Another example is China where the Chinese government

---

66 Brown "A Global Minimum Tax: Is Pillar Two Fair for Developing Countries?" (2023) *International Centre for Tax and Development* https://www.ictd.ac/blog/global-minimum-tax-pillar-two-fair-developing-countries/ (accessed 2023-09-27).

67 Oguttu 2022 *Bulletin for International Taxation* 16.

68 Johannesen "The Global Minimum Tax" (2022) *Journal of Public Economics* https://www.sciencedirect.com/science/article/pii/S0047272722001116 (accessed 2023-07-27) 1; UNCTAD "The Impact of a Global Minimum Tax on FDI" (2022) https://unctad.org/system/files/official-document/wir2022_ch03_en.pdf (accessed 2023-01-27); Chaisse "The Global Minimum Tax: How the Latest Tax Reform Will Impact Business" (2022) *Financier Worldwide* https://www.financierworldwide.com/the-global-minimum-tax-how-the-latest-tax-reform-will-impact-business (accessed 2023-09-27).

69 Bauer *Brussels Report* (2021) https://www.brusselsreport.eu/2021/07/13/why-a-global-minimum-corporate-tax-rate-may-never-be-implemented/ (accessed 2023-07-21).

recently extended its super tax deduction regime for domestic manufacturers, aiming to further support growth and technological innovation within Chinese borders.[70] This all suggests that corporate tax competition would, if at all, only stop when taxes on corporate income are completely abolished.

6 7 Failure to allocate taxing rights to the source jurisdiction

The allocation of taxing rights on under-taxed income to the jurisdiction of the parent company is potentially problematic as such parent company may not be located within the jurisdiction of the economic activity that generates the initial profits. In the South African context, this is especially problematic given that the mining and resource extractive industry accounts for the bulk of profit generation and shifting activities.[71]

6 8 Reduced global investment in future operations

A disadvantage posited that policymakers may have not considered relates to reduced global investment in future operations.[72] A direct result of such a policy would be a concomitant reduction in foreign direct investment with a commensurate sluggish growth from an economic aspect.[73] The ability of a country to generate sufficient employment opportunities illustrates an economy's performance.[74] The impact that a minimum tax may have could lead to certain jurisdictions incurring negative employment opportunities.

7 IMPACT OF A MINIMUM TAX ON DEVELOPING COUNTRIES

It is reported that developing countries lose around $100 billion annually as a result of corporate tax avoidance schemes.[75] The race to the bottom and the reduction of corporate taxes have allowed multinationals to engage in tax avoidance schemes and the impact of such schemes has a far wider impact, with drastic effects on developing countries. The race to the bottom reduces

---

70 OECD "R&D Tax Incentives: China" (2021) https://www.oecd.org/sti/rd-tax-stats-china.pdf (accessed 2023-07-21) 1.

71 Statistics South Africa "Four Facts About the Mining Industry" (2019) https://www.statssa.gov.za/?p=14682 (accessed 2023-01-23); OECD "Local Content Policies in Minerals-Exporting Countries: The Case of South Africa" (2017) https://www.oecd.org/trade/topics/trade-in-raw-materials/documents/trade-raw-materials-south-africa-country-note.pdf (accessed 2023-07-27)1–2.

72 International Labour Organisation "Employment Rich Economic Growth" (2019) https://www.ilo.org/global/topics/dw4sd/themes/employment-rich/lang--en/index.htm (accessed 2023-07-23).

73 *Ibid*.

74 *Ibid*.

75 The Guardian "NGOs Claim Poor Countries Lose $100bn Annually Due to Tax Dodges by EU Firms" (2013) https://www.theguardian.com/global-development/2013/sep/18/poor-countries-tax-dodges-eu-firms (accessed 2023-07-21).

the tax burden on multinational companies that yield profits and pay less taxes in these developing countries. It is advocated that minimum tax will eradicate the race to the bottom, abolish tax havens, and possibly increase revenue for African countries.[76]

The effective tax rate is the total taxes on corporate profits paid to government authorities, or "cash tax" (the numerator), as a proportion of the tax base, which is based on accounting profits (the denominator) expressed as a fraction.[77] In each income year, if a subsidiary's effective tax rate is below the minimum globally agreed rate, its parent company must pay a "top-up tax" on its proportionate share of the income of the low-taxed subsidiary, to the country where it is located (usually referred to as the home or residence country).[78] Under certain circumstances, the liability for the top-up tax shifts to one or more other members of the multinational group. As a result, the primary beneficiaries of a minimum tax would be capital-exporting countries, where multinational companies are typically headquartered, who are given first priority to tax undertaxed profits.

In principle, MNEs operating in developing countries should find the 15 per cent minimum tax easy to pay, as most developing countries have much higher statutory corporate tax rates, ranging from 20 to 40 per cent. However, without the minimum tax in developing countries, companies may pay less than the minimum tax rate when they benefit from tax incentives. There are two categories of tax incentives that developing countries often grant to foreign investors. The first one is incentives that create temporary, or timing differences between companies' financial statements, which declare profits according to international accounting standards (accounting profits), and their taxable income, calculated based on domestic tax rules e.g., accelerated depreciation of capital assets. These incentives do not reduce the total amount of taxes owed; they merely postpone them. They tend to be efficient in attracting investment: they lower the cost of capital and make less profitable investments viable. The OECD, through the Inclusive Framework, has committed to finding a workable solution to prevent these types of incentives from triggering a top-up tax, although the details are yet to be determined.[79]

The second category of tax incentives plainly reduces or eliminates taxes paid on profits, often for a set period e.g., tax holidays, preferential tax rates,

---

76 Protto, Heitmüller, Baine, Ndajiwo, Tandon and Dai "Perspectives on the Progress of Global Corporate Tax Reform" (2021) *International Centre for Tax and Development* https://www.ictd.ac/blog/perspectives-progress-global-corporate-tax-reform-inclusive-framework-beps/ (accessed 2023-07-27).

77 Readhead *et al* (2021) *Investment Treaty News* www.iisd.org/itn/en/2021/06/24/the-end-of-tax-incentives-how-will-a-global-minimum-tax-affect-tax-incentives-regimes-in-developing-countries/.

78 *Ibid*.

79 International Institute for Sustainable Development "The end of tax incentives: How will a global minimum tax affect tax incentives regimes in developing countries?" (2021) https://www.iisd.org/itn/en/2021/10/07/the-end-of-tax-incentives-how-will-a-global-minimum-tax-affect-tax-incentives-regimes-in-developing-countries-alexandra-readhead-thomas-lassourd-howard-mann/ (accessed 2023-08-01).

tax credits, investment allowances, or income exemptions.[80] These incentives are considered less efficient than the first category of tax incentives and more likely to result in profit shifting.[81] They are the types of incentives targeted by the reform. The minimum tax will make many of them ineffective because any multinational company that benefits from an incentive such that its tax rate is less than the minimum rate will simply have to pay the balance to a foreign jurisdiction (often the residence country of the company that receives the incentive).

The minimum tax will only affect taxes calculated on the profit of multinational companies.[82] This would include corporate income taxes, withholding taxes on cross-border payments of dividends or interests, and any profit-based levy such as a profit-based mineral royalty or tax on economic rent. It will have no impact on taxes and charges not based on corporate income such as VAT, customs duties, payroll taxes, revenue-based taxes such as mineral royalties, and production sharing arrangements, and no impact on any incentives granted by governments on these revenue streams. This prompts the question of whether countries will compete for investment by lowering these types of taxes in the future. It would be advisable not to, especially considering that these taxes are more reliable, and easier to collect than taxes on income.

It is important to note that the implementation of a minimum tax would only target MNEs with a gross annual turnover exceeding 750 million Euros.[83] This excludes the majority of MNEs operating in developing countries from the application of the minimum tax. As a result, regardless of the implementation of minimum tax, most organisations would not be affected thereby. This necessitates a dual system of corporate tax for those MNEs that meet the threshold and those that do not. This then necessitates additional resources to be invested into the corporate tax administrative and compliance systems, which may not be affordable to most countries, especially developing countries. Due to the number of MNEs involved in developing countries, the tax revenue to be raised from those MNEs which would be under the minimum tax would not be substantial enough to justify the investment that would be required to be placed into its operation within a developing country.

---

80 UNCTAD-CIAT "Design and Assessment of Tax Incentives in Developing Countries" (2018) https://www.un.org/esa/ffd/wp-content/uploads/2018/02/tax-incentives_eng.pdf (accessed 2023-08-01) iii.

81 Platform on Tax Collaboration "Options for Low-Income Countries' Effective and Efficient Use of Tax Incentives for Investment: A Report to the G-20 Development Working Group by the IMF, OECD, UN and World Bank" (2015) https://www.imf.org/external/np/g20/pdf/101515.pdf (accessed 2023-09-03) 3.

82 *Ibid*.

83 OECD "Economic Impact Assessment of the Global Minimum Tax: Summary" (2024) https://www.oecd.org/content/dam/oecd/en/topics/policy-issues/cross-border-and-international-tax/summary-economic-impact-assessment-global-minimum-tax-january-2024.pdf (accessed 2023-09-03) 1.

8 ALTERNATIVES TO GLOBAL MINIMUM TAX

The main objective of Pillar Two, and therefore minimum tax, is to address the tax challenges arising from digitalisation and globalisation of the economy.[84] With the objectives being this clearly defined, the question is whether this objective could not be achieved by using any other means and whether the introduction of minimum tax is the most efficient method of achieving this. The reach and extent of a minimum tax is expansive, and international consensus not only in theory but in practice and operation is required. However, an introduction of targeted rules in different countries could achieve the same goal, especially because the different countries are facing many other different and varied challenges that may not be addressed by a minimum tax.

Most developing countries struggle with administration and enforcement, illicit financial flows, transfer pricing, taxation of the digitalised economy, and taxation of the ever-prevalent small businesses in developing countries.[85] A lot of work still needs to be done in Africa in particular with regard to these challenges. For example, focusing on the digital economy: it is found that in Africa digital technologies are generally under-used and misused relative to their potential. According to Moore, [86] these digital technologies–

> "…tend to be deployed in a rather fragmented way and for 'taxpayer facing' activities, rather than for internal control purposes. They have much under-exploited potential to support additional revenue collection, to make the collection process less unpleasant and fairer and to address the problem of weak oversight and accountability of tax administrations."

In this regard, the natural focus of the developing world is to activate the full potential of digital technologies before considering the tax implications thereof, or the tax avoidance activities attendant thereto.

Another example is with regards to the last-mentioned challenge of taxing small businesses and often also large businesses. In this space, the real struggle in developing countries is that many, if not most, national tax administrations have large proportions of inactive taxpayers – individuals and companies who are registered with the tax administration, but who do not actually pay tax. Their taxpayer registers are often inaccurate.[87] Moore

---

84 OECD https://www.oecd.org/tax/beps/oecd-releases-pillar-two-model-rules-for-domestic-implementation-of-15-percent-global-minimum-tax.htm.

85 See Ngwenya "The Spill-Overs of Illicit Financial Flows" in Owens, McDonnel, Franzsen and Jude (eds) *Inter-agency Cooperation and Good Tax Governance in Africa* (2018) 43–60; Oguttu "Tax Base Erosion And Profit Shifting in Africa – Part 1: Africa's Response to the OECD BEPS Action Plan" (2016) ICTD *Working Paper* https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/12802/ICTD_WP54.pdf?sequence=1 (accessed 20-07-23) 54; Warris "Measures Undertaken by African Countries to Counter Illicit Financial Flows: Unpacking the African Report of the High-Level Panel on Illicit Financial Flows" in Owens *et al Inter-agency Cooperation and Good Tax Governance in Africa* (2018) 1–15.

86 Moore "What's Wrong with African Tax Administration?" (2022) *ICTD Working Paper* 111 https://blog.sodipress.com/wp-content/uploads/2021/01/what-is-wrong-with-african-tax-administration.pdf (accessed 2023-07-30) 3.

87 *Ibid*.

states that a "major reason for both the large numbers of inactive taxpayers and the inaccuracy of the registers is that considerable efforts are continually made to register new taxpayers, even though experience indicates that few will actually end up paying tax."[88] These are some of the major challenges that developed countries do not necessarily share with developing countries. Pertinent hereto, therefore it would be more apposite for developing countries to focus resources on implementing current laws than to introduce yet another instrument that is less likely to be properly administered.

Concerning the globalisation of the economies, it is submitted that adherence to treaty principles would assist countries in adequately allocating taxing rights. It is a basic principle of international tax treaties that the profits of an enterprise of a contracting state are taxable only in that state unless the enterprise carries on business in the other contracting state through a permanent establishment situated therein.[89] Strictly applied, this principle should ensure equitable tax administration in most countries. It is mostly the lack of enforcement of these rules that results in tax avoidance and evasion. Once again, instead of creating or introducing new rules, taxing authorities should seek to enforce the already existing rules.

Furthermore, governments that have not already, could introduce a specific digital services tax to tax digital corporations.[90] This could be a tax on selected revenue streams of multinational digital companies.[91] As an example of this, a digital services tax implemented in Australia to date has a very high tax-free threshold which ensures that the tax only applies to large MNEs that are thought to make a significant amount of profit in the domestic country.[92] In this way, countries would be able to generate more revenue than they are presently, without adversely impacting local and multinational small and medium enterprises. Making the rules poignant and strict would result in less tax avoidance from MNEs.

In 2021 Kenya introduced a digital services tax (DST), in lieu of adopting the minimum tax. This is against the international pressure for Kenya to conform to the global multilateral minimum tax proposal.[93] The DST was introduced in the Finance Act 2020 and became effective on 1st January 2021.[94] It is payable on income derived or accrued in Kenya from services offered through a digital marketplace.[95] The rate of DST is 1.5 per cent of the

---

88 *Ibid*.

89 Oguttu "The Challenges of Taxing Profits Attributed to Permanent Establishments: A South African Perspective" 2009 21 *SA Merc LJ* 773.

90 A Digital Services Tax (DST) is a tax on selected revenue streams of multinational digital companies. See Tax and Transfer Pricing Institute "Digital Services Taxation: An Introduction and Policy Options for Australia" 2020 7 *Policy Brief* 73.

91 Tax and Transfer Pricing Institute 2020 *Policy Brief* 3.

92 *Ibid*.

93 Bloomberg "OECD Urges Kenya to Drop Plan to Double Digital-Services Tax" (2022) https://www.bloomberg.com/news/articles/2022-04-14/oecd-urges-kenya-to-drop-plan-to-double-digital-services-tax?leadSource=uverify%20wall (accessed 2023-01-27).

94 Kenya Revenue Authority "Introducing the Digital Services Tax" (2020) https://kra.go.ke/images/publications/Brochure-Digital-Service-Tax-Website.pdf (accessed 2023-01-27) 1.

95 A digital marketplace is a platform that enables direct interaction between buyers and sellers of goods and services through electronic means. See Kenya Revenue Authority

gross transaction value. The gross transaction value in the case of the provision of digital services is the payment received as consideration for the services; and in the case of a digital marketplace, it is the commission or fee paid to the digital marketplace provider for the use of the platform. The gross transaction value is exclusive of VAT.

The benefit of DST as a unilateral measure is that its application, implementation, and administration are solely within the control of the Kenya Revenue Authority. It does not need international consensus to be administered, nor does it need approvals to adjust as and when the need arises. Reforms are underway to increase the rate to 3 per cent. Kenya believes that its DST would bring in revenues from many more companies – an estimated 89 compared to just 11 under the OECD deal according to the Kenya Revenue Authority's Commissioner, Terra Saidimu.[96]

There is also a reform proposal from the United Nations to consider which is aimed specifically at digital services businesses. This proposal is based on taxing companies' digital revenues where they are generated, rather than where the MNE is resident, on a country-by-country basis.[97] A growing number of emerging economies, including India, Argentina, Nigeria, and Vietnam, support this UN proposal.

Finally, perhaps a shift in the taxing event should be considered. Under the minimum tax, corporate tax would still be charged on profits. However, there are multitudes of multinationals whose revenue and market capitalisation have increased dramatically but whose profit margins have remained below the recommended 10 per cent cut-off.[98] Under the current construct of the minimum tax, these groups will not be subjected to the minimum tax. In this regard, Saez and Zucman[99] have proposed another way to achieve a more equitable tax distribution. Rather than taxing profits, their proposal would impose a 0.2 per cent tax on the stock market capitalisation of publicly listed companies – the value of their shares. But, more importantly, this system would not wait for profits to reach a specific level before paying out – it would do so far sooner. Taxes raised might be distributed proportionally to sales made in each country, including non-G20 countries.

Some commentators believe that alternatives to global minimum taxes should be specialised domestic minimum taxes. Noked suggests that

(2020) https://kra.go.ke/images/publications/Brochure-Digital-Service-Tax-Website.pdf (accessed 2023-01-27) 1.

96 VATCalc "Kenya to Raise DST from 1.5% to 3% Despite OECD Agreement for 2023 Global Corporate Tax Reforms" (2022) https://www.vatcalc.com/kenya/kenya-plans-to-double-digital-sales-tax-to-3/ (accessed 2023-07-12).

97 Financial Times "IMF Proposes 'Solidarity' Tax on Pandemic Winners and Wealthy" (2021) https://www.ft.com/content/5dad2390-8a32-4908-8c96-6d23cd037c38 (accessed 2023-07-13).

98 Wilson "The G7's Global Corporation Tax: Bringing Big Tech to Heel" (2022) *Money Week* https://moneyweek.com/investments/stocks-and-shares/tech-stocks/603379/the-g7s-global-corporation-tax-bringing-big-tech (accessed 2023-07-20).

99 Saez and Zucman "A Wealth Tax on Corporations' Stock" (2002) *Economic Policy* https://academic.oup.com/economicpolicy/article/37/110/213/6656187 (accessed 2023-07-27) 217.

developing countries should consider designing their own domestic minimum taxes that would apply in a targeted fashion that would only be triggered once the domestic company's income would otherwise be subject to tax in another jurisdiction as per the GLoBE rules. He also suggests that in addition developing countries should impose a domestic minimum tax modeled on the GLoBE rules that would apply to the subsidiaries of the MNEs subject to the GLoBE rules.[100]

The biggest challenge with Noked's proposal is that it would result in extensive financial and administrative costs for developing countries. Parada took the liberty to directly respond to this and stated that he is

> "hesitant to agree that calling on all developing countries to implement a domestic GLOBE can be the holy grail for the challenge of GLOBE rules. Instead, some developing countries, especially those with less competitive advantages and high investment elasticities, could start thinking about more sensitive domestic reforms to their tax incentive regimes, including alternative forms of competition. Perhaps that way they can still ride the wave of minimum global corporate income taxation that the world seems to be in."[101]

Finally, Shaviro emphasises that minimum taxes, in general, are deeply flawed and should only be implemented as a last resort when other better options would not be possible.[102]

9 CONCLUSION

Once, or if, fully implemented, a minimum tax will inevitably redefine what is an acceptable tax base and what is an acceptable tax rate. As such, it does not necessarily attempt to harmonise taxes, but instead, it sets boundaries within which a country is expected to operate. There is an anticipated potential profit loss as a result of increased tax liability in head office companies (unbudgeted), due to the potential top-up where the income from the subsidiary is taxed at below 15 per cent. In the long run, and as a progressively lower minimum tax rate becomes more palatable, the gradual convergence of global corporate income tax rates to a minimum tax, regardless of geographic location, can be reasonably expected to neuter the rationale for profit shifting. A key result of this could be the relocation of mobile economic assets to the originating or parent company jurisdiction.

In the unlikely event that the minimum tax could be adopted by all countries, it could be effective. If adopted by the majority, it would be imposed on those countries that do not adopt it, via the top-up rule. If it is adopted by a few, it will not work. Regardless, it runs a risk of being sabotaged by a lack of transparency and clandestine deals between tax authorities and taxpayers.

---

[100] Noked "Potential Response to GLOBE: Domestic Minimum Taxes in Countries Affected by the Global Minimum Tax" 2021 102 *Tax Notes International* 943.

[101] Parada (2022) *Tax Notes International* 1.

[102] Shaviro "What are Minimum Taxes, and Why Might One Favor or Disfavor Them?" (2020) *NYU Law and Economics Research Paper No 20–38* https://ssrn.com/abstract=3604328 (accessed 2023-11-10) 3.

However, countries that do not adopt may continue with business as usual. Developing country to developing country deals could still be at incentivised rates because if they are not incentivised rates, they run the risk of their MNEs preferring the more advanced economies for investment, as they (the developing countries) cannot compete with developed countries on key business location determinants. In the end minimum tax is likely to have far-reaching implications for developing countries and it is key that each country analyses how it should respond to the pending global instrument. Unfortunately, as things now stand, countries, including developing countries, are racing to introduce and implement minimum tax, through domestic legislation with no obvious plan to address the inability of developing countries to collect tax in terms of the minimum tax.[103] Tandon urges developing countries to carefully assess the impact that Pillar Two may have not just on the present taxes but also on the implications of importing such a rule within its domestic tax law.[104]

The main takeaways from this article for developing countries can be summarised as follows:

1. The minimum tax was designed for and by developed high-income countries;
2. Empirical evidence shows that it is the developed countries that will benefit financially from minimum tax;
3. By reducing taxes from the high ranges of 25 per cent to 35 per cent, a minimum tax of 15 per cent engenders a new legitimised race to the bottom;
4. There is no patent evidence that minimum tax will bear any benefit for developing countries;
5. The administrative costs of adopting minimum tax will be disproportionately higher for developing low-income countries than they would be for developed high-income countries;
6. The punitive provisions such as the top-up tax are an acknowledgement that not all countries would find other benefits in adopting a minimum tax. Developing countries are lulled into believing that there is a benefit to them because the minimum tax depends on mass adoption for it to work, hence the sanction.
7. The adoption of minimum taxes may result in developing countries defaulting on their international agreements;
8. Minimum tax is premised on the assumption that developing countries' incentives are ineffective for the countries' purposes and that the economic playing field is plain;
9. Many countries are rushing into adopting minimum taxes without proper analysis of the impact on developing countries. The effects of hasty adoption may be irreversible; and

---

[103] International Centre for Tax and Development "A Global Minimum Tax: Is Pillar Two Fair for Developing Countries?" (2023) https://www.ictd.ac/blog/global-minimum-tax-pillar-two-fair-developing-countries/ (accessed 2023-11-10).

[104] Tandon 2022 *Intertax* 935.

10. Minimum taxes are flawed, or imperfect at best. Various countries have abandoned them.

Based on the foregoing, developing countries should examine their own tax regimes against their developmental needs and adjust the tax regime or opt to maintain their tax *status quo*. There is no one-size-fits-all solution in international tax. As demonstrated in this article, the benefits of minimum tax for developing countries are not patent, clear, or determinable.

NOTES / AANTEKENINGE

The Creation of the Legal Services Ombud – How to Make It Effective

1 Introduction

The Legal Services Ombud is the creation of the Legal Practice Act (LPA) (s 47 of Act 28 of 2014). The law came into full operation in November 2018 with the main purpose and function being to bring about a unitary regulatory regime for the legal profession. Prior to the enactment of the LPA, the legal profession was regulated under laws (the Attorneys Act 53 of 1979 sets out the rules relating to the admission of attorneys and practice in South Africa, whereas the Admission of Advocates Act 74 of 1964 regulates the admission and removal of advocates in South Africa) and regulatory bodies (s 56 of 25 of 1979 established provincial law societies tasked with regulating the practice of attorneys in their respective provinces, including developing codes of conduct and rules on enforcing discipline among members. The General Council of the Bar is a body established in terms of the Advocates Act 74 of 1964 and mandated to regulate the advocacy profession and establish a code of conduct for the advocacy profession) that imposed their own respective requirements in relation to matters such as qualification requirements, standards and conduct of legal practitioners. (The LPA sets out its purpose in the Preamble, which includes: "to provide for the establishment, powers and functions of a single South African Legal Practice Council and Provincial Councils in order to regulate the affairs of legal practitioners and to set norms and standards; to provide for the admission and enrolment of legal practitioners; to regulate the professional conduct of legal practitioners so as to ensure accountable conduct.")

This brief article intends to discuss the creation of the new Legal Services Ombud, including its role and function and where it fits in with the Legal Practice Council (a national statutory body established in terms of s 4 of the Legal Practice Act 28 of 2014 "as a body corporate with full legal capacity, and exercises jurisdiction over all legal practitioners and candidate legal practitioners"). The Council is the statutory regulatory body of the unitary legal profession that regulates the practice of law in the country in terms of the LPA.

Within this context, the article explores the term "legal ombud" or "ombud" and whether it is appropriate in the regulation of the legal profession with all its complexities and intricacies. Since establishing the Ombud appears to add an additional layer of regulation, what purpose does this serve for consumers of legal services in our country?

1 1 Meaning and purpose of an ombudsman

"Ombud" or "ombudsman" is defined as an official appointed to investigate complaints against a company or an organisation, especially a public authority, with the aim and purpose of ensuring that these complaints are resolved speedily and confidentially ("Ombudsman" *Oxford Languages Dictionary*).

The use of the ombudsman system originated in around 1809 in the Scandinavian country of Sweden (see Cheng "The Emergence and Spread of the Ombudsman Institution" 1968 377(1) *The Annals of the American Academy of Political and Social Sciences* 20–30), the idea behind its establishment being to "safeguard individual rights against governmental encroachment" (see Cheng 1968 *The Annals of the American Academy of Political and Social Sciences* 21). Subsequently, this system was widely adopted across different countries and different systems.

The original purpose of an ombudsman institution was to provide individuals with an office where they could lodge complaints about bad administrative decisions, express grievances and have their grievances addressed. However, what has become clear in the growth and development of the ombudsman system is that it has been used to control and check the executive arm of government's abuse of powers when it comes to dealing with the public.

Our country's recognition of the ombudsman system is entrenched in the Constitution of the Republic of South Africa, 1996 (Constitution). Under Chapter 9, several institutions or bodies have been created with the dual purpose of ensuring that the exercise of public power by the executive arm of the government is kept in check, and providing a process or procedure in terms of which the public can lodge a complaint against executive conduct and obtain redress (see Ch 9 of the Constitution on the creation of the Office of the Public Protector, the South Africa Human Rights Commission and the Commission for Gender Equality, among the most prominent of these institutions).

Although these institutions have varied responsibilities and roles, their common role is to ensure that the executive arm of government and its officials exercise their powers appropriately and, therefore, do not abuse their powers. At the same time, the institutions provide the public with an opportunity to lodge a complaint should there be such an abuse – be it the failure to provide services to a community, the abuse of basic human rights by the police or any government institution, or the failure of government to use the funds entrusted to it efficiently (see s 188 of the Constitution, which sets out the purpose of the Office of the Auditor-General, one of the Chapter 9 institutions required to report on the finances of all national provincial and local government administrations and also to audit how they use these financial resources).

The most prominent of these institutions is the office of the Public Protector established under section 181 of the Constitution. As provided under section 182, the function of the Public Protector is to investigate any conduct in state affairs or in the public administration of any government

department that is alleged to be improper or that results in any impropriety or prejudice to members of society (see s 182(1)(*a*) and (*b*) of the Constitution, where it states that in addition to these powers to investigate, the Public Protector can also make findings and take appropriate remedial action). This ensures there is a remedy in the event of public unhappiness at the conduct of public servants, including government officials and administrators.

It is not the purpose of this article to discuss the powers of the Public Protector in detail, and whether the outcome of its investigations has a binding effect. However, the latter was made abundantly clear in the Constitutional Court judgment of *Economic Freedom Fighters v Speaker of The National Assembly; Democratic Alliance v Speaker of the National Assembly* (2016 (3) SA 580 (CC)). The court held that the remedial action recommended by the Public Protector in terms of section 182 remains binding and must be enforced by the party to whom it is addressed, unless set aside by the court (see *Economic Freedom Fighters v Speaker of The National Assembly supra* par 75, where the court states the rule that demands that decisions made by institutions with legal authority to make them must be obeyed by those they were made against unless they have them set aside; therefore, that they are binding unless these steps are taken).

In coming to this conclusion, the court recognised that the Public Protector's role is to attend to complaints and, in doing so, to cure incidents of impropriety, prejudice, unlawful enrichment, or corruption in government circles. This is done not only to observe the constitutional values and principles necessary to ensure that the "efficient, economic and effective use of resources [is] promoted" (see *Economic Freedom Fighters v Speaker of The National Assembly supra* par 64–66) but also to ensure that the Public Protector is able to do so as the powers of the office are sourced from the Constitution as the supreme law of our country.

As is evident, the role of the ombudsman in society in the protection of individual rights is recognised and respected in terms of our laws and, most importantly, the South African Constitution. Therefore, it is important that the creation of the Legal Services Ombud by the LPA is viewed in this light. The discussion that follows clarifies the role and powers of the Legal Services Ombud in the context of our constitutional order.

1 2 Creation of the Legal Services Ombud: Its role and purpose

As indicated, the Legal Services Ombud is established in terms of the LPA. Section 45 of the Act provides as follows:

> "(1) The Office of the Legal Services Ombud for the Republic is hereby established, as a juristic person.
>
> (2)(*a*) The Ombud must, in consultation with the Minister, determine the seat of the Office of the Ombud.
>
> (*b*) The Office of the Ombud may, with the approval of the Minister, conduct its activities away from its seat."

Section 46 sets out the following objectives of the Office of the Legal Services Ombud:

> "The objects of the Ombud are to–
> (*a*) protect and promote the public interest in relation to the rendering of legal services as contemplated in this Act;
> (*b*) ensure the fair, efficient and effective investigation of complaints of alleged misconduct against legal practitioners;
> (*c*) promote high standards of integrity in the legal profession; and
> (*d*) promote the independence of the legal profession."

Section 47 provides for the appointment of the Legal Services Ombud or ombudsman by stating that the incumbent must be a retired judge discharged from service in line with the Judges' Remuneration and Conditions of Employment Act 47 of 2001. The Ombud's office is regarded as independent and is subject only to the Constitution (see s 47 of the LPA, which further creates an obligation on the part of the Legal Practice Council to assist and protect the office and the Ombud to ensure their independence, impartiality and effectiveness).

It is important to note that in ensuring that the office of the Legal Services Ombud is able to act independently and without any fear or favour, the LPA under section 47(4) provides: "No person may interfere with the functioning of the Ombud." This provision does not, however, go to the extent of section 9 of the Public Protector Act (23 of 1994) (PPA), which provides under section 9(1) that no person shall insult the Public Protector or the Deputy Public Protector, or do anything in an investigation that, in a court of law, would constitute contempt of court (see s 9 of the PPA).

It is evident that the office of Legal Services Ombud established by the LPA has extensive powers to investigate complaints in the broader legal profession where there are concerns of maladministration and prejudice, particularly complaints that relate to how legal services are rendered and how individuals involved in the rendering of legal services conduct themselves. From a reading of section 46, it is clear that this is directly aimed at the conduct of legal practitioners, as emphasised by the Minister of Justice during a speech to inaugurate the office of the Legal Services Ombud (see Joubert "Launch of the Office of the Legal Services Ombud" 2022 (July) *De Rebus* 6–8. The Minister is quoted as follows*:* "[T]he moral standards [in the profession] have to be restored and I believe the Ombud will play a big role to restore those standards.")

The question, therefore, is what the relationship is between the Legal Practice Council and the Legal Services Ombud when it comes to holding legal practitioners to account for their conduct.

2 Legal Practice Council's Code of Conduct

The provisions of the LPA dealing with the establishment of the Legal Practice Council fall under Chapter 4 of the Act. This chapter contains provisions that deal with matters that relate to the professional conduct of legal practitioners and the establishment of disciplinary bodies to ensure that legal practitioners are held accountable for instances of misconduct (s 36 of

the LPA calls for the establishment of a code of conduct for all legal practitioners).

The Legal Practice Council, a regulatory body of legal practitioners established in terms of the LPA, has a code of conduct that was developed following an extensive consultation process (see Code of Conduct in *GG* 42337 of 2019-03-29). The code of conduct was published in 2019 and applies to all legal practitioners, including attorneys and advocates and, where applicable, legal practitioners who are not in legal practice (see s 2 of the Code of Conduct in *GG* 42337 of 2019-03-29). The principal aim of the code is to regulate legal practitioners' conduct in relation to their clients, the justice system and their colleagues (see Code of Conduct in *GG* 42337 of 2019-03-29).

The code has clear provisions requiring and expecting that all legal practitioners at all times act and display honest and ethical conduct in their dealings with clients and the courts. They must always maintain and retain independence to ensure that they provide unbiased service to their clients, and they must further ensure that they maintain confidentiality at all times (see s 3 of the Code of Conduct in *GG* 42337 of 2019-03-29).

Section 37 of the LPA further contains provisions designed to facilitate the investigation of alleged misconduct and the conduct of disciplinary processes against legal practitioners accused of such misconduct. Even though this is not explicit in the LPA, it is clear that such investigations will emanate from any party who brings a complaint before the Legal Practice Council. However, such complaints must relate to misconduct only in relation to the code of conduct and an alleged breach committed by a legal practitioner.

The mandate of the Legal Services Ombud appears to be wider than that of the Legal Practice Council – in that it has as its main object "to protect and promote the public interest in relation to the rendering of legal services as well as to promote high standards of integrity and independence of the legal profession" (see s 46 of the LPA). This is far greater than the investigation of complaints that appears to be the main role and function of the Legal Practice Council – as demonstrated in section 37 of the LPA.

Section 46(*b*) provides that the Legal Services Ombud must "ensure the fair, efficient and effective investigation of complaints of alleged misconduct against legal practitioners". This effectively means that the Legal Services Ombud has the power to investigate any complaints arising out of how the Legal Practice Council deals with complaints of misconduct against its members. Complaints could be varied and may relate to maladministration, bias, or unfairness in how the Legal Practice Council dealt with a complaint against one of its own.

As stated above, the Legal Services Ombud has greater powers to deal with complaints involving the conduct of legal practitioners, including complaints of misconduct. However, such complaints must first be referred to the Legal Practice Council. Should there be any concerns about how complaints have been handled, they may be referred to the Legal Services Ombud. This view is in line with the recognised function of an ombudsman, which is ensuring that government, public officials, and bodies are held

accountable for how they treat and provide services to members of the public.

Having indicated all of the above, it is important to understand the powers of the Legal Services Ombud and their extent, in fulfilling this crucial role of promoting accountability in the legal profession.

3 Powers and functions of the Legal Services Ombud

The powers of the Legal Services Ombud are found under section 48(1) of the LPA. From these provisions, it is evident that the Legal Services Ombud has been provided with extensive powers, which are centred on conducting investigations of its own accord and/or upon receiving a complaint.

From a reading of the LPA, it is clear that an investigation conducted by the Legal Services Ombud will revolve around matters and institutions that fall under its purview. These matters are discussed below.

3 1 Maladministration in the application of the Legal Practice Act

Maladministration, in its simplest terms, refers to the actions of a government or a public body that are seen as causing injustice to the general public (see Caiden "What Really is Public Maladministration?" 1991 51(6) *Public Administration Review* 486–493, where the author describes maladministration (public) as failure or mistakes in the normal functioning of public administration and when justifiable grievances or concerns raised by the public are ignored and/or not dealt with). As demonstrated here, the office of an ombudsman is the ideal body for addressing and dealing with such complaints, and for providing recommendations and/or rulings on how the injustice suffered can be cured (see also UK Parliament Local Government Ombudsman Briefing 04117 of 2017, where the author discusses the importance of the ombudsman as being responsible for investigating complaints relating to injustice suffered by members of the public; http://researchbriefings.files.parliament.uk/documents/SN04117/SN04117.pdf (accessed 2023-08-11)).

Section 48 of the LPA provides that the Ombud is competent to investigate "maladministration in the application of this Act" but does not, however, provide further detail on what would constitute maladministration in the context of legal services. One would assume that it could relate to failures in how the Legal Practice Council, a statutory body formed to regulate the legal profession, conducts itself in regulating the profession. This includes a concern that: the Council has structures in place that speak to or are able to ensure fairness in how it applies various aspects of the LPA; that these structures are functioning optimally; and that failure to have these in place might amount to maladministration. An example of what might be expected of the Council could be providing structures and/or processes relating to the assessment of vocational training of aspirant legal practitioners, and further ensuring that candidates seeking to enter the

profession are not subject to concerns and/or allegations of impropriety or injustice.

A related aspect is the perennial issues relating to the transformation of the legal profession (the Preamble of the LPA contains the following statement on transformation*:* "to provide a legislative framework for the transformation and restructuring of the legal profession in line with the constitutional imperatives so as to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics of the Republic") and ensuring that practising legal practitioners who are Black and, in particular, women are provided with sufficient opportunities and exposure to more diverse and complex commercial as well as government-related work to help expand and grow their practices and stature in the profession.

It can, therefore, be argued that the office of Legal Services Ombud is now a body or institution that will be able to investigate these matters. It may do so on its own initiative or through a complaint, received from individuals and/or representative bodies, about the conduct of the responsible government body (such as the Legal Practice Council) and its responsibilities in ensuring that the legal profession is inclusive and representative of the population of South Africa.

3 2 Abuse, unjustifiable exercise of power or undue delay in performing a function

Section 48(1)(*a*) of the LPA provides that the Ombud may investigate "abuse or unjustifiable exercise of power or unfair or other improper conduct or undue delay in performing a function in terms of this Act". Abuse or unjustifiable exercise of power or undue delay in performing a function in terms of the LPA is closely related to the previous point, but it is clear that it is directly aimed at the regulatory body – in particular, where ordinary people have lodged complaints against certain legal practitioners that have not been acted upon, or where there have been delays in handling complaints, or where the outcome of a complaint is not correct.

The complaints lodged against legal practitioners relate mainly to unprofessional conduct. The LPA granted the Legal Practice Council the powers to produce and implement a professional code of conduct (see Code of Conduct in *GG* 32337 of 2019-03-29). It is mandatory for every legal practitioner to adhere to the code of conduct (s 36(2) of the LPA states that the code of conduct serves as the prevailing standard of conduct to which all legal practitioners and candidate legal practitioners must adhere) in their dealings with the general public, as well as with their colleagues and other applicable stakeholders.

It is, therefore, important that an independent body exists that is able to investigate concerns on how a regulatory body establishes a code of conduct, that same is implemented, and that there are systems in place to ensure that the members of the legal profession are taken through proper disciplinary processes and that such matters are resolved without unnecessary delays (see also s 37 of the LPA, referring to the establishment

of disciplinary bodies. Section 41 deals with appeals against findings of the disciplinary committee; an appeal may be referred to an appeal tribunal. Section 41 also includes a list of persons who are approved by the Legal Practice Council to serve on an appeal tribunal).

It is well known that the Legal Practice Council, through its provincial structures, receives a volume of complaints from the general public and that there is a backlog in dealing with these complaints (see Moosa "Legal Services Ombud Will Protect the Public Against Crooked Lawyers" (13 June 2023) *Business Day* https://www.businesslive.co.za/bd/national/2023-06-13-legal-services-ombud-will-protect-public-against-crooked-lawyers-desai-says/ (accessed 2023-08-25). The incumbent Legal Services Ombud is quoted as saying that there is still a "huge backlog of matters" relating to the conduct of practitioners before the Legal Practice Council and that it is the responsibility of his office to ensure that these are resolved by ensuring that the Appeals Tribunals are also set up and working optimally"). In this instance, on its own initiative, the Legal Services Ombud is in a position to commence an investigation on this issue and to provide guidance to the Legal Practice Council on how these complaints can be handled and how investigations may be sped up to ensure proper accountability of the legal profession and justice to the general public.

3 3 Acts or omissions resulting in unlawful or improper prejudice

Section 48(1)(*a*) of the LPA empowers the Ombud to investigate any alleged "act or omission which results in unlawful or improper prejudice to any person, which the Ombud considers may affect the integrity and independence of the legal profession and public perceptions in respect thereof". Such an act or omission is an all-encompassing complaint. One can deduce that it is aimed at ensuring that the legal profession be protected and insulated from individuals and/or institutions that seek to cause it harm. Examples of such conduct could include acts of certain individuals who may enjoy prominence in politics or society unfairly attacking the legal profession and its members to an extent that it has an effect on the integrity of the profession.

At the same time, the provision creates a positive obligation on the Legal Services Ombud to ensure that it investigates any act or omission by any party that may seek to tarnish and/or question the integrity and/or reputation of the legal profession. This could emanate from the manner in which certain sections or members of the profession conduct themselves in their dealings with courts and/or their fellow professionals. The Legal Services Ombud is not required to wait for a complaint to be lodged with the Legal Practice Council before taking action to investigate such matters and produce findings to prevent a recurrence of such matters.

3 4 Further powers

As demonstrated above, the Legal Services Ombud is granted extensive powers aimed solely at ensuring that there is absolute integrity,

transparency, inclusivity as well as fairness when it comes to the provision of legal services in South Africa. The Legal Services Ombud achieves this through the extensive powers and functions that it has been granted by the LPA.

In addition to these powers and in an effort to ensure that complaints are dealt with promptly, the LPA under section 48(1)(*c*) promotes the use of alternative dispute resolution mechanisms to ensure that matters are resolved amicably. This includes the Legal Services Ombud advising the complainant on any appropriate remedies they can follow to seek redress (s 48(1)(*b*)(ii) and (iii) of the LPA). Furthermore, where a criminal offence is alleged, this may be referred to the relevant authorities for further investigation and prosecution (s 48(1)(*c*)(i) of the LPA).

The Legal Services Ombud is further empowered to make suitable recommendations, including sanctions. Any party, including a legal practitioner against whom a sanction has been imposed, may be referred to the relevant body responsible for their conduct in order for the respective body to take whatever disciplinary action it deems appropriate against the individual (s 48(1)(*c*)(ii) of the LPA).

4 Obligations related to findings of the Legal Services Ombud

The question arises whether the findings of the Legal Services Ombud are binding. The LPA is clear that the Legal Services Ombud may at any time during and/or at the conclusion of its investigation refer a matter and/or its findings for criminal prosecution should it determine that a criminal offence has been committed (s 48(1)(*b*) of the LPA). The findings may also be referred to an appropriate body or authority to take disciplinary steps, where applicable.

An important point to consider, as clearly appears under section 48(1)(*c*)(ii), is that the Legal Services Ombud may make an appropriate recommendation regarding redress of the prejudice in question or any other appropriate recommendation that the Ombud deems expedient to the affected body or authority. However, the LPA does not state – either directly or indirectly – whether the recommendations or findings made by the Legal Services Ombud have a binding effect on the public body or official against whom it was made. The importance of clarity on this issue cannot be overstated when one considers the nature and purpose of the Legal Services Ombud as established by statute.

As is the case with any ombudsman office established, the main purpose is to ensure that government and/or public bodies be compelled to account to the members of the public they serve (s 48 of the LPA). The Legal Services Ombud achieves this task by receiving or initiating complaints against acts of maladministration, fraud or corruption, or inadequate service delivery by public bodies (ss 46 and 48 of the LPA).

The importance of the office of the Legal Services Ombud in these circumstances is signified; it is there to ensure the individual rights enshrined in our Constitution are respected and adhered to – for example, the right of

access to justice, including but not limited to section 34, which provides for the right to have one's dispute dealt with in a fair public hearing before a court or an independent body or forum (see s 35(1) of the Constitution).

The LPA ensures the independence of the Legal Services Ombud by emphatically stating that the institution is independent and only subject to the Constitution and the law (s 47(1) of the LPA). This effectively means that decisions, recommendations, or findings must be tested against the Constitution and, if found to be sound, the question remains whether they can be regarded as binding. As indicated, the LPA is silent on the matter, but it is clear that the Legal Services Ombud as an independent body, enjoying the protection of the Constitution, should have the means within the law to ensure that it is taken seriously.

To answer this question, one has to rely on court decisions on the status of the findings of another equally (or more) important ombudsman office – that of the Public Protector. In the decision of the *South African Broadcasting Corporation v Democratic Alliance* (2016 (2) SA 522 (SCA)), the Supreme Court of Appeal, taking into account the nature and purpose of the office of the Public Protector in the Constitution (*South African Broadcasting Corporation v Democratic Alliance supra* par 52. The court stated that the Public Protector as a Chapter 9 institution established in terms of the Constitution cannot be second-guessed in its decision. See also par 53, where it held that remedial action of the Public Protector (absent review) was to be followed and implemented) and as a body that was designed to "support democracy" and to ensure that public bodies meant to protect the general interests of the public remain accountable, held that the decisions of the Public Protector remain binding and must be followed and implemented unless they are taken on review by the public body against whom they were made (*South African Broadcasting Corporation v Democratic Alliance supra* par 53).

The decision of the Supreme Court of Appeal was reiterated in the Constitutional Court case of *Economic Freedom Fighters v Speaker of National Assembly; Democratic Alliance v Speaker of National Assembly* (*supra*). The court held that the findings of the Public Protector have a binding effect and that "compliance is not optional and remedial action taken against those under investigation cannot be ignored without legal consequences" (see also the discussion of the case by CJT Mbiada "The Public Protector as a Mechanism of Political Accountability: The Extent of Its Contribution to the Realisation of the Right to Access Adequate Housing in South Africa" 2017 *PER/PELJ* 20).

It is probably too ambitious to equate the office of the Public Protector and the Legal Services Ombud in terms of reach, status and impact, considering that the latter is primarily focused on ensuring fairness and justice in the administration of justice. The Legal Services Ombud must ensure that the actors regulating the legal profession apply the laws, act fairly at all times and provide necessary protections to the public they serve. In contrast, the office of the Public Protector is there to ensure that government institutions as a whole do not embark on conduct that threatens our democracy or seek to avoid accountability for their actions. However, both institutions are clearly independent and accountable only to the Constitution. Their

recommendations/findings must be respected and followed unless reviewed by a court of law.

5 General provisions

Sections 49 to 51 of the LPA are general provisions dealing with the term of the Ombud, the Office of the Ombud comprising its administrative functions and the financing of the Legal Service Ombud. The provisions, and the manner in which they have been drafted, reinforce the point that the Office of the Ombud is viewed as independent. It is subject only to the Constitution, and the seat of its office must be determined in consultation with the Minister (see s 45(2) of the LPA, where it is clear that the Ombud and their office must operate independently, in substance and in form, meaning they are not required to share space). Furthermore, the allocation of a budget to the Legal Services Ombud must be determined by Parliament (s 51(6) of the LPA; these monies also include the establishment of the administrative functions of the Legal Services Ombud) and not by the relevant minister, once more emphasising the independence of the Legal Services Ombud. (The office of the Legal Services Ombud is not an organ of state and functions outside of the public service administration; see s 48 of the LPA).

The administrative functions of the Legal Services Ombud are run by a director appointed by the Ombud for a renewable period of five years, and the director's remuneration and allowances are determined by the relevant minister in consultation with the Minister of Finance. In contrast, the Legal Services Ombud is appointed for a renewable period of seven years, which once more demonstrates that they act independently.

As indicated, the President is responsible for appointing the Legal Services Ombud. Since the appointment must be a judge who has been discharged from active service in terms of the Judges' Remuneration and Conditions of Employment Act (see s 5(1) of 47 of 2001, which contains a formula to be applied in calculating the salary of a judge discharged from active service in terms of the Act), their salary will be determined in terms of this Act. The LPA is, however, silent on the removal of a Legal Services Ombud. Therefore, reliance must be placed on the provisions of the Judicial Services Commission Act 9 of 1994 and, in particular, the definition of "judge", which effectively includes a judge discharged from active service in terms of the Judges' Remuneration and Conditions of Employment Act (see s 7(1)(*g*) of 47 of 2001 for the definition of "Judge" in terms of the Act).

The Judicial Services Commission regulates the conduct of judges appointed in terms of the laws of the country, which includes the ability of any person to lodge a complaint about a judge. Such a complaint must be handled in terms of the procedures set out in the Judicial Services Commission Act (s 14 of 9 of 1994, which sets out the grounds as well as the procedures for handling disciplinary matters against judges). This further demonstrates the intention of the legislature to insulate and protect the Legal Services Ombud and the office of the Ombud from external threats to its independence. The Legal Services Ombud, appointed as a judge in terms of the Judicial Services Commission Act can only be reprimanded by a chairperson of the judicial conduct committee (the committee is established

in terms of s 8 of 9 of 1994. It has powers to reprimand the judge, including requiring an apology to the complainant and providing a written warning in instances where the misconduct is not deemed to amount to an impeachable offence) or even removed from their position (s 19 of 9 of 1994; where it appears that the judge suffers from incapacity or is grossly incompetent, a tribunal is convened. Where it finds that this is the case, it will prepare a report to be sent to the Judicial Services Commission, which can then vote to refer the matter to the Speaker of the National Assembly for the National Assembly to decide and vote on the impeachment of the judge) after an exhaustive disciplinary process that may involve the appointment of an independent tribunal depending on the severity of the charges that the judge faces at the time.

6 Concluding remarks

The article was prepared in order to understand the nature and purpose of establishing the Legal Services Ombud. Through a discussion of the meaning of "ombudsman" as a concept, and what it seeks to achieve, it has become clear that the role of the Legal Services Ombud operates in the sphere of the already existing Legal Practice Council responsible for regulating the legal profession.

It is clear that the Office of the Legal Services Ombud plays an important role in the promotion of access to justice for all South Africans, and further plays a crucial role in ensuring that the legal profession continues to be held to a higher standard, and become fully transformed. As the Minister of Justice remarked during the launch of the Office (see South African Government "Minister Ronald Lamola: Launch of the Legal Ombuds" (10 June 2022) https://www.gov.za/speeches/minister-ronald-lamola-launch-legal-ombuds-2-jun-2022-0000 (accessed 2023-08-25):

> "It will address the systematic injustices within the legal profession, foster accountability and provide redress. Our people have a right to be treated with respect and integrity."

He further mentioned in his concluding remarks, importantly, that

> "the rule of law and constitutionalism are the cornerstones of our democracy. Legal professionals play a pivotal role in strengthening the rule of law, let us must work together to deepen democracy and make South Africa a great and prosperous nation."

These remarks from the Minister comprehensively demonstrate that the office of the Legal Services Ombud is a crucial block of our democracy.

It is important that South Africans are educated about its existence and that the Office itself be resourced and supported properly in the same way as the Office of the Public Protector and other constitutionally protected bodies formed to protect human rights and access to justice are protected.

These measures, in addition to providing clarity on whether the decisions of the Legal Services Ombud are binding will ensure the Office of the Legal Service Ombud is effective and also create confidence in the eyes of the public that they have an independent body that will ensure proper

accountability for all institutions involved in the administration of justice in our country, including the Legal Practice Council.

As the saying goes, “the proof of the pudding is in the eating”.

Basil Kgaugelo Mashabane
LLB LLM MSc in Finance and Financial Law
University of South Africa, Pretoria, South Africa
https://orcid.org/0000-0002-1852-0720

CASES / VONNISSE

When Might an Assault be so Trivial as to Not Justify a Criminal Conviction? Assault With Intent to do Grievous Bodily Harm, *De Minimis Non Curat Lex*, and the Case of

S v Rahim 2024 JDR 3448 (KZP)

1 Introduction

As Hall (*General Principles of Criminal Law* 2ed (1960) 216–217) cogently points out, criminal harms differ in gravity: "[F]irst, because of the differential external effect upon the victim and the community … and secondly, by reference to the degree of moral culpability of the offender". When might criminal conduct be regarded as so trivial as to not be appropriate to visit with the stigma of a conviction? This question engages some important issues concerning criminalisation, and finds practical application in the *de minimis non curat lex* maxim, which insists that "mere trifles and technicalities must yield to practical common sense and substantial justice" (*Diageo SA (Pty) Ltd v Commissioner for the South African Revenue Services* 2023 JDR 2422 (GP) par 56), or to put it in simple terms, that the law does not concern itself with trivial things (for a detailed discussion of this rule see Hoctor "Assessing the *de minimis non curat lex* defence in South African Law" in Schwikkard and Hoctor (eds) *A Reasonable Man: Essays in Honour of Jonathan Burchell* (2019) 119).

This maxim is well-established in South African law, not only finding application in criminal law but also in relation to such fields of law as insolvency, property law, contract and delict (Labuschagne "*De minimis non curat lex*" 1973 *Acta Juridica* 291 301–302). The *de minimis* maxim certainly fulfils a practical function, in preventing state resources being wasted on inconsequential wrongs, but in the criminal law context, its functioning underscores the need to protect the rights of the individual accused. These rights may be unjustifiably limited by the state, in the context of the exercise of the blunt instrument which the criminal justice system represents, following the commission of a trivial misdeed. In essence, the maxim concerns itself with prosecutability, with deciding whether the "machinery of the criminal law … [ought to be] set in motion" (*R v Roux* 1946 EDL 248 252, cited in *R v Kuyler* 1960 (3) SA 834 (O) 839E–F), rather than as a defence excluding unlawfulness (Hoctor *Snyman's Criminal Law* 7ed (2020) 121). In Snyman's turn of phrase, prosecution should never amount to persecution

(Snyman "Die Papiertjie Moet Bloemfontein Toe Gaan: Waar is die Amptenary se Diskresie? *S v Kgogong* 1980 3 SA 600 (A)" 1980 *SACC* 313 314). On what is the decision to prosecute (or not) based? In essence, this appears to be a value judgment or policy decision (*S v Dimuri* 1999 (1) SACR 79 (ZH) 89D–E; *Diageo SA (Pty) Ltd v Commissioner for the South African Revenue Services supra* par 57).

Feinberg (*Harm to Others* (1984) 189–190) explains that legal coercion should not be used to prevent minor harms, even though in theory a choice to do so would be morally legitimate, because "chances are always good that such a use of power would cause harm to wrongdoers out of all proportion both to their guilt *and* to the harm they would otherwise cause, even when the priority of innocent interests is taken into account" (original emphasis). This reasoning applies equally to more serious crimes such as kidnapping (*S v Dimuri supra*) and assault (*S v Bester* 1971 (4) SA 28 (T)), and even to the grave crime of assault with intent to do grievous bodily harm, which may be defined as "an assault which is accompanied with the intent to do grievous bodily harm" (Milton *South African Criminal Law and Procedure Volume II: Common-law Crimes* 3ed (1996) 431).

The crime of assault with intent to do grievous bodily harm, which is a separate substantive crime rather than merely an aggravated form of assault (Hoctor *Snyman's Criminal Law* 400), consists of the following elements (Milton *SA Criminal Law and Procedure* 432): (i) an assault (that is, following Snyman's definition, "any unlawful and intentional act or omission (a) which results in another person's bodily integrity being directly or indirectly impaired, or (b) which inspires a belief in another person that such impairment of her bodily integrity is immediately to take place" (Hoctor *Snyman's Criminal Law* 395); which is (ii) committed with intent to do grievous bodily harm. What constitutes "grievous bodily harm" is a factual question for the courts to decide, but it is clear that the actual infliction of grievous bodily harm is not required for the crime to be committed, but only that the accused *intended* to commit such harm (Hoctor *Snyman's Criminal Law* 400). In this regard, the practice of listing "grievous bodily harm" as an additional element of the crime (as in Burchell *Principles of Criminal Law* 5ed (2016) 599, and Kemp (ed) *Criminal Law in South Africa* 4ed (2022) 339) is therefore inaccurate and misleading.

The application of the *de minimis non curat lex* maxim to the crime of assault with intent to do grievous bodily harm, and the considerations involved in making such decision (GF "*De minimis non curat lex* in assault cases" 1971 11 *Rhod LJ* 85 comments in the context of assault that a value judgment is required), arose for consideration in *S v Rahim* (2024 JDR 3448 (KZP)).

2 Facts

This case arose out of a domestic dispute: the appellant was the daughter-in-law of the complainant. Relationships between the parties were strained. The appellant lived in a garden cottage, adjacent to the home of the complainant. According to the appellant, her living circumstances were far

from ideal, in that she was locked in this dwelling, and would receive food at the mercy of her husband (par 3). The appellant had complained that her minor child was being withheld from her, and her complaints prior to the incident involving the alleged assault had resulted in the South African Police Services being called to the residence (par 4).

On the day of the incident, the complainant was located outside the entrance of the appellant's dwelling place, the appellant was in the unit's kitchen area, and the appellant's husband was busy unpacking the three knotted grocery packets brought to the unit by him. It is not disputed that there was an emotional exchange between the complainant and her husband about the whereabouts of their minor child (par 3–4). However, there are differences in the versions of the three parties about what transpired next.

The complainant stated that during the course of her heated discussion with her husband, the appellant picked up the knotted packet closest to her, and threw the packet at him, saying "here you can have it" (par 5, this version did not entirely accord with his statement to the police). For his part, the appellant's husband stated to the police that the appellant had picked up and thrown the packet of groceries towards the complainant. His version in court was not entirely consistent with his police statement, as in court he stated that the appellant picked up the packet on her left side, and turning to the right flung it towards the complainant standing at the door, saying "here you can have it" (par 6).

Whilst the appellant denied throwing a packet of groceries at or towards the complainant, there was a concession on her part during the leading of evidence that she had indeed thrown a packet of groceries, but a denial that she intended to assault the complainant (par 8). The focus of her evidence was on her alleged maltreatment by the complainant's family, and in particular the restrictions on her access to her child, and to her liberty, only ameliorated by her obtaining an interim protection order after the intervention of a social worker (par 7).

The nature of the injury sustained by the complainant, having been struck by the packet of groceries, was swelling to his right ankle (par 2). The packet of groceries did not merely comprise soft goods but contained cans (par 10, 11).

The appellant was convicted of assault with intent to do grievous bodily harm in the trial court, and duly sentenced to a R5 000 fine, or in the alternative, five months imprisonment, wholly suspended for five years on condition that the appellant was not convicted of assault with intent to do grievous bodily harm during the period of suspension (par 1). The matter was heard on appeal by the KwaZulu-Natal Division of the High Court, Pietermaritzburg.

3 Judgment

On appeal, the court confirmed the ongoing onus of proof borne by the State, even if the court disbelieved the evidence of the appellant (par 9,

citing *Juggan v S* [2000] JOL 7459 (A) par 12 (per Zulman JA), which in turn relied on *S v Mtsweni* 1985 (1) SA 590 (A) 593I–594E). The court then proceeded to examine whether the required *mens rea* element of the crime of assault with intent to do grievous bodily harm had been established beyond reasonable doubt: was there indeed an intention to cause grievous bodily harm by means of the assault?

This crucial inquiry was rendered more difficult in that neither counsel was able to refer the court to evidence relating to intention in the trial court (par 10). The court noted that a conviction could only follow if the appellant's intention was, at a minimum, established on the basis of *dolus eventualis*. Clearly, the trial court concluded that there was such intent to assault based on the appellant's actions in throwing the packet of groceries, along with the appellant's words that the complainant could "have" the groceries (par 11). The State contended that such evidence was sufficient for the inference of the necessary intent to assault, but this was denied by the appellant (par 10). For its part, the court noted that it was not possible to properly comment on the trial court's reasoning in arriving at the conclusion it did in the absence of any further clarificatory evidence in this regard (par 11).

It was therefore incumbent on the court to address the factual question whether the required intent to do grievous bodily harm had been proved by the State beyond reasonable doubt. In doing so, the court held, *inter alia* the following factors pertain: "(a) the nature of the weapon used and in what manner it was used; (b) the degree of force used and how such force was used; (c) the part of the body aimed at; and (d) … the nature of the injury, if any, … sustained" (par 12). Taking these factors into account in the present context, the court held that the necessary intention on the part of the appellant to do grievous bodily harm to the complainant had not been established (par 13):

> "This being supported by the uncontested evidence that the complainant 'had not done anything wrong' as stated by him, that there existed no reason or basis for the appellant to want to cause harm to the complainant, and that the relationship between the complainant and the appellant was better than that between the appellant and [her husband]."

Holding that the trial court erred in accepting one version of events (that of the complainant) while disregarding the evident contradictions in the evidence underpinning the State case (par 13), the court concluded that the conviction of assault with intent to do grievous bodily harm had not been proved beyond a reasonable doubt, and it was set aside (par 14).

The court continued that even if such a conclusion was not correct, there was an alternative basis for upholding the appeal against conviction: the application of the *de minimis non curat lex* maxim (par 15). It was accepted by the court that the context for the charges being laid against the appellant was the acrimonious divorce proceedings between the appellant and her husband, in the absence of which the incident would have been brushed aside (par 16). The court proceeded to discuss the *de minimis non curat lex* maxim as applied in the case law, stating that in terms of the operation of the maxim, where the offence is regarded as trivial, it ought to be regarded as not having been committed, and should lead to an acquittal (par 18, citing

the leading case of *S v Kgogong* 1980 (3) SA 600 (A) 603). The court, in particular (par 19), referred to the case of *S v Visagie* (2009 (2) SACR 70 (W)), where it was held that the assault which had taken place was of so trivial a nature that based on the *de minimis* maxim the conviction should be set aside. Holding that assessing the application of the *de minimis* maxim entailed "a policy decision to be exercised according to all the relevant circumstances of the case" (par 20), the court concluded that in the case at hand the assault was "of such a trivial nature as to warrant the court ignoring it altogether" (par 22). Consequently, the appeal was upheld, and the conviction and sentence were set aside.

4 Discussion

The case of *Rahim* raises a few interesting issues which require further analysis. In the discussion which follows, two matters are considered: (i) the nature of the intent requirement for the crime of assault with intent to do grievous bodily harm; and (ii) the *de minimis non curat lex* maxim.

4 1 The intent to do grievous bodily harm

As mentioned above, the court in assessing whether the State had proved that the appellant had the necessary intent to do grievous bodily harm, focused on factors such as the nature of the weapon, the degree of force, the part of the body at which the attack was directed, and the nature of the injury. In this regard, the court cites the case of *S v Dipholo* (1983 (4) SA 757 (T) (par 12)). These factors are noted at 760E–G of *Dipholo*, which in turn refers to *S v Mapasa* (1972 (1) SA 524 (E) 525D). The *Mapasa* dictum derives from what appears to be the original framing of these factors in *S v Mbelu* (1966 (1) PH H176 (N)) (which the *Mapasa* judgment cites at 525C–F):

> "Where the court is confronted with the problem whether it should draw the inference that an assault was accompanied by this particular intent it usually has to rely on four main factors which provide the index to the accused's state of mind. I am not suggesting that these four factors are exhaustive; I do suggest that in the large majority of cases these are the factors which provide a guide to the accused's state of mind. They are, first, the nature of the weapon or instrument used; secondly, the degree of force used by the accused in wielding that instrument or weapon; thirdly, the situation on the body where the assault was directed and fourthly the injuries actually sustained by the victim of the assault."

The practical test established by this dictum has been applied in several cases. Apart from the *Mapasa* and *Dipholo* cases mentioned above, reference may be made to: *S v Bokane* (1975 (2) SA 186 (NC) 187B–D (to which *S v Van Wyk* 2000 (1) SACR 590 (T) 591G–I refers)); *S v Seatholo* (1978 (4) SA 368 (T) 372B–E (to which *S v Mzamo Fuma* 2008 JDR 0792 (BHC) 3 and *S v Nyikana* 2008 JDR 0866 (BHC) 10–11 in turn refer)); *S v Melrose* (1985 (1) SA 720 (ZS) 723B–D); *S v Baardman* (1998 JDR 0584 (C) 4–5); *S v Williams* (2000 JDR 0533 (T) 4–5); *S v Mvelase* ([2000] 3 All SA 48 (N) 54); *S v Kamanga* (2004 JDR 0169 (T) 2); *S v Reza* (2004 JDR 0348

(ZH) 3); *S v Maluleke* (2004 JDR 0533 (T) 4–5); *S v Mbara* ([2005] JOL 13800 (E) 2–3); *S v Sikakane* (2009 JDR 0393 (GSJ) 4–5); *S v Pretorius* ([2015] JOL 34444 (FB) par 9); and *S v Rusi* (2019 JDR 1711 (ECG) par 36).

However, as Miller J points out in *Mbelu*, this list of factors is not exhaustive. Thus, in *S v Mapasa* (*supra* 525E–G), the court also mentions that account should be taken of factors such as the age and physical condition of the participants in the incident, as well as the manner in which the instrument with which the assault is committed, is used. In a judgment preceding the *Mbelu* case, *S v Voyi* (1962 (2) PH H203 (T)), the court mentions a similar list of factors to those listed in *Mbelu* in establishing intent to commit grievous bodily harm (the nature of the attack, the dangerousness of the means used, the vulnerability of the body part targeted), but adds an additional factor: the presence of words indicating such intent.

In the case under discussion, having cited the factors which originally derived from the *Mbelu* judgment (by way of the *Dipholo* decision), the court concluded that upon the facts it could not be established that the appellant had "any intention" to injure the complainant (par 13). Therefore, neither a conviction of either assault with intent to do grievous bodily harm, nor even the lesser offence of common assault was tenable on the basis of the evidence (par 14 (in the report two succeeding paragraphs are numbered par 14)).

The application of the abovementioned factors to the factual scenario is strongly supportive of the correctness of the court's decision. The court could have concluded its judgment at this point. However, the court continued, even if this conclusion was not correct, there was a further ground for setting aside the conviction: the *de minimis non curat lex* maxim (par 15). This aspect will be considered below.

4 2 De minimis non curat lex

Since the early 20th century, when criminal conduct has been categorised as trivial by courts, this has been held to provide the basis for a defence to both common-law crimes and statutory offences (*S v Magidson* 1984 (3) SA 825 (T) 832F–I). Indeed, in the context of the common-law crime of *crimen iniuria*, it was held that even some of the Roman-Dutch jurists stated that it was not standard practice to prosecute criminally for the "lighter species of *injuria*", and consequently criminal proceedings founded on light or trivial *injuria* would not be sanctioned by the courts (*R v Umfaan* 1908 TS 62 67, as cited and discussed in *R v Howard* (1917) 38 NPD 192 196; *R v Muller* 1938 OPD 141 142).

It appears that the *de minimis non curat lex* maxim was first mentioned in a reported criminal case in *R v Sassin* (1914 CPD 972 974) (this matter pertained to the liquor laws; see also, in this context, *R v Wainstein* 1920 EDL 309 313, in the context of gambling laws *R v Weber* 1921 EDL 26 27, and in the context of breach of the peace offences *R v Innes* 1917 CPD 151 152 and *R v Robinson* 1937 TPD 117).

Where, however, the court was of the view that the offence in question was not consistent with a slight infraction being overlooked for the purposes of criminal liability, the question of triviality was not regarded as relevant to conviction (*R v Marcuse* (1908) 25 SC 355 358, 359; *R v Ah Pong* 1946 AD 884 890; *R v Mkolo* 1939 EDL 91 100; *R v Du Plessis* 1956 (1) PH H115 (SR)).

Any doubt or uncertainty as to whether the *de minimis non curat lex* maxim finds application in the criminal law was put to rest in *R v Dane* (1957 (2) SA 472 (N)), which dealt with the successful appeal against a conviction of malicious injury to property arising out of the trimming of a hedge between neighbouring properties. The court held that "the damage done, if any, was so trifling that the matter should never have come to court", and that the whole matter ought to have been regarded as "so trivial as not to be worthy of…judicial attention" (473D–E). It was emphasised by Kennedy J that the *de minimis* maxim applies in criminal cases, and that "in charges of extreme triviality, it can and should … be applied, as, for instance, a charge of the isolated theft of a pin should be dismissed" (473D–E). Holmes J delivered a pithy concurring judgment: "I think the Crown has made a mountain out of a mole-hill" (473E).

In the years since *Dane*, the *de minimis non curat lex* maxim has been confirmed in the criminal law context on a number of occasions. Notably, the Appellate Division applied the *de minimis* maxim in the leading case of *S v Kgogong* (*supra*), further confirming its use in *S v A* (1993 (1) SACR 600 (A) 607d–f), where the court confirmed the well-established practice of applying the *de minimis* maxim to ensure that people are not found guilty of trivial assaults.

Apart from being raised in the context of a number of statutory charges, most notably drugs offences (as discussed by Hoctor in Schwikkard and Hoctor *A Reasonable Man: Essays in Honour of Jonathan Burchell* 129–130, the criminalisation of conduct relating to cannabis being a particular focus), the *de minimis* rule has found application in the context of a number of different common-law crimes since its application in *Dane*: in relation to theft (*S v Mbala* 1969 (1) PH H44 (E), *S v Kgogong supra* 604A–B where a "mere scrap of paper" serving a guide to a policeman conducting an interrogation was stolen, and *S v Du Toit* 1983 (1) PH H31 (O) where a bunch of grapes of undetermined size and nature was stolen); assault (*S v Bester supra* where the accused slapped an 11-year-old boy who had tripped his daughter and caused her slight injuries, and *S v Visagie supra*, where whilst arguing the appellant pushed the complainant which resulted in accidental injury); and malicious injury to property (*S v Windvogel* [2007] JOL 19378 (E)). It is further accepted that the *de minimis* rule could find application to the crimes of defamation (*S v Hoho* 2009 (1) SACR 276 (SCA) par 21–22; this crime has been repealed by s 34 of the Judicial Matters Amendment Act 15 of 2023) and kidnapping (*R v Long (1)* 1969 (3) SA 707 (R) 709A; *S v F* 1983 (1) SA 747 (O) 752C; *S v Dimuri supra* 84B, 90D–E). Moreover, while the *de minimis* rule does not apply to *crimen iniuria*, the triviality inquiry in this context is analogous to that of the *de minimis* rule (*S v Bugwandeen* 1987

(1) SA 787 (N) 796A–B, followed in *S v Seweya* 2004 (1) SACR 387 (T) par 17 and *S v Mostert* 2006 (1) SACR 560 (N) 571C–F).

As indicated above (section 1), the assessment of whether the matter before the court may be regarded as too trivial to ascribe legal consequences to it is a factual inquiry. Such inquiry may be guided by various factors. (The principal factors contained in the schema developed by Veech and Moon "*De minimis non curat lex*" 1947 *Michigan Law Review* 537 are briefly referred to below. This schema has been adopted by other writers such as Inesi "A Theory of *de minimis* and a Proposal for its Application in Copyright" 2006 *Berkeley Technology Law Journal* 945; Ruedin "*De minimis non curat* the European Court of Human Rights: The Introduction of a New Admissibility Criterion (Article 12 of Protocol No 14) 2008 *European Human Rights Law Review* 80; and Hoctor in Schwikkard and Hoctor *A Reasonable Man: Essays in Honour of Jonathan Burchell* 119.) First, the court may have regard to the *purpose* of the provision, that is, the purpose, policy or legislative intention underlying the criminalisation of the offence in question (Veech and Moon 1947 *Michigan Law Review* 545). Secondly, the court may take into account the *practicality* of the provision, which is considered along with the promotion of the practical and speedy administration of justice (Veech and Moon 1947 *Michigan Law Review* 552–553). Thirdly, the court may take into account the *value*, size and type of the harm caused (Veech and Moon 1947 *Michigan Law Review* 558). Lastly, the court may consider *intent*, in terms of which the presence (or absence) of intent may be regarded as indicative of the reasonableness of the accused's actions (Veech and Moon 1947 *Michigan Law Review* 556).

4 3 When is an assault trivial?

This question falls to be considered in the context of the fact that assault may be committed by even slight application of force to the body of another, subject to the application of the *de minimis* maxim (*Freedom of Religion South Africa v Minister of Justice and Constitutional Development* 2020 (1) SACR 113 (CC) par 35). Gross (*A Theory of Criminal Justice* (1979) 187) sets out three varieties of conduct, using the context of assault, in discussing "inoffensiveness as an exculpatory claim". Gross notes (187) that the first two varieties are *de minimis* defences (the third variety will be mentioned below), and describes these as follows:

> "Sometimes there is no harm because the act is too trivial as an encroachment upon the interest in question. For that reason a slight deliberate shove as one makes one's way to the back of a crowded bus cannot be an assault. But even when the encroachment is more substantial it may fail to be offensive because the give-and-take of social intercourse requires toleration of certain encroachments – at least if no refusal to tolerate them has been communicated to those who may otherwise rely on conventions of toleration. Thus, e.g., a hearty slap on the back, even though thoroughly disagreeable to the recipient, may nevertheless be inoffensive from a criminal point of view, since it is within the ordinary bounds of social intercourse, and no narrower bounds have previously been set by the victim."

In the context of South African jurisprudence (including cases from the erstwhile Rhodesia), it is notable that the intent factor of the inquiry into whether the *de minimis non curat lex* maxim applies has primarily found application in assault cases, frequently in the context of preceding provocation (Labuschagne "*De minimis non curat lex* as strafregtelike verweer in 'n regstaat: Opmerkinge oor strafsinvolheid en die groeiende rasionele dimensie van geregtigheid" 2003 66 *THRHR* 455 462 approves of taking provocation into account as a basis for the *de minimis* rule.). The instances of successful reliance on the *de minimis* maxim (or where the court was prepared to accept the operation of the maxim) are consistent with the second category of conduct identified by Gross – "where the give-and-take of social intercourse requires tolerance of certain encroachments" (*A Theory of Criminal Justice* 187).

Thus, in *R v Van Vuuren* (1961 (3) SA 305 (E) 307E–H), in the course of overturning an assault conviction on the grounds of lack of unlawfulness, the court indicated that the *de minimis* rule could possibly apply in relation to the force employed by the second appellant when he led the complainant away from the appellant's wife in order to restrain the complainant from insulting her further. In the Rhodesian case of *R v Maguire* (1969 (4) SA 191 (RA) 192E–F) the appellant's conduct in pulling his wife away from the telephone when he thought she intended to phone the police was regarded as *de minimis*, based on the provocation encountered. Furthermore, in *Van Staden v Cilliers* (2009 JDR 1384 (GNP) 4), a delict case relating to assault, provocation was also determinative of the application of the *de minimis* maxim, where the court held that the assault "if any was minimal, and in response to the Plaintiff's unseemly resort to the physical". The court in *S v Bester* (*supra*) did not specifically indicate that it found the complainant's provocative conduct, in tripping the appellant's daughter so that she fell, to be the primary reason for the court to set aside the appellant's assault conviction, for slapping the complainant, on the basis of the *de minimis* maxim. Nevertheless, the blow followed a "woordewisseling" ("argument") (29) between the child complainant and the appellant, making it clear that the element of provocation played a role in the subsequent assault.

In the most recent case in which the *de minimis* maxim was considered in some detail, *S v Visagie* (*supra*), an assault conviction flowing from an incident in a mechanical workshop was overturned. The court examined a number of cases where it was contrary to public policy to allow the operation of the *de minimis* rule and then concluded that the case at hand was not to be regarded as falling within this category. The court, noting that provocation could be considered as a possibly important circumstance (along with other factors) in arriving at a value judgment as to whether or not, all circumstances considered, the gravity of the matter warrants the court's attention, held that the *de minimis* rule was applicable and overturned the conviction (par 27, 34, 36).

The factual considerations to be taken into account in deciding whether an assault preceded by provocation ought to be regarded as *de minimis* are highlighted in the following statement in the Rhodesian case of *R v Botha* (1939 SR 43 (cited in *S v Visagie supra* par 34)):

> "[T]here are cases where the blow or the assault committed in retaliation in circumstances of provocation is so trivial and so slight when compared with the provocation received that the law would very properly say it is not a matter with which the Courts should be concerned."

In the *Visagie* case, it was clear that the appellant and complainant were aggressively squaring up to one another in the course of their argument, immediately before the appellant's push caused the complainant to trip, accidentally falling over a low bed lift in the workshop, consequently fracturing his wrist (*supra* par 31, 35). Could it be said that the court deemed the harmful conduct to be within the ordinary bounds of social intercourse, so as to fall within Gross's second category of conduct?

This value judgment may be contrasted with assault cases where the court was not prepared to accept that the conduct could be regarded as *de minimis*. In *S v Schwartz* (1971 (4) SA 30 (T)) the court regarded the elderly male appellant's pushing over of the elderly female complainant, both dwellers in the same block of flats, as not constituting *de minimis*. The court's value judgment in this regard is evident from its reasoning (31E–G):

> "It is an assault on a woman; it is an assault in circumstance where the possibility of minor conflicts between residents of the same flat building could always arise and assault in such circumstances is a more serious matter because it undermines the whole possibility of civilised joint habitation of flat buildings as our modern urban life demands."

While the court was sympathetic to the possibility of a teacher's physical chastisement being regarded as *de minimis* in the 1977 case of *De Swart v S* (1977 (2) PH H122 (O)), it held that the appellant teacher's head-butting of the 11-year-old complainant could not be regarded as inconsequential. Neither could the first appellant's conduct in *R v Van Vuuren* (*supra*), where the complainant was seized by the arm and propelled down some stairs nor too could the appellant's act of slapping his wife across the face, which caused her to fall to the ground, as per the court in *S v Maguire* (*supra*). In *Maguire* (*supra* 193A–C), the court sought to explain the need to contextualise the value judgment to be made on the facts of a case as follows:

> "It seems to me that, wherever the defence of *de minimis non curat lex* is raised, the court has to consider all the circumstances under which the blow which is said to be trivial was delivered. In some circumstances, a blow may be considered so trivial as to justify the court ignoring it altogether; in different circumstances, a similar blow might be a relatively serious assault; for example, slaps delivered by fishwives to each other during a drunken brawl might well be ignored on the principle of *de minimis non curat lex* whereas an unprovoked slap delivered to the face of a lady, say at a garden party, could not be similarly ignored."

In its consideration of the possible application of the *de minimis non curat lex* maxim, the court in *Rahim* took account of the approach and reasoning in the cases of *S v Dimuri* (*supra*), *S v Kgogong* (*supra*), *S v Visagie* (*supra*) and *S v Maguire* (*supra* par 17–20), before concluding that the appellant's conduct should be regarded as *de minimis*. Notably, the court did locate its value judgment in this regard in the context of the incident – the "acrimonious divorce proceedings" and "related primary residence battle

between the parties", that is, between the appellant and her husband (par 16). Moreover, the factors upon which the assessment of the court are based are clear: the provocative circumstances of the appellant's ongoing dispute with her husband which seem to be the animating cause of the appellant in frustration flinging the packet towards the doorway, as well as the fact that the commission of the harm was not related to any altercation between the appellant and the complainant at the time the packet of groceries was thrown towards the doorway (relating to the "intent" factor – see above), and the fact that the complainant's injury was not severe (the "value" factor – see 4(ii) above).

There is a curiosity about the judgment. In other *de minimis* cases, the application of the maxim follows a confirmation of the blameworthiness of the accused, at least in so far as the harmful conduct in question is concerned. What follows is a statement by the court that despite the technical guilt of the accused, based on the operation of the *de minimis* maxim, criminal liability should not be attributed to the accused (see, e.g., *S v Bester supra*). However, in the *Rahim* case, the assessment of whether the *de minimis* maxim finds application follows the court conclusively holding that the appellant ought to be acquitted of any assault liability, whether assault with intent to do grievous bodily harm or common assault, on the basis of lack of intent (par 13–14). The court couches the reason for this approach in an *ex abundanti cautela* approach ("[e]ven if I am wrong in my conclusions as aforesaid" (par 15)). However, the fact that the *de minimis* maxim is discussed at all after a finding that the appellant lacked any intent to assault is somewhat jarring, as having dismissed the possibility of criminal intent, it requires one to once again invest the appellant with such intent for the purposes of demonstrating the application of the *de minimis* maxim.

Gross (*A Theory of Criminal Justice* 187) mentions a third form of "lack of offensiveness" in the assault context apart from the two varieties of conduct which fall under the *de minimis* maxim. Gross refers to the accidental blow, which does not constitute harm, even though the same blow deliberately inflicted would constitute assault:

> "[W]hen the blow is deliberate it is an offense to sensibility, since it normally humiliates the victim and puts him in fear of violence. The accidental blow, however, does not touch the dignity or security of the person who is struck, and for that reason there is no harm in it." (*A Theory of Criminal Justice* 187)

While negligent conduct can certainly cause harm, for the purposes of criminal law there is no such thing as an unintentional assault. In the *Rahim* case, the court established that there was at least reasonable doubt that the appellant had any intent to assault the complainant, and so could not be convicted of any form of assault. However, this is an entirely different conclusion to a finding of *de minimis non curat lex*, where all the elements of criminal liability are required to be complied with, before the court may on grounds of a value judgment (or policy), having assessed the various factors indicative of triviality, declare that the accused should be acquitted.

5 Conclusion

It is submitted that the court in *Rahim* clearly remedied an injustice: the conviction of the appellant for assault with intent to do grievous bodily harm. There is no indication on the facts, using the criteria which have been established and confirmed through the case law, that such a conviction was justified. Nevertheless, the courts have shown practical wisdom in allowing for the possibility of other factors to be taken into account in establishing intent to do grievous bodily harm. Similarly, in relation to the *de minimis non curat lex* maxim, it is submitted that there are settled categories of factors (discussed above) that fall to be considered in assessing whether the conduct in question is too trivial and inconsequential to be found criminal liability. It is nevertheless clear that in exercising the required value judgment or policy decision associated with such a decision, the court is not restricted to any particular consideration.

In applying the *de minimis* maxim to assault, the court in *Rahim* has carefully and correctly (it is submitted) followed the approach adopted in previous decisions based on similar factual scenarios. The judgment is a useful addition to the jurisprudence on the *de minimis non curat lex* maxim, even if, given the finding that no intent to assault was present at the time of the infliction of the harm, the portion of the judgment dealing with triviality, if not trivial, is gratuitous.

Shannon Hoctor
BA LLB LLM DJur PGDip (Latin)
Faculty of Law, Stellenbosch University, Stellenbosch, South Africa
https://orcid.org/0000-0002-5012-6491

The Implications of a Tactical Resignation Before the Announcement of a Sanction of Dismissal

Mthimkhulu v Standard Bank of SA
(2021) 42 *ILJ* 158 (LC)

1 Introduction

Unlike the typical cases interdicting disciplinary proceedings – which have often not been greeted with judicial applause because of their adverse impact on the Labour Court's urgent court roll (*Magoda v Director-General of Rural Development & Land Reform* (2017) 38 *ILJ* 2795 (LC) par 1; *Booysen v Minister of Safety and Security* (2011) 32 *ILJ* 112 (LAC) par 54 (*Booysen*); *Jiba v Minister: Department of Justice & Constitutional Development* (2010) 31 *ILJ* 112 par 17 (*Jiba*); *Mosiane v Tlokwe City Council* (2009) 30 *ILJ* 2766 (LC) par 15) – *Mthimkhulu v Standard Bank of SA* ((2021) 42 *ILJ* 158 (LC) (*Mthimkhulu*)) stands on a slightly different footing. Moshoana J's instructive decision speaks to the problematic persistence of urgent applications to invalidate unlawful dismissals. The case also replicates a set of fundamental issues concerning the legal effect of post-resignation disciplinary proceedings. In essence, the vexed question is whether an employee who has been found guilty of a serious offence may avoid the ultimate sanction of dismissal by resigning before an employer announces the sanction. To invoke Moshoana J's colourful language, the applicant's stance is that "being the first man on the ball, the respondent employer forfeited the right to tackle and play the ball".

Mthimkhulu also invites consideration of jurisdictional quandaries in contemporary labour-dispute resolution regarding the power of the Labour Court to set aside an unlawful dismissal. In a word, the judgment is too good to escape scholarly attention. To respond adequately to the crisp questions arising, the essential starting point remains the pertinent facts at issue in *Mthimkhulu*. This note conducts an overview of the principles underpinning disposal applications for interim relief. The decision of the Labour Court in the case at hand also affords an opportunity for critical appraisal of all facets of resignation, the instances of the institution and/or continuation of disciplinary proceedings post-resignation, as well as the jurisdictional footprints implicated whenever the Labour Court is asked to invalidate unlawful dismissal.

2 The factual matrix

In the case at the bar, the employee was charged with misconduct relating to gross dishonesty and fraudulent conduct. As such, the material facts mirror

those in companion cases such as *Naidoo v Standard Bank SA Ltd* ((2019) 40 *ILJ* 2589 (LC) (*Naidoo*)) and *Mahamo v Nedbank Lesotho Ltd* ([2011] LSLAC 9 (*Mahamo*)). He appeared before an internal disciplinary inquiry and was found guilty. The presiding officer afforded the applicant and the Bank an opportunity to present mitigating and extenuating factors before he could determine an appropriate sanction. Cunningly, Mthimkhulu resigned with immediate effect. Upon receipt of the resignation, the Bank sought to hold Mthimkhulu to the terms of his employment contract to serve a 30-day notice period. Later, a sanction dismissing Mthimkhulu from the Bank's employ was announced. Mthimkhulu vigorously resisted the announcement of the sanction on the basis that the Bank no longer had jurisdiction over him. He demanded that the employer abandon and nullify the dismissal before the close of business on 1 September 2020 (*Mthimkhulu supra* par 6). The demand was rejected by the Bank. The rebuff prompted Mthimkhulu to launch an urgent application.

3 Interdicting workplace disciplinary hearings

Interdicting uncompleted disciplinary proceedings is a contentious issue and has been subject to extensive commentary (see generally, Maloka "Interdicting an In-House Disciplinary Enquiry With Reference to *Rabie v Department of Trade and Industry* 2018 ZALCJHB 78" 2019 *Journal for Juridical Science* 10; Peach and Maloka "Is an Agreement to Refer a Matter to an Inquiry by an Arbitrator in Terms of Section 188A of the LRA a Straitjacket?" 2016 *De Jure* 368; Cohen "Precautionary Suspensions in the Public Sector: *MEC for Education, North West Provincial Government v Gradwell* (2012) 33 *ILJ* 2012 (LAC)" 2013 (34) *ILJ* 1706; Smit and Mpedi "An Update on Labour Law Developments From the South African Courts" 2012 *TSAR* 522; Moletsane "Challenges Faced by a Public Sector Employer That Wants to Dismiss an Employee Who Unreasonably Delays a Disciplinary Enquiry" 2012 13 *ILJ* 1568; Mischke "Delaying the Disciplinary Hearing: Strategies and Shenanigans" 2001 *Contemporary Labour Law* 21). It cannot be denied that many applicants approach the Labour Court on an urgent basis intent on either derailing the disciplinary proceedings or bypassing the dispute-resolution procedures set out in the Labour Relations Act (66 of 1995) (LRA). The reasoning in *Jiba* is generally considered to provide a definitive statement on the undesirability of intervening in uncompleted disciplinary proceedings:

> "Although the court has jurisdiction to entertain an application to intervene in uncompleted disciplinary proceedings, it ought not to do so unless the circumstances are truly exceptional. Urgent applications to review and set aside preliminary rulings made during a disciplinary inquiry or to challenge the validity of the institution of the proceedings ought to be discouraged. These are matters best dealt with in arbitration proceedings consequent on any allegation of unfair dismissal, and if necessary, by this court in review proceedings under s 145." (*Jiba supra* par 17; see also *Neumann v WC Education Department* (2021) 42 *ILJ* (LC) 561 par 13 (*Neumann*); *Ngobeni v PRASA* (2016) 37 *ILJ* 1704 (LC) par 14)

The statutory imperative of effective and expeditious dispute resolution means that the Labour Court will only intervene in pending disciplinary proceedings where truly "exceptional circumstances" are shown to exist

(*Steenkamp v Edcon Ltd* (2016) 37 *ILJ* 564 (CC) par 33 (*Steenkamp*); *CUSA v Tao Ying Metals Industries* (2008) 29 *ILJ* 2451 (CC) par 65; *Golding v Regional Tourism Organisation of Southern Africa* [2017] ZALCJHB 376 par 6. See also Van Niekerk "Speedy Social Justice: Structuring the Statutory Dispute Resolution Process" 2015 36 *ILJ* 837; Wallis "The Rule of Law and Labour Relations" 2014 35 *ILJ* 8491). If the Labour Court were to intervene readily in ongoing disciplinary inquiries, the vital role of statutory labour dispute-resolution forums would be negated. The LRA places a premium on the value of self-regulation (*NUMSA v Bader Bop (Pty) Ltd* (2003) 24 *ILJ* 305 (CC) par 26 and 65; *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) par 47. See also Steenkamp and Bosch's "Labour Dispute Resolution Under the 1995 LRA: Problems, Pitfalls and Potential" 2012 *Acta Juridica* 120).

Section 158(1)(*i*) of the LRA confers on the Labour Court the discretion to grant interim relief subject to the applicant satisfying the prerequisites thereof. The applicant must establish that the application ought to be heard as one of urgency and, if so, must establish that they are entitled to interim relief (*State Capture, Corruption and Fraud in the Public Sector Including Organs of State v Zuma* [2021] ZACC 2 par 71; *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) par 41; *Ngoye v PRASA* [2021] ZALCJHB 21 par 21–30; *Mbana v FAWU* [2021] ZALCCT 2 par 20; *Neumann supra* par 16). Quite apart from the crucial requirement of urgency, the applicant has to scale over other well-known hurdles for granting interim relief as re-affirmed in countless cases. It is standard learning that the applicant must establish among other matters: (a) the existence of a *prima facie* right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the grant of the interdict; and (d) the absence of an alternative remedy (see e.g., *Mkasi v Department of Health: Kwa-Zulu Natal* [2019] ZALCD 4 par 20; *Golding v Regional Tourism Organisation of Southern Africa supra* par 6; *Moroenyane v Station Commander of SAPS-Vanderbijlpark* [2016] ZALCJHB 330 par 55).

An applicant for urgent relief must be open to a searching examination as to the reasons for the urgency, and the basis upon which it is said that substantial redress would not be obtained at a hearing in due course. The majority of applications for urgent interim relief collapse for lack of urgency. This is particularly so where urgency was entirely self-induced. It has been held:

> "Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out and secondly whether the applicant seeking relief will not obtain substantial relief at a later stage. In all instances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. Thus, it is required of the applicant adequately to set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary." (*Maqubela v SA Graduates Development Association* (2014) 35 *ILJ* 2479 (LC) par 32. See also *AMCU v Northam Platinum Ltd* (2016) 37 *ILJ* 2840 (LC) par 26)

Moreover, the Labour Court is unlikely to be persuaded that the urgent application was not an opportunistic attempt to scupper the disciplinary enquiry from proceeding (*Malehopo v Athletics SA* [2011] ZALCJHB 220 par

5 and 9). On the matter of self-induced urgency, the Labour Court in *Mthimkhulu* found that the time constraints were due to the applicant's conduct. The applicant was prodded to seek urgent relief largely because he was scheduled on 18 September 2020 to undergo an interview to become a pupil in the following year. The only reasonable inference was that the applicant "sought the blemish of him having been dismissed removed before the interview" (*Mthimkhulu supra* par 3). Moshoana J concluded that the court application had to be struck from the roll for that reason alone. Notwithstanding that a lack of urgency put paid to the applicant's case, the court went on to address the difficult and interesting questions concerning the interplay between a tactical resignation before the pronouncing of disciplinary penalty on the one hand, and the tricky issue of the jurisdiction of the Labour Court to invalidate a dismissal, on the other. The resolution of these issues brings into sharp focus the effect of post-resignation disciplinary action.

4 The legal principles of resignation

Resignation may be effected by conduct as well as words. It is the term ordinarily used to denote the termination of employment by the employee. Equally, dismissal is used to refer to termination by an employer. Like dismissal, the circumstances in which resignation can occur are layered (*TISO Black Star Group (Pty) Ltd v Ndabeni* [2020] ZALCJHB 187 par 17–19; *DA v Minister of Public Enterprises Solidarity Trade Union v Molefe* [2018] ZAGPPHC 1 par 57–65; *Sunshine Solutions (Pty) Ltd v Ngwenya* [2017] ZALCJHB 39 par 2–7 (*Sunshine Solutions*); *ANC v Municipal Manager, George Local Municipality* (2010) 31 *ILJ* 69 (SCA) par 5–9 (*George Local Municipality*); *Lottering v Stellenbosch Municipality* [2010] ZALCCT 42 par 2–3 (*Lottering*)). Resignation can arise from cancellation for breach, which is often rooted in the acceptance of repudiation. If the contract permits, resignation can manifest itself in the form of termination on notice. In *Sihlali v SABC* ((2010) 31 *ILJ* 1477 (LC) (*Sihlali*)), the resignation was held to be a unilateral termination of a contract of employment by the employee. Thus, as a rule, resignation brings an end to the contract of employment. It is underscored by "a clear and unambiguous intention not to go on with the contract of employment, by words or conduct that would lead a reasonable person to believe that the employee harboured such an intention" (*Sihlali supra* par 11; see also *Fijen v Council for Scientific & Industrial Research* (1994) 15 *ILJ* 759 (LAC) 772C–D; *SALSTAFF obo Bezuidenhout v Metrorail* [2001] 9 BALR 926 (AMSSA) par 6 (*SALSTAFF obo Bezuidenhout*); *George Local Municipality supra* par 11). It is said that once an employee delivers a resignation to the employer it cannot be retracted. However, the employer may consent to a withdrawal. In the absence of such consent, it is a final and unilateral act by the employee (*Municipal Manager, George Local Municipality supra* par 11). In short, an employee needs to communicate their resignation to the employer for it to be effective (*Sunshine Solutions supra* par 36).

In general terms, voluntary resignation means that there is strictly no dismissal within the purview of section 186 of the LRA. Having said that, resignations are a trigger for allegations of constructive dismissal, which are

continually contested pursuant to section 186(1)(*e*) of the LRA. (Some prominent examples include *September v CMI Business Enterprise CC* (2018) 39 *ILJ* 987 (CC) par 10 (*September*); *Strategic Liquor Services v Mvumbi NO* 2010 (2) SA 92 (CC) par 4; *Murray v Minister of Defence* 2009 (3) SA 130 (SCA) par 11–12; *Metropolitan Health Risk Management v Majatladi* (2015) 36 *ILJ* 958 (LAC) par 21). The link between resignation and subsequent constructive dismissal claims is palpable. Resignation avoids the odium of being dismissed. An employee is considered to have been constructively dismissed if the employer made continued employment unbearable. Expressed differently, by resigning the employee is saying in effect that the situation has become so intolerable that they can no longer fulfil their duties (*Pretoria Society for the Care of the Retarded v Loots* (1997) 18 *ILJ* 981 (LAC) 984E–F; *HC Heat Exchangers (Pty) Ltd v Araujo* [2019] ZALCJHB 275 par 49; *Bakker v CCMA* [2018] ZALCJHB 13 par 55–60 and 97–98. See also Tshoose "Constructive Dismissal Arising from Work-Related Stress: *National Health Laboratory Service v Yona & Others*" 2017 *Journal of Juridical Science* 121; Nkosi "The *President of RSA v Reinecke* 2014 3 SA 295 (SCA)" 2015 *De Jure* 18; Whitear-Nel and Rudling "Constructive Dismissal: A Tricky Horse to Ride: *Jordaan v CCMA* 2010 31 *ILJ* 2331 (LAC)" 2012 *Obiter* 193; Rycroft "The Intolerable Relationship" 2012 33 *ILJ* 2271).

Cheadle AJ comprehensively distilled the common-law rules relating to termination on notice by an employee as follows:

> "Notice of termination must be unequivocal – *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (SCA) 830E.
>
> Once communicated, a notice of termination cannot be withdrawn unless agreed – *Rustenburg Town Council v Minister of Labour* 1942 TPD 220 and *Du Toit v Sasko (Pty) Ltd* (1999) 20 *ILJ* 1253 (LC).
>
> Termination on notice is a unilateral act – it does not require acceptance by the employer – Wallis *Labour and Employment Law* par 33, 5–10. This rule is disputed by the applicants in so far as it applies to notice not in compliance with the contract. The rule is accordingly dealt with more fully below.
>
> Subject to the waiver of the notice period and the possible summary termination of the contract by the employer during the period of notice, the contract does not terminate on the date the notice is given but when the notice period expires – *SALSTAFF obo Bezuidenhout* par 6.
>
> If the employee having given notice does not work the notice, the employer is not obliged to pay the employee on the principle of no work no pay.
>
> If notice is given late (or short), that notice is in breach of contract entitling the employer to either hold the employee to what is left of the contract or to cancel it summarily and sue for damages – *SA Music Rights Organisation v Mphatsoe* [2009] 7 BLLR 696 and *Nationwide Airlines (Pty) Ltd v Roediger* (2006) 27 *ILJ* 1469 (W).
>
> If notice is given late (or short) and the employer elects to hold the employee to the contract, the contract terminates when the full period of notice expires. In other words, if a month's notice is required on or before the first day of the month, notice given on the second day of the month will mean that the contract ends at the end of next month – *Honono v Willowvale Bantu School Board* 1961 (4) SA 408 (A) 414H–415A." (*Lottering* par 15.1–15.7)

Furthermore, and with respect to the statutory landscape, the provisions of sections 37 and 38 of the Basic Conditions of Employment Act (75 of 1997)

(BCEA) are applicable. Section 37(1)(*c*) provides that a contract cannot be terminated at the instance of a party to the contract on notice of less than four weeks if an employee has been employed for a year or more. Section 38(2) read with subsection (1) stipulates that if an employee gives notice of termination and the employer waives any part of the notice, the employer must pay the remuneration the employee would have received if the employee had worked the full notice. It follows that although section 37(1)(*c*) requires an employee to give a minimum period of notice, section 38(2) permits an employer to waive any part of that notice if it pays the employee an amount equal to what the employee would have earned for the unworked part of the notice (*Lottering supra* par 34). If notice is given and not waived, the contract terminates on expiry of the notice. That said, if the employer waives any part of the notice, the contract terminates when the employee leaves work (i.e., at the commencement of the waived period). Where an employee has given notice to terminate but fails to work the notice, that failure constitutes a breach of contract entitling the employer to hold the employee to the contract (i.e., work out the notice) or cancel the contract. It is worth noting how section 37 or 38 affects the application of common-law principles to a failure to comply with the contract until its expiry at the end of a notice period. If an employer fails to pay an employee who works the full notice period, the employee can sue the employer for the remuneration earned for that work (*Lottering supra* par 37). Sections 37 and 38 do not alter the common-law principles in cases where an employer fails to pay an employee for working out their notice period. The same would apply to an employee who tenders to work the full period but is not permitted by the employer to do so. In the end, what sections 37 and 38 do is guarantee a minimum period of notice that may be waived by an employer. If waived, the employer must pay the employee an amount equivalent to what the employee would have earned had they worked out their full notice.

5 Effect of post-resignation disciplinary action

A central question that cannot be overlooked is: when does a resignation take effect? It bears repeating that the termination of a contract, particularly a contract of employment, has important consequences for the reciprocal rights and duties of the parties. Notably, statutorily and contractually, if required to do so, an employee is required to serve out their notice period, and once this notice period has been served, a resignation can be said to have taken effect. In a situation where an employee resigns without giving notice, they are in breach of the contract of employment (*Vodacom (Pty) Ltd v Motsa* (2016) 37 *ILJ* 1241 (LC) par 11 (*Vodacom*)). The general effect of a breach of contract is that an aggrieved party has a right, in response to repudiation, to accept the repudiation and make an election either to cancel and sue for damages or seek specific performance (*Segal v Mazaar* 1920 CPD 634 644–645; *Consol Ltd v Twee Jongee Gezellen (Pty) Ltd* 2005 (4) All SA 517 (C) 533–537. See also Van der Merwe, Van Huyssteen, Reinecke and Lubbe *Contract General Principles* 4ed (2012) 288–290; Christie and Bradfield *Christie's The Law of Contract in South Africa* 6ed (2011) 563–565). It must be added that judicial discretion to order specific performance within the overall sphere of employment relations is generally circumscribed (*Masetlha v President of the RSA* 2008 (1) SA 566 (CC) par

88; *Santos Professional Football Club (Pty) Ltd v Igesund* 2003 (5) SA 73 (C) 78–81. For analysis, see Louw "'The Common Law … Not What It Used to Be': Revisiting Recognition of a Constitutionally Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment (Part 3)" 2018 *PER/PELJ* 33; Mould "The Suitability of the Remedy of Specific Performance to Breach of a 'Player Contract' With Specific Reference to the *Mapoe* and *Santos* Cases" 2011 *PER/PELJ* 8). It should not, however, be assumed that there is an absolute bar to granting an order for the specific performance of a contract of employment. For example, in *Nationwide Airlines (Pty) Ltd v Roediger* [2006] JOL 17221 (W), an airline captain was held to his contractual undertaking to give three months' notice. In sum, mere resignation would not result in an abrupt end to an employment relationship.

As already indicated, the bedrock principle is that resignation is a unilateral act that does not require acceptance by the employer for it to be effective. In legal parlance, once an employee has resigned, they cease to be an employee of that employer. The critical question remains whether the termination has taken effect. This question is of particular importance since there are conflicting authorities regarding the powers of the employer to discipline an employee post-resignation. It has been held that resignation with immediate effect divests the erstwhile employer of disciplinary jurisdiction over the departing employee (*Mtati v KPMG Services (Pty) Ltd* (2017) 38 *ILJ* 1362 (LC) par 25 (*Mtati*)). The proposition in *Mtati* was given explicit support in an unreported decision in *Chiloane v Standard Bank of SA Ltd* (J2270/2018), handed down on 5 July 2018, when the Labour Court emphasised that the employer's power to discipline the employee ceased when she tendered an unequivocal resignation with immediate effect, but held that the employer could avail itself of common-law remedies.

In *Mahamo*, Mosito AJ stated that "the erstwhile employer had no power in our law to discipline its erstwhile employee. The disciplinary power reposes in the employer so long as the employment relationship subsists between the parties" (*Mahamo supra* par 24). The employee in *Mahamo* had purported to resign from her employment with immediate effect on 3 April 2006. The employer responded on 4 April, indicating that it still considered her as an employee until her disciplinary case had been finalised. On the same day, the employer served Ms Mahamo with disciplinary charges accusing her of gross dishonesty and/or theft. The hearing scheduled to take place on 10 April 2006 was postponed. In correspondence with the employer, Ms Mahamo made it clear that she would not attend the hearing scheduled for 13 April 2006, because she was no longer an employee. The hearing proceeded in her absence, and she was found guilty and dismissed. The conclusion in *Mahamo* was based on a trilogy of eSwatini decisions, namely*: Dludlu v Emalangeni Foods Industries* (IC Case No 47/2004) (*Dludlu*); *Rudolph v Mananga College* (IC Case No 94/2007) and *Mdluli v Conco Swaziland Ltd* (IC Case No 12/2004). In *Dludlu*, President of the Industrial Court of Swaziland PR Dunseith gave the following reasons for dismissing the employer's prerogative to exercise post-resignation disciplinary power:

> "Resignation is a unilateral act which brings about termination of the employment relationship without requiring acceptance ... Whilst the Respondent took every effort to ensure that the disciplinary hearing was

> procedurally fair, its efforts were unnecessary because the employment contract had already been terminated by the Applicant himself on 20th October 2000. The question whether the termination of the Applicant's services was fair and reasonable does not arise in circumstances where the Applicant has resigned and no case for constructive dismissal has been pleaded or established." (*Dludlu supra* par 15–15.2)

The approach endorsed in *Mtati* and related cases from eSwatini and Lesotho align with the reasoning of the minority judgment in *Toyota SA Motors (Pty) v CCMA* ((2016) 37 *ILJ* 313 (CC)) (*Toyota SA Motors*). Zondo J (as he then was) concluded:

> "Where an employee resigns from the employ of his employer and does so voluntarily, the employer may not discipline that employee after the resignation has taken effect. That is because, once the resignation has taken effect, the employee is no longer an employee of that employer, and that employer does not have jurisdiction over the employee anymore." (*Toyota SA Motors supra* par 142)

At this juncture, it is apposite to deal with the contrary views expressed in *Mzotsho v Standard Bank of South Africa (Pty) Ltd* (Case J2436-18), delivered on 24 July 2018 (*Mzotsho*), and in *Coetzee v Zeitz Mocca Foundation Trust* ((2018) 39 *ILJ* 2529 (LC)). In the former case, Whitcher J dealt with an instance where an employee resigned immediately upon being given notice to attend a disciplinary hearing. She concluded that the contractual power to discipline endured. This conclusion is at variance with the reasoning of the minority in *Toyota*. In the latter case, the approach of the Labour Court appears to suggest that *Mtati* stands on shaky grounds since the correct reflection of the law is the one laid down in *Vodacom*. *Vodacom* restated the contractual principle that an employer who is confronted with an immediate resignation in breach of the contract of employment may hold the employee to the contract by seeking an order for specific performance. Since it is accepted that resignation terminates the contract of employment unilaterally, the practical effect of an order of specific performance would be to reinstate the contract and direct performance in accordance with its terms.

The *Naidoo* case is particularly instructive for present purposes. It arose out of the bank's attempts to discipline its employees after they tendered their resignation with immediate effect. The employees challenged the bank's jurisdiction to continue with the disciplinary hearing after their resignation with immediate effect. They also sought to interdict the bank from proceeding with and finalising a disciplinary hearing after their resignation. In granting interim relief in favour of the applicants, Nkutha-Nkontwana J noted that the bank was not deprived of remedies, but self-help was not one of them and the court could not sanction it (*Naidoo supra* par 29). The proposition that "once the employer elects to hold the employee to the terms of the contract, it must enforce that election by means of a court order" (*Naidoo supra* par 25) is out of line and cannot be supported. Moshoana J explains:

> "What obtains is an election. The correct legal position may be summed up as being, where one party to a contract, without lawful grounds indicates to the other party an unequivocal intention no longer to be bound by the contract, that party is said to repudiate the contract. Where that happens, the other

> party to the contract may elect to accept the repudiation and rescind the contract. If s/he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated. An aggrieved/innocent party by making an election not to rescind as a party to the contract keeps the contract alive. Should the aggressor persist with the repudiation the aggrieved may approach a Court of law on the strength of the same contract to compel the aggressor to comply with its contractual obligation. What keeps the contract alive is not an order for specific performance but an election by the aggrieved party. Specific remedy is an equitable remedy in the law of contract, whereby a court issues an order requiring a party to perform a specific act, such as to complete performance of the contract. It is a remedy and not a right, whereas an election is a right available to an innocent party." (*Mthimkhulu supra* par 13 and the authorities cited therein)

It is clearly of critical importance for an aggrieved employer to exercise an election when faced with an employee who is contractually obliged to serve a notice period but evinces no intention to do so. If the aggrieved employer chooses to end the contract, it will be that election that ends the contract.

6 Effect of resignation prior to the announcement of a sanction of dismissal

It will be recalled that at issue in *Mthimkhulu* was the legal effect of resignation before the announcement of a disciplinary sanction. The key to deciding whether the tactical resignation of Mthimkhulu had a legal effect is not to lose sight of the fact that, when disciplinary steps were set in motion, he had not yet resigned. The short answer, therefore, is that the resignation before the announcement of a sanction of dismissal had no legal effect. In sporting parlance, "the Bank was still entitled to tackle the ball since it elected to keep the playing field – the contract of employment – alive or open for play" (*Mthimkhulu supra* par 15). Moshoana J explained why it is necessary to cut to the chase and adopt an uncompromising stance:

> "The resignation by Mthimkhulu is nothing but a stratagem. He knew very well that the inevitable consequences would be a sanction of dismissal. An employee who resigns in the face of a disciplinary enquiry cannot claim constructive dismissal. What Mthimkhulu did was an attempt to be the first man on the ball. Having done so he argues that the Bank cannot tackle the ball away from him. Of course, it is not too difficult to observe that the resignation was nothing but a beguiler." (*Mthimkhulu supra* par 8)

It must be appreciated that the contract of employment was not cancelled by the Bank despite the repudiation by Mthimkhulu. The election to resile lies with the aggrieved party and not the aggressor. In short, the answer to the essential question is that resignation prior to the announcement of a sanction of dismissal has no legal effect.

7 Jurisdiction of the Labour Court to invalidate unlawful dismissal

The second contention of the applicant in *Mthimkhulu* raises closely related threshold questions concerning whether the Labour Court has jurisdiction to set aside a dismissal on the one hand, and on the other, the power to

entertain a dismissal dispute if it has not been referred to conciliation as required by section 191(5) of the LRA. The question of whether the Labour Court is empowered to determine the setting aside of dismissal has caused some difficulty since the pronouncements in *Solidarity v SABC* (2016 (6) SA 73 (LC)) (*SABC 8*). It will be remembered that in the *SABC 8* case, Lagrange J upheld the applicant's case of unlawful dismissal for contravening the public broadcaster's suppressive Protest Policy. It must be reiterated that the LRA does not envisage invalid or unlawful dismissals (notably, *Steenkamp supra* par 104–108; *Ngoye v PRASA supra* par 16–20; *Baloyi v Public Protector* [2020] ZACC 27; *Phahalane v SAPS* (2021) 42 *ILJ* 184 (LC); *Chubisi v SABC (SOC)* (2021) 42 *ILJ* 395 (LC); *James v Eskom Holdings SOC Ltd* (2017) 38 *ILJ* 2269 (LAC) par 21–25. See also Maloka "Jurisdictional Quandaries Triggered by a New Variant for Dismissal" 2021 34 *SA Merc LJ* 106). It can be fairly asserted that when an applicant claims that a dismissal is unlawful as opposed to unfair, there is no remedy under the LRA (*Mthimkhulu supra* par 17). In short, the Labour Court has no jurisdiction to make any determination of unlawfulness.

The argument concerning the power of the Labour Court to adjudicate a dismissal dispute that has not been referred to conciliation brings to the table a barrier. It is settled law that referral of a dismissal dispute to conciliation is a precondition to the Labour Court's jurisdiction. The fuller implications of this prescription are that non-compliance with conciliation formalities, including referral for conciliation, is a jurisdictional bar to the Labour Court hearing the unfair-dismissal claim (*NUMSA v Driveline Technologies (Pty) Ltd* (2000) 21 *ILJ* 142 (LAC) par 73; *September supra* par 17–18; *Uber SA Technological Services (Pty) Ltd v NUPSAWU* (2018) 39 *ILJ* 903 (LC) par 4–16. See also Maloka "Penetrating the Opacities of the Form: Unmasking the Real Employer Remains Labour Law's Perennial Problem" 2018 *Speculum Juris* 135). A restrictive approach to the interpretation of section 191 is buttressed by antecedent South African labour-law experience of nearly a century (*NUMSA v Intervalve* (2014) ZACC 35 par 116–129). Section 157(5) of the LRA specifically provides that the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if the LRA requires the dispute to be resolved through arbitration. In the present matter, the application fell to be dismissed for lack of jurisdiction. It cannot be said that

> "what befell Mthimkhulu is a dismissal within the meaning of section 186 of the LRA read with section 213. In terms of the LRA where a dismissal is for reasons of misconduct, as is the case for Mthimkhulu, the fairness of that dismissal is justiciable at the CCMA." (*Mthimkhulu supra* par 18)

In the end, nothing prevented Mthimkhulu from challenging the fairness of his dismissal before the purpose-built labour dispute-resolution forum.

8 Concluding remarks

The decision in *Mthimkhulu* underscores the point that a tactical resignation has no legal effect. The employer retains disciplinary power over a departing employee notwithstanding resignation with immediate effect. Simply put on that analysis, the employer is entitled to continue with disciplinary proceedings to their conclusion. Stated otherwise, resignation cannot

forestall the institution of disciplinary action or interrupt a workplace inquiry already in motion. The important feature of *Mthimkhulu* relates to the labour litigation processes under the LRA. The judgment underscores the fact that the scheme of the LRA makes referral to conciliation a mandatory first step that may ultimately lead to adjudication. It must be emphasised that the mandatory nature of conciliation as a requirement for arbitration also serves to clothe the Labour Court with jurisdiction. On the crisp jurisdictional question, the benchmark of *Steenkamp* is that the Labour Court lacks jurisdiction to make any determination of unlawfulness. Stated otherwise, the concepts of "invalidity", "unlawfulness" or "wrongfulness" are alien to the scheme of unfairness envisaged in the overall scheme of the LRA unfair-dismissal dispensation. The overall message conveyed in *Mthimkhulu*, respectfully, is clear: a resignation prior to the pronouncement of sanction of dismissal is nothing but a beguiler. In a nutshell, escape artists who resign before the finalisation of disciplinary proceedings, ostensibly to avoid accountability, will be held to account.

Prof Vuyo Peach
Mercantile Law Department, College of Law
University of South Africa, Pretoria, South Africa
https://orcid.org/0000-0002-8084-8487

Notes on the Political Significance of Songs in Promoting Equality and Maintaining Historical Legacy: Legal Challenges to Hate Speech in:

Afriforum v Economic Freedom Fighters
[2022] ZAGPJHC 599; 2022 (6) SA 357 (GJ)

1 Introduction

Song and music can be a powerful medium through which life is expressed (Adebayo "'Vote Does Not Fight': Examining Music's Role in Fostering Non-Violent Elections in Nigeria" 2017 17 *African Journal on Conflict Resolution* 55 56). Music has influenced the struggle for independence in most African countries (Adebayo 2017 *African Journal on Conflict Resolution* 55 61). This sentiment is evident from the judgment in *Afriforum v Economic Freedom Fighters* ([2022] ZAGPJHC 599) (*Afriforum*). This case note studies the importance of singing songs in a democracy and its limitations. History contains numerous examples of how music was used as a tool for political transformation and social revolution (Adebayo 2017 *African Journal on Conflict Resolution* 55 64). The disadvantage lies in the reality that the singing of songs can, in some instances, feed hatred and lead to dire consequences such as the commission of hate crimes (Adebayo 2017 *African Journal on Conflict Resolution* 55 64). The *Afriforum* judgment endorses a contextual approach to the interpretation of racist speech and its capacity to be classified as hate speech.

In the *Afriforum* matter, the Equality Court had to establish whether the singing of the songs "Kill/Kiss the Boer/Kill/Kiss the Farmer and "*Biza a ma*' Fire Brigade; Call the Fire Brigade" constituted hate speech. It was found that singing the songs did not constitute hate speech. At first glance, it seems that the judgment in *Afriforum* is a direct contradiction of the judgment in *Nelson Mandela Foundation Trust v Afriforum NPC* ([2019] ZAEQC 2; [2019] 4 All SA 237 (EqC); 2019 (10) BCLR 1245 (EqC); 2019 (6) SA 327 (GJ)) (*Nelson Mandela Foundation*), wherein it was found that the gratuitous display of the old South African flag constituted hate speech. This contribution indicates that these judgments pose distinct issues and differ in many aspects. A critical analysis of the decision under discussion reveals the importance of songs in African societies and democracy for activism. This note also points out the importance of distinguishing between offensive speech and hate speech.

It should be noted that when the discussion of the *Afriforum* case was at an advanced stage, the Supreme Court of Appeal ([2024] ZASCA 82) delivered a judgment that essentially vindicated the position of the Equality

Court. While the Supreme Court judgment is interesting on its own terms, it does not form the subject of the enquiry in this note. Still, the Supreme Court judgment serves to further motivate the argument of this note since it confirms the Equality Court's judgment, which is discussed in this note. According to the judgments, a reasonably well-informed person would appreciate that when Mr Malema sang "*Dubula Ibhunu",* he was not calling for farmers or white South Africans to be killed. Both the Equality Court and Supreme Court judgments illustrate the importance of context in a hate-speech enquiry. The judgments reinforce the pertinent argument that singing songs should be protected owing to their political use, ability to bring social unity and cohesion, and advocacy for social and political change.

2 The factual background

In essence, the issue leading to the case of *Afriforum* was the singing of the song "Kill the Boer/ Kill the Farmer and *Biza a ma fire brigade*", translated as "Call the Fire Brigade". The complainant in this case was Afriforum, which alleged that the songs were in contravention of sections 10(1) and 7(*a*) of the Promotion of Equality and Prevention of Unfair Discrimination Act (4 of 2000) (PEPUDA) (*Afriforum supra* par 1). Afriforum sought an order declaring that the singing of the two songs constituted hate speech (*Afriforum supra* par 27). This complaint came about after members of the Economic Freedom Fighters (EFF) sang the song "Kill the Farmer" outside a magistrates' court in Senekal, where a matter was heard concerning the murder of a farm manager (*Afriforum supra* par 54).

According to Afriforum's complaint, the singing of the songs promoted the dehumanising and targeting of certain racial groups with acts of violence (*Afriforum supra* par 32). Afriforum's complaint linked the singing of the songs to farm attacks and farm murders. The applicant led its evidence and called three expert witnesses and two witnesses who testified based on personal experiences (*Afriforum supra* par 27). The first expert witness was Mr Roets, who testified on farm attacks and led evidence that singing the impugned songs undermined the seriousness of farm attacks (*Afriforum supra* par 32). The applicant employed Mr Roets, who gave evidence based on his book *Kill the Boer* (*Afriforum supra* par 32). The respondent challenged the role of Mr Roets as an expert witness, based on his relationship with the applicant (*Afriforum supra* par 48). The next expert witness to testify on behalf of the applicant was Mr Human, who is a pastor of the Dutch Reformed Church and works for the applicant's trauma unit dealing with farm attacks and farm murders (*Afriforum supra* par 50). Mr Human's evidence was rejected based on unsubstantiated evidence (*Afriforum supra* par 52). The third expert witness to testify on behalf of the applicant was Mr Crouse, an employee of the Institute of Race Relations (*Afriforum supra* par 53). His testimony concerned the singing of the song *Bizani ifire brigade* by Dr Ndlozi at the magistrates' court in Senekal (*Afriforum supra* par 54). It was argued that Mr Crouse also did not qualify as an expert witness and that his testimony did not assist in proving the applicant's case (*Afriforum supra* par 59). Mr Muller, another witness, presented evidence as a victim of a farm robbery, and Mr Prinsloo also testified. However, all the witnesses' testimonies were held to be of no

probative value in that they had not succeeded in establishing a link between the singing of the songs and the farm attacks or farm murders (*Afriforum supra* par 62–67). Furthermore, the Afriforum's expert witnesses were held to be of no assistance to their case since the witnesses were professionally linked to the complainant (Afriforum), as indicated in their testimonies, and they had a vested interest in the outcome of the case.

The defendant (EFF) first led evidence through Mr Malema's testimony. He argued that the song should not be understood according to its literal meaning but as expressing views against an oppressive state system (*Afriforum supra* par 70). Malema's evidence focused on political ideologies and concepts such as communism, revolutionaries, and the struggle for land ownership (*Afriforum supra* par 72). Malema argued that the song should be seen in the context of the battles fought by African culture and the expression of political views and ideas through songs (*Afriforum supra* par 75).

An expert witness, Professor Gunner, testified on behalf of the EFF, providing evidence that the songs carried significant weight owing to their historical context and mentioned that a political idea could be enacted through a song (*Afriforum supra* par 77). According to the expert witness testimony, the song aimed to expose government failure (*Afriforum supra* par 111). Professor Gunner's evidence reflects the political significance of songs in a political arena, particularly in an African state. The expert witness referred to other songs often sung by politicians, such as "*Tshela Thupa*", translated as "Holding the Stick", and "*Leth'u Mshine Wam*", translated as "Bring My Machine Gun" (*Afriforum supra* par 107–108). According to Professor Gunner, these songs should not be interpreted according to their literal meanings but according to the political ideas or political messages carried by the songs (*Afriforum supra* par 107). For instance, the EFF promotes ideologies of economic empowerment and land distribution, and these ideologies are usually communicated through songs (*Afriforum supra* par 104). This led the court to decide that declaring the impugned songs as hate speech would significantly alter or curtail the right to freedom of expression (*Afriforum supra* par 111).

Afriforum was held to have failed to make a case that the singing of the impugned songs infringed section 10(1) of PEPUDA. Furthermore, witnesses who testified on behalf of Afriforum were held to be of no assistance to the court, as they could not demonstrate the link between farm attacks and song singing.

3 The test for establishing hate speech

This matter was brought in terms of sections 7(*a*) and 10(1) of PEPUDA. Section 7(*a*) prohibits hate speech on the grounds of race. In contrast, section 10(1) prohibits speech that is hurtful or harmful, or that incites harm and propagates or promotes hatred based on a specified group characteristic. However, in terms of the judgment in *Qwelane v South African Human Rights Commission* ([2021] ZACC 22; 2021 (6) SA 579 (CC); 2022 (2) BCLR 129 (CC)) (*Qwelane*), section 10(1) of PEPUDA excludes the word "hurtful" from its criteria and calls for the application of a

reasonableness test. The inclusion of the word "hurtful" was declared unconstitutional owing to its broad nature, which could result in the prevention of various forms of speech, including offensive or racist speech. This test, applied in *Qwelane* was the objective test that assesses whether a reasonable reader or reasonable listener would regard the statement or utterance as harmful (*Qwelane supra* par 72). Similarly, in the case of *Qwelane*, the assessment of hate speech questioned whether the utterance could be reasonably construed to demonstrate a clear intention to incite harm (*Qwelane supra* par 93). The reasonable reader or listener used in *Qwelane* is described as a reader or listener of ordinary intelligence who can determine, while taking into account the applicable context, whether the utterance could be said to constitute hate speech (*Qwelane supra* par 95).

The test of the reasonable reader or listener is challenging in a country such as South Africa, which is characterised by past discrimination and different lived experiences based on gender and race, among others. The legacy and impact of apartheid and racial segregation cannot be ignored when applying a reasonable-reader or -listener test, as this would result in substantive equality not being attained or achieved. According to Jeewa and Bhina, a reasonable reader or listener cannot always be characterised as a neutral concept, which would permit judges to hide behind racism and other stereotypes (see Jeewa and Bhima "Discriminatory Language: A Remnant of Colonial Oppression" 2021 11 *Constitutional Court Review* 1 14). In this current judgment, the court appeared to have considered history and did not apply a reasonable neutral race-free reader test, which is commended in terms of this note's argument. This is demonstrated by the significant weight given to Professor Gunner's testimony by the court in arriving at its finding: had such evidence not been carefully considered, and had it been based on a neutral, reasonable person or a raceless person, the singing of the impugned songs would have been held to constitute hate speech.

4 Assessment

The different outcomes in the cases of *Nelson Mandela Foundation* and *Afriforum* point to potential contradictions and bias. However, crucial distinguishing factors can be found in the *Afriforum* judgment that warrant debate and which prove to be worthy factors in establishing the existence of hate speech in complex political matters. Three crucial factors emanating from the *Afriforum* judgment are discussed in this section to highlight why it is vital to differentiate the two decisions. The *Nelson Mandela* judgment is discussed first, followed by the three crucial factors: (i) distinguishing offensive speech and hate speech; (ii) the importance of song in a democracy; (iii) an application of the reasonable-reader or -listener test that is democratically inclusive.

4 1 The facts in Nelson Mandela Foundation v Afriforum

In *Nelson Mandela Foundation,* the applicant lodged a complaint against Afriforum for displaying the old South African flag (pre-democracy flag) during a protest, called Black Monday, over farm murders in South Africa

(*Nelson Mandela Foundation supra* par 23). The applicant (the Nelson Mandela Foundation) sought an order declaring that the gratuitous display of the old flag constituted, in terms of section 10(1) of PEPUDA, hate speech against Black South African people. It was held that the display of the old flag constituted hate speech in terms of section 10(1) of PEPUDA based on the argument that the old flag represented apartheid, which was characterised by racial segregation and an inhumane government system featuring gross human-rights violations (*Nelson Mandela Foundation supra* par 64).

It was further argued that apartheid is a crime against humanity and, as such, the gratuitous display of its flag does not strive for unity and the promotion of diversity but strives for continued division. Such display cannot be protected in terms of section 16 of the Constitution of the Republic of South Africa, 1996 (Constitution), which provides for the right to freedom of expression. It is submitted that this argument successfully distinguishes the outcome in *Afriforum,* wherein the impugned songs were aimed at expressing political ideologies linked to economic freedom, thus sparking public debate and awareness; the singing of the impugned songs was not primarily aimed at promoting racial hatred and division, leading ultimately to the incitement of violence based on race.

The outcome in *Nelson Mandela Foundation* would have been different had the old flag been displayed in a historical museum; however, a display at a protest against farm attacks and farm murders could spark violence and racial division, so the court's outcome can be justified.

The cultural and historical heritage of all racial groups is protected according to the Constitution, and this is demonstrated later.

The contrast between the two judgments lies in the fact that, in *Afriforum,* the singing of the impugned songs was to spark public awareness and debate on the EFF's political ideologies, and the impugned songs have always been sung during political rallies and reflect South African politicking culture. The impugned songs, as sung previously during political rallies, targeted government policies that derailed economic growth and land redistribution but did not target any racial group. On the other hand, the gratuitous display of the old flag in *Nelson Mandela Foundation* invoked memories of a government system based on racial segregation. This cannot be said to be in the public interest and contradicts PEPUDA, which strives to prevent unfair discrimination.

In the case under discussion, Professor Gunner's testimony on the value and purpose of songs in politics, assisted the court in arriving at its decision, especially concerning the application of the reasonable-reader or -listener test to assess the motive of the respondent in singing the impugned songs. Accordingly, the singing of the impugned songs was held not to have intended to cause harm, although it was offensive; the motive was not to target specific racial groups but to send a message on land redistribution and economic emancipation.

4 2 Distinction between offensive statements and hate speech

The singing of the impugned song "*Dubula ibhunu*" is offensive, especially since the song's literal meaning is "Shoot the Boer". Likewise, the song "*Biza* a ma fire brigate" ("Call the Fire Brigade") seems to suggest that a fire would be started or an instance of arson. This interpretation was considered by the court (*Afriforum supra* par 111) when it was mentioned that the impugned song could be regarded as offensive and not hate speech. However, the court pointed out the crucial issue of ensuring that a distinction be made between offensive speech and hate speech. Sight must never be lost of the special protection accorded to offensive speech, thus warranting the clear distinction. In making this distinction, courts can in some instances assess whether the impugned speech or expression advances democracy, is part of a truth-finding process or is a means of self-fulfilment (see Geldenhuys and Kelly-Louw "Demystifying Hate Speech Under the PEPUDA" 2020 23 *PER/PELJ* 10).

The *Afriforum* judgment involved distinguishing statements that appear hostile, offensive or aggressive, from hate speech. The court further pointed out that an aggressive or offensive tone should not be treated in the same way as hate speech (par 96). Accordingly, it held that, although the impugned songs were offensive, they qualified as a form of political expression. Within that context, a reasonable listener or reader would conclude that the impugned songs do not constitute hate speech. The judgment referred to the cases of *Hotz v University of Cape Town* (2017 (2) SA 485 (SCA)) and *South African National Editors' Forum v Economic Freedom Fighters* (*SANEF*) *v EFF* ([2019] ZAEQC 6) (*National Editors Forum*), which are discussed here, together with similar judgments that distinguish offensive speech and hate speech.

The court in *Afriforum* referred to the case of *Hotz v University of Cape Town* ((*supra*) par 32), where the court cautioned against courts finding that hostile speech made concerning race automatically constituted hate speech. Furthermore, the judgment referred to the *National Editors Forum* case, which involved debates on the Zondo Commission of Inquiry into State Capture. In this case, Malema commented:

> "Let us attack fighters. Let us occupy every street, every house, and every space in society. Let us not leave the enemy to chance. Where we meet the enemy, we must crush the enemy. Be on Facebook, Twitter, and social media to guard the revolution. When the enemy raises its ugly head, cut the head. No time to entertain enemies of the revolution. We must protect the revolution at all costs." (*National Editors Forum supra* par 7)

In this case, the applicants alleged that these comments singled out journalists and threatened them (*National Editors Forum supra* par 8). The EFF had criticised the applicants for defending President Ramaphosa (*National Editors Forum supra* par 8). Notably, the court cautioned against automatically viewing offensive and controversial views as hate speech (*National Editors Forum supra* par 46), which would undermine the value of freedom of expression and its advantages in a democracy. In this case, it was thus held that the respondents acted in the public interest and that the

applicants had failed to establish that the comments in question qualified as hate speech in terms of section 10(1) of PEPUDA.

The importance of permitting offensive and unpopular speech in a democracy was also reiterated in *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* ([2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) par 109) (*Laugh It Off*). The matter involved a company known as Laugh It Off, which printed humorous remarks about Sabmark registered trademarks on T-shirts that were sold by Laugh It Off. The remarks, such as "Black Labour" and "No regard given worldwide", reflected racial and economic issues and made fun of some of Sabmark's trademarks – for example, the Black Label alcoholic beverage, among others (*Laugh It Off supra* par 7).

In some instances, impugned speech, although offensive, may promote debate within a democracy – such as in the case of *The Citizen 1978 (Pty) Ltd v McBride* ([2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC)). In this matter, McBride sought to be Chief of Police for Ekurhuleni; however, he was criticised in the Citizen newspaper in a commentary wherein he was described as a "murderer" and "criminal" and having committed cold-blooded murder (De Klerk "*The Citizen v McBride* 2011 (4) SA 191 (CC): Defamation – The Defence of "Fair" Comment and Media Defendants" 2011 27 *De Jure* 447 447). Although the commentary against McBride was distasteful, the Constitutional Court reiterated the importance of open and vigorous discussion in a democratic country (*The Citizen v McBride supra* par 100). *The Citizen v McBride* judgment is directly applicable in that it reiterates the importance of offensive comments to a democracy and the importance of distinguishing between what is hateful and what is offensive.

The court's stance in *Afriforum*, referring to the distinction between offensive speech and hate speech, has precedent, as demonstrated in the above-mentioned judgments.

4 3 The importance of song in a democracy

The judgment in *Afriforum* refers to the political significance of songs, which often carry political ideas. This section discusses the value of songs in politics and democracy, especially in demonstrating and protesting for the promotion of human rights and in some instances highlighting societal ills and cultural ills. Furthermore, songs constitute historical legacy and cultural heritage and form an integral part of our democracy. They should be promoted as a form of the constitutional expression guaranteed in section 16(1) of the Constitution.

The singing of struggle songs emanates from the historical heritage of freedom songs, which are in the archive of the people of South Africa (see Tichmann and Galant "The 'Singing Freedom' Exhibition: Painful Histories, Collective Memories and Perceptions of Freedom" 2015 3 *Oral History Journal of South Africa* 21 22). Black people were condemned to a situation of relegation, and treated as non-humans, which resulted in their using songs as a means of healing and of instilling ideologies in their fighting the struggle (Ramantswana "Song(s) of Struggle: A Decolonial Reading of

Psalm 137 in Light of South Africa's Struggle Songs" 2019 32 *OTE* 464 466). These songs were intended to inspire people to fight against oppression and foster liberation (Ramantswana 2019 *OTE* 464 480). The singing of struggle songs is thus engraved in South Africa's heritage and history (Ramantswana 2019 *OTE* 464 484). Equally important is music's role in fostering unity and social transformation. For example, Phakathi mentions that music can also be used to fight against xenophobia (see Phakathi "The Role of Music in Combating Xenophobia in South Africa" 2019 16 *African Renaissance* 125 142).

Although times have changed, songs about freedom and struggle still play an essential role today (see Tichmann and Galant 2015 *Oral History Journal of South Africa* 21 29). For instance, struggle songs have been sung during service protests and, more prominently, during the Fees Must Fall Protests (Ndelu "A Rebellion of the Poor: Fallism at the Cape Peninsula University of Technology" in Langa, Ndelu, Edwin and Vilakazi (eds) *#Hashtag: An Analysis of the #feesmustfall Movement at South African Universities* (2017) 13–32). Furthermore, in protests involving gender-based violence, songs are sung owing to the critical role that music plays in the lives of Africans (Mlamla, Dlamini and Shumba "Madoda Sabelani!: Engaging Indigenous Music in the Fight Against Toxic Masculinities and Gender-Based Violence in South Africa: A Critical Discourse Analysis" 2021 *Acta Criminologica* 101 102). In indigenous traditional communities, people use music such as Maskandi (traditional Zulu music) to convey critical political messages and to communicate on matters affecting the community (Mlamla *et al* 2021 *Acta Criminologica* 101 102). The song "*Madoda Sabelani*", for instance, has been sung in protests against the scourge of gender-based violence (Mlamla *et al* 2021 *Acta Criminologica* 101 102). During the Fees Must Fall protests, activists sang songs like "*Senzeni Na!*", also focusing on rape and other forms of violence against women (see Dlakavu "Black Feminist Revolt and Digital Activism Working to End Rape Culture in South Africa" 2016 7 *Buwa* 103).

Activism through song also takes place in the LGBTQIA+ community (lesbian, gay, bisexual, transgender, queer/questioning, intersex, asexual, and many other gender and sexual identities). Musicians such as Nakhane Touré have used songs and music to express issues on gender identities and sexuality to assert themselves against hegemonic heteronormativity and deal openly with gay sexuality (Ncube "To Be Black, Christian and Gay: Nakhane Touré's Brave Confusion" 2015 12 *Muziki* 37 42). Hilder also articulates the use and importance of song in reflecting sexuality through songs like "Sing if You're Gay / Sing if You Are Happy That Way" (Hilder "Stories of Songs, Choral Activism and LGBTQ+ Rights in Europe" 2023 2 *Music and Minorities* 1 8). Unfortunately, situations still result in inequalities and culminate in different forms of oppression (Tichmann and Galant 2015 *Oral History Journal of South Africa* 21 28). This points to the importance of history and music and its cultural relevance in addressing societal inequalities.

Afrikaans heritage is also celebrated in songs such as "De La Rey", which refers to the Anglo-Boer War. The song is about a general of the Anglo-Boer War and has been sung enthusiastically by White Afrikaans speakers at

rugby matches. It was also played in trucks at Eugene TerreBlanche's funeral. The heroic figure of De La Rey was seen as a saviour who could lead the Afrikaans community, which was threatened during the Anglo-Boer War. The singing of the song has, however, been criticised and led to fears of re-domination by the Afrikaans-speaking people in South Africa (see Van der Waal and Robins "'De La Rey' and the Revival of 'Boer Heritage': Nostalgia in the Post-Apartheid Afrikaner Culture Industry" 2011 37 *Journal of Southern African Studies* 763 763).

The case of *Duncanmec (Pty) Limited v Gaylard* NO ([2018] ZACC 29; 2018 (11) BCLR 1335 (CC); [2018] 12 BLLR 1137 (CC); 2018 (6) SA 335 (CC); (2018) 39 ILJ 2633 (CC)) (*Duncanmec*) involved racism in the workplace and the singing of political struggle songs. Workers were charged with racism and dismissed from their place of employment for participating in an unprotected strike and singing a Zulu song that, translated into English, means "Climb on top of the roof and tell them that my mother is rejoicing when we hit the boer" (*Duncanmec supra* par 10). A disciplinary hearing was later conducted, and the employees were found guilty of racism, which warranted a dismissal (*Duncanmec supra* par 13). Dissatisfied with this ruling, the trade union (NUMSA) challenged the dismissal, arguing that the singing of the song did not constitute hate speech. However, the Labour Court endorsed the previous decision that the workers were guilty of racism (*Duncanmec supra* par 28). The decision was later overturned by the Constitutional Court, which found that the protest was peaceful, and the uttering of the words was viewed in the context of a strike or protest action. It should not be seen as racism (*Duncanmec supra* par 52).

Another matter that dealt with a similar issue is the case of *Robertson Winery (Pty) Ltd v CSAAWU* ([2016] ZALCCT 45; (2017) 38 ILJ 1171 (LC) par 32), wherein workers and members of a trade union, during a protest, sang a song containing the words "*Dubula* Reinnette", referring to the company's human resources manager. The song containing the word "*Dubula* Reinnette" is a variation of the well-known struggle song containing the phrase "*Dubula iBhunu*" (shoot the Boers), which was also in contention in the *Afriforum* matter.

5 Conclusion

According to the judgment in *Afriforum,* the singing of struggle songs, though controversial, forms part of our South African heritage and is crucial to our democracy, especially as we still grapple with severe issues of socio-economic inequality and racism that should continue to be debated to redress and acknowledge past racial transgressions. South Africa protects and promotes the right to freedom of expression, which entails public debate concerning redressing past injustices. The judgment in *Afriforum* reiterates that emphasising only the literal application of words would result in the prohibition of vast categories of speech (Kok and Botha "How to Make Sense of the Civil Prohibition of Hate Speech in Terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000" 2019 34 *Southern African Public Law* 1 28).

When assessing whether the singing of a song constitutes hate speech, it becomes apparent that context is critical. A reasonably informed person knows that the singing of songs during EFF rallies and occasions is not calling for farmers or white South Africans to be killed. According to the *Afriforum* judgment, singing songs about struggles with a group of politically conscious people is not likely to incite violence. This is the importance of context. The courts should contextualise the singing of historical songs in line with their constitutional rights to freedom of expression. This argument reinforces the crucial view that citizens must tolerate offensive speech and that such speech may include racist, homophobic, and other forms of offensive speech. It is essential to defend the right to sing political songs; however, a careful interrogation of the songs' context is required. This view is also supported by the *Qwelane* judgment, wherein the word "hurtful", as listed in section 10(1) of PEPUDA, was excluded from the requirements for hate speech. In *Duncanmec*, the Constitutional Court also pointed out the importance of context (Botha "'Swartman': Racial Descriptor or Racial Slur? *Rustenburg Platinum Mine v SAEWA obo Bester* [2018] ZACC 13; 2018 (5) SA 78 (CC)" 2020 10 *Constitutional Court Review* 353 375). Botha mentions that while the mere singing of a song can undoubtedly constitute hate speech, the effect of the singing must be assessed in relation to its historical significance and purpose during the event (Botha 2020 *Constitutional Court Review* 353 375).

It may thus be accepted that offensive speech and aggressive utterances do not automatically constitute hate speech, as demonstrated in the judgment of *Afriforum*. However, this does mean there are no limits to accepted speech in a democratic country; in that regard, free speech must be distinguished from hate speech. The singing of a song will accordingly only constitute hate speech according to the determination of a reasonably informed person, taking into account the context of the singing of the songs.

Martha Keneilwe Radebe
LLB LLM LLD
Senior Lecturer, Department of Public Law
University of Pretoria, Pretoria, South Africa
https://orcid.org/0000-0002-7030-374X

Supervening Impossibility and the Supplier's Duty to Perform in terms of Section 19 of the Consumer Protection Act, 2008

National Consumer Commission v Crystal Tears Investment 206 CC t/a Misty River and Elizabeth Hoogenhout t/a Misty River
NCT/261684/2023/73(2)(b)

1 Introduction

One of the many negative consequences of the COVID-19 pandemic, during which South Africa was subjected to restrictions imposed owing to the pandemic, was the many terminations of numerous bookings and reservations for the provision of services such as travel, accommodation, and the hosting of weddings. (For example, see for instance the facts in *KwaZulu-Natal Consumer Protector v Africa Wild Travel CC* (KZNCT03/21) [2022] ZANCT21 and *Booking.com v National Consumer Commission: In re National Consumer Commission v Abrahams t/a Sunset Villa 1 and Booking.com* NCT/262956/2023/73(2)(b) CPA – rule 34.) In *National Consumer Commission v Crystal Tears Investment 206 CC t/a Misty River and Elizabeth Hoogenhout t/a Misty River* (NCT/261684/2023/73(2)(b)), the consumer had booked a venue for her forthcoming wedding and had paid a substantial amount towards the costs of the wedding celebration. The occasion had to be cancelled owing to the imposition of lockdown restrictions imposed by the government and, unfortunately, the parties could not reach an agreement about postponing the event. The consumer demanded repayment of monies already paid, which the supplier refused. The matter was referred to the Tribunal, which held that certain provisions of section 19 of the Consumer Protection Act, (68 of 2008) (CPA) applied and that the supplier was therefore liable to refund the consumer. The Tribunal also imposed an administrative fine on the supplier.

Although it is agreed that the supplier was indeed liable to refund the monies paid by the consumer, it is respectfully argued that the Tribunal was incorrect in finding that the supplier was in breach of the provisions of section 19 of the CPA. It is argued that the provisions in question cannot be relied upon in the event that the contract between the consumer and the supplier was terminated owing to an event of supervening impossibility, as it is argued the imposition of the lockdown restrictions constituted.

The matter also allows some reflection on aspects of section 19.

2 Background

The start of the year 2021 saw South Africa and large parts of the world still firmly in the grip of the Covid-19 pandemic. In fact, in November of the preceding year a new variant of the coronavirus, known as 501.v2, was first identified in South Africa. The new variant of the virus caused a substantial rise in the number of infected persons because of its ability to spread more rapidly thus infecting more people in a shorter time. The increased risk led to the President of South Africa, Mr Cyril Ramaphosa, announcing on 11 January 2021 an adjusted Level 3 lockdown for the country (https://www.thepresidency.gov.za/speeches/statement-president-cyril-ramaphosa-progress-national-effort-contain-covid-19-pandemic%2C-11-january-2021 (accessed 2023-06-14)).

This announcement precipitated the publication by the then Minister of Cooperative Governance and Traditional Affairs, Dr Nkosazana Dlamini Zuma of regulations in terms of section 27(2) of the Disaster Management Act (57 of 2002) in Government Notice R11 (and published in *GG* 44066 of 2021-01-11) to give effect to the president's announcement. These regulations amended the Level 3 regulations as originally contained in GN No 480 and published on 29 April 2020 in *GG* 43258, which subsequently were amended on several occasions.

In terms of the adjusted Level 3 regulations the movement of persons was limited, and a curfew was imposed restricting people to their places of residence between the hours of 21h00 and 05h00. Failure to comply with this provision was an offence and punishable by imprisonment to a period not exceeding six months or a fine or both. Importantly also, all social gatherings were prohibited (regulation 4).

It is in this context that the events of the present case took place.

3 Facts

The complainant in the matter visited the premises of the respondents on 27 September 2020 to find a venue for her intended wedding. After receiving a quotation, the complainant booked the venue by paying a deposit of R7 000 to the respondents. The complainant made two further payments soon after to bring the amount of money paid to the respondents to a total value of R25 750.00 (par 15). (The dates indicated for when the payments were made are somewhat confusing, but nothing hinges on this. See par 14 and 15.)

The booking was made for the wedding to take place on 16 January 2021 and 150 guests were to be catered for (par 14).

Then on 11 January 2021, a few days before the wedding date, the president announced the adjusted Level 3 lockdown in terms of the existing state of disaster as indicated above. Of relevance is the fact that most indoor and outdoor gatherings, including all social gatherings, were prohibited (par 15). This announcement caused Ms Hoogenhout (the second respondent) to email the complainant to suggest that the wedding celebration be postponed (par 17). To this, the complainant responded by indicating that if the occasion

is to be cancelled the complainant expects to be refunded (par 18). The complainant followed this up with an email message on 8 February 2021 advising that the wedding celebration would not continue because "they could not postpone indefinitely" and she requested that the total amount already paid be refunded (par 19). The respondents did not repay the amount and upon investigation, the applicant (National Consumer Commission) was informed by the second respondent that a refund would only be made if the venue had been booked for the specific date by another client (par 20).

The complainant approached the applicant, who investigated and upon conclusion of which the matter was referred to the Tribunal in terms of section 73(2)(*b*) of the CPA (par 5).

4 Judgment

The Tribunal found that the first respondent had contravened sections 19(2) and (6) read with section 21(9) of the CPA and that such contravention constituted prohibited conduct (par 37.1). As a result, the Tribunal ordered the first respondent to refund the complainant the amount of R27 750, together with interest (par 37.1–37.3). An administrative fine of R15 000 was also imposed on the first respondent in respect of its prohibited conduct in refusing to refund the complainant the money paid by the latter for the wedding venue and related services (par 28 and 37.4). The Tribunal stated as follows (par 28):

> "Given the attitude adopted by the respondents and the unjustifiable refusal to refund the complainant, which resulted in the latter suffering significant financial loss, the Tribunal is of the view that an imposition of an administrative fine is appropriate. Suppliers such as the respondents should not be allowed to take money from the public and refuse to refund consumers when failing to provide the service for which the funds were paid."

5 Analysis and discussion

The fundamental reason for ordering the refund as indicated above is to be found in the following conclusion of the Tribunal (par 21):

> "Because the parties agreed on a date for the hiring of the wedding venue, section 19(2) of the CPA finds application. *In terms of this provision, it is an implied condition of every transaction for the supplier of goods and services that the supplier is responsible for delivering the goods or performing the services on the agreed date and at the agreed time, if any.*" [Emphasis added.]

The relevant part of section 19(2) provides as follows:

> "Unless otherwise expressly provided or anticipated in an agreement, it is an implied condition of every transaction for the supply of goods or services that–
>
> (*a*) the supplier is responsible to deliver the goods or perform the services–
>
> (i) on the agreed date and at the agreed time, if any, or otherwise within a reasonable time after concluding the transaction or agreement;
>
> (ii) at the agreed place of delivery or performance; and

(iii) at the cost of the supplier, in the case of delivery of goods".

In terms of section 19(2)(*a*) the supplier is responsible for delivering the goods or performing the services on the agreed date, time, and place, and at the cost of the supplier, unless agreed otherwise. Some observations about the wording of the provision may be opportune. It would appear as if the provision were formulated rather awkwardly, especially in sub-paragraphs (*a*)(i) and (ii). The first part of sub-paragraph (*a*)(i) provides that the supplier is under an implied contractual obligation to perform on a date and at a time as agreed between the parties unless they have agreed otherwise. This does not seem to add anything or help the consumer in any way. It does not assist in providing a clear date and time for performance in the absence of an agreement on these aspects. Does it add value to state that, in the absence of an agreement to the contrary, it is an implied term of the agreement that the parties agree to perform on the date on which they have agreed to perform? The second part of sub-paragraph (*a*)(i) provides that unless agreed otherwise performance must take place within a reasonable time after the conclusion of the agreement. This at least assists in providing some certainty as to when performance must take place in the absence of an agreement as to when performance is to take place. Similarly, and in addition to what is mentioned above about the first part of sub-paragraph (*a*)(i), sub-paragraph (*a*)(ii) provides that performance of the service must take place at the agreed place, unless agreed otherwise. This again adds no value as to where that place is in the absence of an agreement on that aspect unless one reads that with paragraph (*b*), which provides that "the agreed place of delivery of goods or performance of a service is the supplier's place of business, if the supplier has one, and if not, the supplier's residence". Paragraph (*b*) is clear and provides certainty and is not assisted in any way by sub-paragraph (*a*)(ii). The need for the first part of sub-paragraph (*a*)(i), as well as sub-paragraph (*a*)(ii) appears unclear, and it is submitted that these provisions serve no purpose and can be removed.

Section 19(2) provides implied terms that will be the default position in respect of the relevant aspects in the absence of an agreement to the contrary (De Stadler "Section 19" in Naudé and Eiselen (eds) *Commentary on the Consumer Protection Act* Revision Service 1 (2016) 19–5). In the current matter, the date and place of when and where the service had to be performed were agreed upon expressly. Although not specifically mentioned it is safe to assume that the time for the performance was agreed expressly as well especially considering that the function was a wedding reception which by its nature starts at an appointed time. (In the absence of any specific mention of this aspect it is assumed that there was agreement on this as well, if not expressly then at least anticipated as provided by section 19(2). However, it would seem as if this aspect was not germane to the case, and nothing turns on it.) It would also appear that the cost was agreed upon expressly since a quotation was provided by the respondents and accepted by the complainant. Although not relevant to the present matter it appears that sub-paragraph 19(2)(*a*)(iii), paragraph 19(2)(*b*), and subsection 19(2)(*c*) do make sense in that in the absence of an agreement to the contrary these provisions read into the contract will provide much-needed certainty and serves to protect the consumer. For instance, section 19(2)(*c*) deals with the important aspect of the passing of risk. The provision states

that in the absence of an agreement to the contrary, the supplier bears the risk of goods being delivered until the consumer has accepted delivery.

It is submitted that all the relevant aspects, for which default rules are provided by section 19(2), have been expressly agreed upon between the parties. It is in any event clear that the real bone of contention is the date for the performance of the service. This has been expressly agreed with the result that in the ordinary course of events, section 19(2) would not find application to the matter at hand, contrary to what was held by the Tribunal (par 21). It is submitted therefore that the Tribunal's finding of prohibited conduct under section 19(2) on the part of the first respondent is incorrect as there was no need for implied terms to be incorporated into the contract as the parties had expressly agreed on the relevant aspects.

Assuming for the sake of argument that there was no agreement on the aspects in respect of which section 19(2) provides implied terms, especially the date of the performance, what would be the effect? Another question also arises and that is what the effect would be of the announcement of a general lockdown and the imposition of a curfew and prohibition of all social gatherings, including wedding celebrations as happened in this case, especially where there has been an expressly agreed date.

On the first question, and as indicated, it must be said that it is very difficult to see how section 19(2)(*a*)(i) can provide any assistance to clarify the matter in the absence of an agreed date, except in so far as the second part of the provision provides that the service is to be provided within a reasonable time after the conclusion of the transaction. Clearly, *in casu* the service could not be provided while prohibited from being provided. At best this must then mean that the service is to be provided within a reasonable time after it again has become possible to do so. It is clear from the facts that the respondents were not afforded that opportunity with the complainant indicating that they could not continue with the wedding celebrations (par 19). (It should be noted that the Lockdown restrictions were announced on 11 January 2021 and already on 8 February 2021 the complainant advised that they are not proceeding with the wedding as they cannot wait "indefinitely" (par 19).) It is submitted that the complainant (consumer) cannot rely on this provision and that the respondent cannot be held in breach of the provision in these circumstances. In any event, the facts are that there was indeed an express agreement as to the date for the performance of the service, which meant that the first respondent was under an obligation to perform on 16 January 2021 – a time at which providing the service was prohibited by law.

When performance in terms of a contract becomes objectively impossible due to no fault of one of the parties because of an unavoidable and unforeseen event, the obligations to perform in terms of the contract, as a rule, are extinguished (Naudé "Termination of Obligations" in Hutchison and Pretorius (eds) *The Law of Contract in South Africa* 4ed (2022) 391. See also Van Huyssteen, Lubbe, Reinecke, and Du Plessis *Contract General Principles* 6ed (2020) 591–592). This is referred to as supervening impossibility of performance. There are two basic requirements to establish supervening impossibility, which is firstly that the performance must be objectively impossible (Naudé in Hutchison and Pretorius *The Law of*

Contract in SA 389). Objective impossibility does not necessarily mean absolute factual impossibility. So, for instance, will performance be considered objectively impossible where it is factually possible for the debtor to perform, but performance has become illegal because new legislation prohibits the performance (Naudé in Hutchison and Pretorius *The Law of Contract in SA* 390). Secondly, supervening impossibility requires that the impossibility must be unavoidable by a reasonable person. This means that the impossibility to perform must not be due to the fault of one of the parties but must be caused by an event that is beyond the control of the debtor, often referred to as *vis major* or *casus fortuitus*. Even if the happening of the event was foreseeable, it will still be *vis major* if it is unavoidable by a reasonable person (Naudé in Hutchison and Pretorius *The Law of Contract in SA* 390–391 and Van Huyssteen *et al Contract General Principles* 592–593). See also *Glencore Grain Africa (Pty) v Du Plessis NO* ([2007] JOL 21043 (O)) concerning the requirements for establishing supervening impossibility.

The effect of supervening impossibility is that it "discharges the contract" (Van Huyssteen *et al Contract General Principles* 592–593. See also Naudé in Hutchison and Pretorius *The Law of Contract in SA* 391 and Kerr *The Principles of the Law of Contract* 6ed (2002) 545). See further *KwaZulu-Natal Consumer Protector v Africa Wild Travel CC* (*supra* par 22) where the KwaZulu-Natal Consumer Tribunal states the following:

> "Our law makes provision for such circumstance where a *force majeur* causes a contract to become impossible to perform. In the case of *Peters, Flamman & Co v Kokstad Municipality* [1919 AD 427] the Court held that: 'if a person is prevented from performing his contract by *vis major* or *casus fortuitus* … he is discharged from liability.' The terms *force majeure*, *vis major* and *casus fortuitus* are used interchangeably and refer to an extraordinary event or circumstances beyond the control of the parties, a so-called 'act of God'."

Supervening impossibility then has the effect of extinguishing the contractual obligation and therefore also the duty to perform and the corresponding right to claim performance (Van Huyssteen *et al Contract General Principles* 592–593). The authors also observe that the reason for extinguishing the contractual obligations in the event of supervening impossibility is not so much that the event was caused by an unforeseen or unforeseeable event but rather that the event was not avoidable (Van Huyssteen *et al Contract General Principles* 593). As is the case with legislation prohibiting certain conduct it may be foreseeable but certainly not avoidable.

Back to the matter under discussion. Section 19(2) imposes certain obligations on the supplier when contracting with a consumer for the provision of services. These obligations are implied terms that will form part of the contract in the absence of an agreement between the parties to the contrary. Where a contract containing these implied terms is subjected to an event that constitutes supervening impossibility, such as legislation prohibiting performance, then the contract and the obligations imposed by it are extinguished.

The imposition of regulations in terms of the state of disaster which prohibited social gatherings after the conclusion of the contract but before the date of performance constitutes an event of supervening impossibility.

The KwaZulu-Natal Consumer Tribunal in *KwaZulu-Natal Consumer Protector v Africa Wild Travel CC* (*supra* par 24) summarises the position, albeit in the context of international travel, as follows:

> "The Covid-19 pandemic has been declared a global pandemic by the World Health Organisation and the effect of the prohibition on international travel would make the performance of the obligations under the contract impossible and would fall under the common law doctrine of *force majeur*. The general effect of a *force majeur* is that it extinguishes the obligations owed between the parties and no action for damages for a breach of contract is available to a party to a contract where the other party is unable to perform as a result of the *force majeur*."

It must follow that any obligations imposed by section 19(2) if it did in fact apply to the contract between the parties, were extinguished by the supervening event and therefore the respondent should not have been found to have been in breach of the provisions of the section.

As the respondent was found by the Tribunal to have also breached section 19(6) it stands to consider whether this provision is applicable. Section 19(6) reads as follows:

> "If the supplier tenders the delivery of goods or the performance of any services at a location, on a date or at a time other than as agreed with the consumer, the consumer may either-
> (a) accept the delivery or performance at that location, date and time; or
> (b) require the delivery or performance at the agreed location, date and time, if that date and time have not yet passed; or
> (c) cancel the agreement without penalty, treating any delivered goods or performed services as unsolicited goods or services in accordance with section 21."

De Stadler in Naudé and Eiselen (*Commentary on the Consumer Protection Act* 19–12), points out that the subsection specifically refers to a breach of the agreed terms regarding delivery or performance. This is an important observation as it was argued above that the parties had in fact expressly agreed on all relevant terms, particularly the date of performance. However, as also argued, the contract and the obligations agreed to therein, had terminated on the coming into effect of the regulations prohibiting social gatherings – the supervening *vis major* event. As there was no contract it must follow that there could not possibly have been a breach of the terms thereof. One may also argue that there could not be a tender to offer the performance "on a date or at a time other than as agreed with the consumer". The reason is simply that there was no agreement. De Stadler in Naudé and Eiselen (*Commentary on the Consumer Protection Act* 19–12) states that "[t]he use of the term "tendered" means that the subsection applies both to situations where delivery [performance] is made after the agreed upon date or where the delivery [performance] date has not yet passed, but where the seller has indicated that he will deliver [perform] at a different date." From this and the wording of section 19(6), it seems clear that the purpose of section 19(6) is to provide protection to a consumer in circumstances where a supplier attempts to force the consumer to accept the performance of a service or delivery of goods on a date or time or at a place other than as originally agreed. In other words, it is a remedy aimed at giving effect to the contract as agreed between the parties. The provision is

not aimed at enforcing a contract extinguished by operation of law. The offer (or tender) by the respondents to host the wedding celebration on another occasion, could not have constituted unsolicited services when it became objectively impossible to do so on the original date. To hold otherwise implies that the respondents were objectively able to comply with the obligations imposed by the contract, which they were not as performance had been rendered objectively impossible and the contract had been terminated.

Even if one accepts that there still was an agreement despite the supervening impossibility of performance, considering that the term "agreement" is defined quite widely in section 1 of the CPA, it is submitted that it is not possible to get around the fact that performance was no longer objectively possible. To attempt to find another mutually convenient date for performance can therefore not be interpreted to mean that it is an attempt to change the original date as performance on the original date is not objectively possible. (See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 par 18 where the Supreme Court of Appeal states that when interpreting a document "[a] sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.")

The Tribunal stated (par 24) "that the complainant's wedding celebrations had to be *cancelled* three days before it was to take place owing to a ban on social gatherings" (emphasis added). If that meant that there was a contract that was now cancelled by one of the parties, it is submitted that that is not correct. The contract terminated or was discharged because performance became objectively impossible. If there was a contract that was cancelled by the complainant (see par 25) then it may well mean that the respondents would be entitled to a reasonable cancellation fee as provided by section 17(3)(*b*) of the CPA. The matter should then in any event have been dealt with in terms of section 17 and not section 19. (Whether section 17 could have been used in this context is an open question.)

If the argument is accepted that the tender by the respondents to host the wedding celebrations on another date, is not unsolicited service then it follows that section 21(9) does not find application. This provision states:

> "If a consumer has made any payments to a supplier or deliverer in respect of any charge relating to unsolicited goods or services, or the delivery of any such goods, the consumer is entitled to recover that amount, with interest from the date on which it was paid to the supplier, in accordance with the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975)."

This does not mean that the consumer is without any recourse. In the event where supervening impossibility of performance results in the one obligation being extinguished in a situation of reciprocal obligations, then the counter-obligation is also extinguished (Van Huyssteen *et al Contract General Principles* 593). The extinction of the obligations creates a duty on the parties to return whatever performance has already been received in terms of the contract, and this duty can be enforced by way of an enrichment action (Naudé in Hutchison and Pretorius *The Law of Contract in SA* 391).

6 Conclusion

The facts in *National Consumer Commission v Crystal Tears Investment 206 CC t/a Misty River and Elizabeth Hoogenhout t/a Misty River* (*supra*) provide the opportunity to engage with aspects of section 19 of the CPA and the supplier's duty to perform in the context of a situation where there is supervening impossibility of performance.

It is argued that *in casu*, and contrary to what the Tribunal found, section 19(2) does not apply. The basic reason is that section 19(2) will find application in the absence of an agreement to regulate the aspects mentioned in the subsection, i.e., date, time, place, and cost of performance or delivery. These aspects were indeed expressly agreed between the parties, negating the need for the default rules of section 19(2). The note then considers the impact of supervening impossibility on the obligations created by section 19(2) in the event the provisions do find application. The effect of supervening impossibility generally is to discharge a contract resulting in the obligations created in terms of the contract being extinguished. This will apply with respect to both expressly agreed terms but also implied terms. Implied obligations imposed on parties in terms of section 19(2) will therefore be extinguished by the occurrence of a *vis major* event resulting in the objective impossibility of performing these obligations. When obligations are extinguished owing to the occurrence of an event which is not the fault of any of the parties then it is not correct to state, as the Tribunal did (see par 28), that there is a failure on the part of the debtor to perform. A party cannot fail to perform that which is objectively impossible to do.

The first respondent was found also to have breached section 19(6) of the CPA. The section provides that where a supplier tenders to perform the agreed services at a date, time, or place other than agreed with the consumer, the latter can "cancel the agreement without penalty, treating any delivered goods or performed services as unsolicited goods or services in accordance with section 21." It is argued that the purpose of section 19(6) is to uphold a contract and to protect the consumer by holding the supplier to what was originally agreed. A supplier cannot be held to perform that which has become objectively impossible to perform through no fault of the contracting parties. The section cannot be applied in the situation of supervening impossibility of performance and the Tribunal was incorrect in finding so.

In casu, it is suggested that section 19 does not find application. The matter is one where the happening of a *vis major* event caused performance to become impossible through no fault of the parties involved. The contract was terminated and the obligations in terms thereof extinguished. This gave rise to a duty on the part of the first respondent to return the money already received, and which return was enforceable by way of an enrichment action. Section 19 is not appropriate for addressing a situation of supervening impossibility. Considering that there was no breach of sections 19(2) and (6), there was no prohibited conduct, and the imposition of an administrative fine therefore was not proper.

Lastly, it is a pity that the supplier apparently did not avail itself of legal advice as this may have contributed to the legal issues being aired more thoroughly – and may well have saved the supplier from an administrative fine.

Mark Tait
Associate Professor, Mercantile Law Department
Nelson Mandela University, Port Elizabeth, South Africa
https://orcid.org/0000-0001-5405-0191

The Best Interests of a Child in Alternative Care and Intercountry Adoption – A Model for a Uniform Approach

Glynis van der Walt
B Juris LLB LLM LLD
Senior Lecturer, Private Law
Nelson Mandela University, Port Elizabeth, South Africa
https://orcid.org/0000-0002-4877-6794

SUMMARY

Where a child is orphaned or abandoned, an obligation rests on the State to provide appropriate alternative care for the child concerned. It is of fundamental importance that a child who is found to be struggling emotionally, economically, physically and psychologically be protected. Such children need, and have a legal right, to be cared for and protected. Governments have a legal obligation to respond. Both international and national law recognise the standard of the best interests of a child and the principle is fundamental when determining *inter alia* whether alternative care for the child concerned is the most appropriate option. However, the best-interests principle is a vague and indeterminate concept, allowing for decisions to be based on a subjective approach. A model is proposed in the article in an attempt to provide a uniform approach for reaching a decision regarding the placement of an orphaned or abandoned child in appropriate alternative care.

1 INTRODUCTION

It is generally accepted that the family forms the foundation of society.[1] The importance of the family unit is recognised in both international law and the national law of South Africa. While family reunification is prioritised, where this is not an option, an obligation falls on the State to provide a child with appropriate alternative care. Developments that include, *inter alia*, the global economic crisis, the consequences of the HIV/AIDS[2] pandemic and the Covid-19 pandemic[3] on the numbers of children currently in need of

1 Revised White Paper on Families in South Africa (31 March 2021) GN 586 in *GG* 44799 of 2021-07-02.

2 Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome.

3 Davids "COVID-19 Orphanhood Is a 'Hidden Pandemic'" (16 August 2021) https://www.news.uct.ac.za/article/-2021-08-16-covid-19-orphanhood-is-a-hidden-pandemic (accessed 2021-12-08).

alternative care,[4] urbanisation, and an increase in migration have impacted negatively on the current position of children in South Africa. Statistics indicate high numbers of children in need of alternative care in South Africa. While statistics showed a decline in the number of children orphaned between 2009 and 2017 (largely because of increased access to antiretroviral medication), this trend did not continue and between 2018 and 2020, there was an increase of 230 000 orphans. In 2020, statistics indicate there were 2.9 million orphans in South Africa.[5] As a developing country with a multiracial and multicultural population, placing South African orphaned and abandoned children (OACs)[6] in care that meets the best interests of the child concerned is a challenge to those charged with deciding what form of care is appropriate.

This determination becomes even more challenging because South Africa has the highest AIDS death rate.[7] With 51 000 AIDS-related deaths and 5.5 million people on antiretroviral treatment in 2021, it is apparent that HIV remains a serious factor that has a negative impact on families in South Africa.

In 2008, the sector skills work plan of the Health and Welfare Sector Education and Training Authority acknowledged this by listing social work as a scarce skill.[8] Current challenges faced by social workers include, *inter alia*, the fact that social workers receive poor salaries, work in poor conditions that include insufficient infrastructure and unsafe environments, lack necessary resources, have high caseloads and staffing characterised by

---

4 Defining the meaning of "alternative care" is challenging as the standards provided for in the Convention on the Rights of the Child (CRC) (UN General Assembly 1577 UNTS 3 (1989) Adopted: 20/11/1989; EIF: 02/09/1990) and the Guidelines for the Alternative Care of Children (the Guidelines) (UN General Assembly A/RES/64/142 Adopted 18/12/2009 https://www.refworld.org/docid/4c3acd162.html (accessed 2023-08-15)) respectively differ in a potentially significant way. Neither the CRC nor the Guidelines define "alternative care", but art 18 of the CRC provides that the "parents, or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child". Art 20 mandates that alternative care be provided when a child is "temporarily or permanently deprived of his or her family environment". However, the Guidelines imply that a child's right to alternative care arises when they are deprived of "parental care". Art 20(2) of the CRC accords the right to "alternative care" to children temporarily or permanently deprived of their family environment, and to children who, in their own best interests, cannot be allowed to remain in that environment. States parties are required to ensure alternative care for such children in accordance with their national laws. Art 20(3) of the CRC provides that alternative care could include, *inter alia*, foster placement, *kafalah* of Islamic law, adoption, or if necessary, placement in suitable institutions for the care of children.

5 Hall "Children in South Africa" (July 2023) http://childrencount.uct.ac.za/ (accessed 2023-09-11).

6 A child:

(a) who has obviously been deserted by the parent, guardian or care-giver;

(b) who has, for no apparent reason, not had contact with the parent guardian or care-giver for a period of at least three months; or

(c) in respect of whom the whereabouts of the parents are unknown or who cannot be traced.

7 Be in the Know "At a Glance: HIV in South Africa: The Biggest HIV Epidemic in the World" (undated) https://www.beintheknow.org/understanding-hiv-epidemic/data/glance-hiv-south-africa (accessed 2021-07-28).

8 Bredell *A Work-Life Perspective on the Subjective Wellbeing of Social Workers* (dissertation University of Stellenbosch) 2022 ii.

high turnover.[9] It is not uncommon for social workers to experience burnout. Furthermore, the fact that social workers often suffer from their own emotional and psychological suffering owing to the constant personal interaction with individuals who have experienced some form of trauma has a negative impact on their ability to function optimally. The well-being of every social worker is of utmost importance to ensure continued service delivery of a high quality.[10] Lack of guidance and supervision of social workers further aggravates the quality of service from social workers.

The impact of overburdened social workers must also be considered in relation to the best interests of a child in making appropriate placements.

Adding to concern as to whether the best interests of an OAC are met where placement in alternative care is under consideration are the circumstances of social workers in Child and Youth Care Centres (CYCCs). These social workers must deal with multiple difficulties, including the necessity of fulfilling a multiplicity of roles (which may overlap), lack of adequate resources, personal safety and security concerns, and limited support, which cause strain, and compromise the core role of social workers in such CYCCs. The child-welfare system is already overstrained, and the fact that the grant system is potentially used by caregivers as a means of poverty alleviation, rather than to care for the child concerned, cannot be ignored.

It is apparent that making a determination of the placement of an OAC is fraught with potential problems. The following needs to be determined:

- What is the current position in South Africa regarding the provision of services by those making a determination in the best interests of a child to place an OAC in appropriate alternative care?
- To what extent is the South African legal framework consistent with international standards in placing a child in alternative care?
- Is South African legislation compliant with the constitutional imperative of serving a child's best interests in all matters?
- To what extent does the principle of subsidiarity impact a decision to place a South African child in national alternative care instead of opting for intercountry adoption?
- What role could intercountry adoption play in determining appropriate alternative care for an OAC in South Africa?

With these questions in mind, a model is proposed to assist in ensuring that the child's best interests are met in a determination of appropriate placement in care.

A consideration of the current South African context with respect to the reality of problems faced in providing good-quality service delivery to OACs follows.

---

9 Bredell *A Work-Life Perspective on the Subjective Wellbeing of Social Workers* 2–3.

10 Dimba-Ndaleni, Motloung and Kasiram "Social Workers' Experiences of Working with Children and Youths at Child and Youth Care Centres in Durban" 2022 58(1) *Social Work/Maatskaplike Werk* 61 67.

2 THE CURRENT SOUTH AFRICAN CONTEXT WITH RESPECT TO SERVICES PROVIDED AND MAKING A DETERMINATION OF PLACEMENT IN LINE WITH THE BEST INTERESTS OF THE CHILD

In a system that is burdened with unmanageable workloads, serious questions have been raised by children's rights organisations, social workers and legal academics as to how to ensure that the best-interests principle is complied with, and what the State must do to ensure that this concern be overcome and that due consideration be taken with respect to the rights of the child.[11]

A consideration of children's rights in international instruments follows. It traces the shift in children's rights, the ongoing evolution of children's rights, and the positive duty placed on the State to ensure the promotion and protection of such rights.

3 CHILDREN'S RIGHTS AND INTERNATIONAL CONVENTIONS

During recent decades, there has been a significant shift in the approach to the rights of children. Internationally, children are no longer regarded as "objects" but as bearers of subjective rights. In accordance with the interest theory of rights,[12] an individual has a right if their interest is enough to place on others a *duty* to protect such right. The State's duty to protect rights is acknowledged in the Constitution of the Republic of South Africa, 1996 (Constitution).[13] To fulfil its duty, it is submitted that the State must consider the evolution of children's rights as ongoing and should therefore take cognisance of the ongoing progressive development of fundamental human rights. This realisation is particularly important in respect of vulnerable children. Present international standards are contained in the Convention on the Rights of the Child (CRC),[14] the African Charter on the Rights and Welfare of the Child (ACRWC),[15] and the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (the Hague Convention).[16] The CRC, the first comprehensive rights-based international treaty, was drafted in an era when intercountry adoption was not regulated,

---

11 Sibanda and Lombard "Challenges Faced by Social Workers Working in Child Protection Services in Implementing the Children's Act 38 of 2005" 2015 51(3) *Social Work/Maatskaplike Werk* 332 336 and 343.

12 McBride "Preserving the Interest Theory of Rights" 2020 26(1) *Legal Theory* 3; Buck *International Child Law* (2005) 13.

13 S 7(2) of the Constitution.

14 UN General Assembly *Convention on the Rights of the Child* (20 November 1989) 1577 UNTS 3 https://www.refworld.org/docid/3ae6b38f0.html (accessed 2023-08-15).

15 *African Charter on the Rights and Welfare of the Child (ACRWC)* (1990).

16 Hague Conference on Private International Law *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption* (Hague Convention) (Adopted: 29 May 1993; EIF: 01/05/1995)) https://www.refworld.org/docid/3ddcb1794.html (accessed 2023-08-14) 33.

leaving the child adopted internationally at risk of abuse, including child trafficking and profiteering. The *travaux preparatoires* reveal that intercountry adoption is considered as a subsidiary means of alternative care, only to be considered when all other possibilities are exhausted.[17] The drafters of the Hague Convention were mindful of the concerns associated with placing a child via intercountry adoption. Consequently, the focus of the Convention was on the need to define substantive safeguards and procedures to assist all authorities involved in placing a child by means of intercountry adoption.[18] Article 29 of the CRC is testimony to this fact. In this regard, Para-Aranguren opines as follows:

> "Article 29 substantially reproduces the text of the draft (article 4), with some amendments to specify the prohibition of contacts between the parties to the intercountry adoption, aiming to prevent trafficking and any other kind of practices that may be contrary to the purposes of the Convention, in particular, to avoid that the consents required for the granting of the adoption are induced by payment or compensation, as is expressly forbidden by Article 4."[19]

The Hague Convention has provided for stringent standards and regulations aimed at protecting the child placed by intercountry adoption.[20] The exercise, standards and practice of placement that occurred before the Hague Convention are very different from the standards that currently regulate the placement of an OAC abroad. It is accordingly submitted that the CRC should be interpreted in light of the progressive safeguards of the Hague Convention. The CRC, the ACRWC and the Hague Convention all recognise the best-interests-of-a-child principle. However, there are discrepancies evident in the international standards contained in the three conventions relating to their approach to the principle. The CRC provides that the best-interests principle is *a* primary consideration and elevates this standard to the status of *paramount* interest with respect to the adoption of the child.[21] The United Nations Committee on the Rights of the Child has taken the principle one step further, defining the best interests of the child as a "general principle" guiding the interpretation of the entire Convention. In the

---

17 Detrick *Commentary on the United Nations Convention on the Rights of the Child* (1999) 351.

18 The Hague Convention made provision to ensure that where a child was to be placed in terms of intercountry adoption, states involved were to establish safeguards to prevent abduction and profiteering in children by: protecting birth families from exploitation and undue pressure; ensuring only children in need of a family are adoptable and adopted; preventing improper financial gain and corruption; and regulating agencies and individuals involved in adoptions by accrediting them in accordance with Convention standards.

19 Para-Aranguren *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* (1993) par 495.

20 Some commentators argue that the standards are too strict. See Bartholet "Intergenerational Justice for Children: Restructuring Adoption Reproduction & Child Welfare Policy" 2014 *Law and Ethics of Human Rights* (*Law & Ethics Hum Rts*) 103, 120 and 122.

21 A judicial process that conforms to statute, in which the legal obligations and rights of a child in relation to the biological parents are terminated, and new rights and obligations are created between child and adoptive parents. Adoption involves the creation of the parent-child relationship between individuals who are usually not naturally related. The adoptive family gives the adopted child the rights, privileges and duties of a child and heir. Under the Guidelines, adoption is understood as permanent care.

process of drafting the provisions of the CRC, there was much debate about the wording of article 3. The formulation of the article was extensively debated – as to whether to reflect the principle as "a" or "the" primary consideration. In the final drafting, "a" primary consideration was used in recognition that given the widened scope of article 3, situations would arise when other legitimate and competing interests could not be disregarded. The conclusion was thus to settle for the less decisive wording: "a primary consideration". Thus, the best interests of the child cannot ordinarily be the only consideration but should be among the first aspects to be considered and should be given considerable weight in all decisions affecting children.

The concern that a decision may be made according to the subjective opinion of the person making such a decision is noted by Detrick,[22] who states that the persistent criticism lodged against the best-interests principle is that the principle "will enable cultural considerations to be smuggled in by states into their implementation of the rights recognised in the CRC".

The "weighting" of the best interests of the child within article 3 must be considered in light of the articles of the other relevant conventions. The basis of how the best interests are determined remains the principal problem in applying the principle. Article 3 remains vague and indeterminate, and problems related to the application of subjective criteria by decision-makers involved in determining what could be considered to be in the particular child's best interests may plague the assessment of what is *de facto* in the best interests of the child. It is submitted that the model proposed takes this factor into account.

The year 2020 marked the 30th anniversary of the adoption of the ACRWC.[23] As a regional Charter, the provisions of the ACRWC reflect and are informed by African cultural values and heritage. The ACRWC differs from those of the CRC in respect of the best-interests principle in that it provides that the best interests of the child are *the* primary consideration in any decision affecting the child. It is apparent that the ACRWC applies a higher standard in respect of the principle of the best interests of the child, when compared to the CRC.

The primary aim of the Hague Convention is to guide/govern the placement of a child in a permanent family in terms of national or international adoption; the Convention emphasises the importance of the principle of the child's best interests when placing a child by intercountry adoption, while respecting the child's fundamental rights.[24] The Hague Convention makes provision for substantive safeguards and procedures when an intercountry adoption is processed. The aim is the protection and

---

22 Detrick *Commentary on the United Nations Convention on the Rights of the Child* 89. See too Akhtar, Nyamutata and Faulkner *International Child Law* 4ed (2020) 1.

23 Mezmur "The African Children's Charter @ 30: A Distinction Without a Difference?" 2020 28(4) *The International Journal of Children's Rights* 693 706.

24 The Hague Convention provides that it is mandatory that participating states consider domestic solutions as preferable to international solutions; ensure that the child is adoptable; evaluate thoroughly the prospective adoptive parents to determine whether they are eligible; match the child with a suitable family and impose additional safeguards where required.

safeguarding of the child concerned. Buck[25] opines that the family has been structurally weakened in certain countries. It is submitted that South Africa is one such country,[26] not least of all as a consequence of the impact that migrant work had on the extended family. The absence of many able-bodied men in the community had a direct impact on the functioning of the extended-family principle in such communities.[27] It is submitted that the rights of a child must be considered in light of the integrity of the family unit, as well as the approach of the State to support families and to provide appropriate alternative care to the vulnerable child where the family environment is not functioning properly.

With respect to the principle of subsidiarity, the CRC provides that intercountry adoption should be considered as a form of alternative care when no appropriate alternative care is available in the country of origin of the child concerned. Fenton-Glynn[28] opines that one of the main arguments in favour of placing a child by intercountry adoption is the assertion that OACs would otherwise be placed in CYCCs. She notes that while the CRC acknowledges various forms of alternative care,[29] the Preamble of the CRC expresses a preference for *family* care. Fenton-Glynn's[30] discussion in this regard is focused on considering whether institutional care could ever be deemed appropriate for a child who is adoptable. It is however submitted that the importance of placing an adoptable child in a family environment is as important when *all other* domestic solutions are considered. In all instances where a child is found to be adoptable, the importance of placing a child in a family environment cannot be overemphasised. Para-Aranguren confirms this position.[31] The ACRWC expressly provides for the placement of the child as a measure of *last resort* only by intercountry adoption – that is, when no other suitable care is available in the child's country of origin. The ACRWC also recognises that it is a primary consideration that the child grows up in a *family* environment where such environment is found, nationally or internationally. The Hague Convention recognises that it is of primary importance that a child grows up in a family environment and that this is essential for the happiness and healthy development of the child. At the same time, the Hague Convention states that intercountry adoption may offer a child the advantage of a permanent family in the instance where a suitable family cannot be found in the country of origin.[32] Where a child is

---

25 Buck *International Child Law* 64.

26 Green Paper on Families: Promoting Family Life and Strengthening Families in South Africa GN 756 of 2011 in *GG* 34657 of 2011-10-03 5.

27 Mhlungu "The Damaged Family Structure in African Societies Is a Result of Lack of Land" (23 March 2018) https://www.news24.com/citypress/voices/the-damaged-family-structure-in-african-societies-is-a-result-of-lack-of-land-20180323 (accessed 2021-06-01).

28 Fenton-Glynn *Children's Rights in Intercountry Adoption: A European Perspective* (2017) 35. A Child and Youth Care Centre is a facility for the provision of residential care to more than six children outside the child's family environment ordered by the Children's Court in accordance with a residential care programme.

29 Art 20 of the CRC.

30 Fenton-Glynn *Children's Rights in Intercountry Adoption: A European Perspective* 35.

31 Para-Aranguren *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* 46.

32 Vité and Boéchat ("A Commentary on the United Nations Convention on the Rights of the Child, Article 21: Adoption" in Alen, Vande Lanotte, Verhellen, Ang, Berghmans and Verheyde (eds) *A Commentary on the United Nations Convention on the Rights of the Child*

found to be adoptable, it is submitted that in recognition of the important role a family plays in nurturing a child and allowing such a child to develop to their full potential, placing such child in a *family* environment is of utmost importance for their future. Such care must meet the best interests of the child.

4 NATIONAL LEGISLATION

In recent years, the South African legislature has increasingly recognised children's rights, promoting and protecting these rights, and ensuring the safeguarding of its children. The provisions of the Children's Act (CA),[33] the Constitution and the Social Assistance Act (SAA)[34] recognise the well-established principle that the best interests of a child are of paramount importance in any matter involving a child. South Africa is a multicultural society where customary law and common law coexist.[35] There are thus two legal systems that run in parallel under the supremacy of the Constitution.[36] Notwithstanding any challenges with the coexistence of the two systems,[37] the crucial role that a family plays in a child's life is recognised and accepted by both systems. Unless factors mitigate against it being in a child's best interests – for example, where there is evidence of abuse – family reunification must be prioritised.[38] It is submitted that this is an important factor that cannot be overlooked when considering which form of alternative care is deemed most appropriate for the child concerned.

Moreover, the South African state has shown its commitment to recognising, promoting, protecting and safeguarding children's rights, both through the enactment of the CA, which incorporates the Hague Convention and (by implication) the CRC, and through ratification of the ACRWC. When deciding to place a child in adoption (be it national or intercountry adoption), the Constitution further ensures the protection of children by providing that a child's best interests are of paramount importance in all matters. Accordingly, only where it can be said to be in the particular child's best interests will adoption, in South Africa or abroad, be considered a potential solution. International standards are subject to the provisions of the

21 (2008) 16) note that a distinction must be drawn in national law between simple adoption (where filial ties are not broken with the family of origin, and adoption is revocable) and full adoption (implying full integration of the child into the adoptive family and all legal ties with the family of origin are severed). In terms of art 27(1) of the Hague Convention: "Where an adoption granted in the State of origin does not have the effect of terminating a pre-existing legal parent-child relationship, it may, in the receiving State which recognizes the adoption under the Convention, be converted into an adoption having such an effect – *a*) if the law of the receiving State so permits; and *b*) if the consents … have been or are given for the purpose of such an adoption".

33 38 of 2005.

34 13 of 2004.

35 *Gumede v The President of the Republic of South Africa* 2009 (3) SA 152 (CC) par 21–22.

36 S 8 of the *Constitution of the Republic of South Africa*, 1996 (Constitution).

37 Boezaart "Building Bridges: African Customary Family Law and Children's Rights" 2013 6 *International Journal of Private Law* 395.

38 UNICEF "The Right of the Child to Family Reunification" (May 2016) https://www.unicef.org/eca/sites/unicef.org.eca/files/ADVOCACY_BRIEF_Family_Reunification_13_10_15.pdf (accessed 2024-11-12) 1.

Constitution, and any decision to place a child must be taken in light of section 28 thereof.[39]

Following ratification of the Hague Convention by South Africa, all South African courts, tribunals and forums must comply with its provisions (if not also its practices, procedures and guidelines). Section 39(1)(*b*) of the Constitution states that a court, tribunal or forum must consider international law and may consider foreign law in deliberations. It is accordingly evident that international instruments play a very important role in the interpretation of the Constitution. Section 28(2) of the Constitution is evidence that South Africa's constitutional values are in keeping with international standards. By ratifying conventions such as the CRC and the ACRWC, South Africa has confirmed its commitment to international human rights.[40] The phrase "*must* consider international law" (author's emphasis) in section 39(1)(*b*) imposes and obliges courts to refer to and use all legal principles under the Hague Convention when performing their interpretive task.

5 ALTERNATIVE CARE

Concerns have been raised with the fact that national adoption rates are low, the foster-care system is overburdened, and social workers involved in the process of foster care have high caseloads; in this context, whether a child's best interests have been met when placed in a form of care that experiences the difficulties mentioned is questioned.[41] For example, although the placement of a child in a CYCC might meet the physical needs of the child, it is clear that "care" of a child goes far beyond physical needs. Such needs include, *inter alia*, emotional and psychological care.

It is submitted that the needs of an OAC are met when the OAC is placed in a permanent and stable family environment. However, in South Africa, it is apparent that the family unit frequently faces a fundamental crisis. The impact of HIV/AIDS, widespread poverty,[42] unwanted pregnancies,[43] child abandonment,[44] rapid urbanisation, and the increased migration of adults and children into and within South Africa in search of economic and political refuge[45] has devastated families and communities, leaving an ever-

---

39 *C v Minister of Health and Welfare* 2012 (2) SA 208 (CC) 30.

40 Pretorius *Inter-Country Adoptions and the Best Interests of the Child* (LLM dissertation North-West University) 2012 34–35.

41 Van der Walt *Intercountry Adoption and Alternative Care: A Model for Determining Placement in the Best Interests of the Child* (LLD thesis Nelson Mandela University) 2019 177.

42 Smart *Children Affected by HIV/AIDS in South Africa: A Rapid Appraisal of Priorities, Policies and Practices* (2003) 3.

43 Blackie *Sad, Bad and Mad: Exploring Child Abandonment in South Africa* (masters of Anthropology dissertation, University of the Witwatersrand) 2014 19.

44 Vorster "Abandoned Children: South Africa's Little Dirty Secret" 2015 http://www.dailymaverick.co.za/ (accessed 2017-05-31). Vorster refers to the fact that, as of 2015, approximately 3 500 children are abandoned annually in South Africa. The National Adoption Coalition estimates that while there are no statistics available, there is reason to believe that the number of abandoned children has increased http://www.adoptioncoalitionsa.org (accessed 2017-05-31).

45 Department of Social Development "South Africa's Child Care and Protection Policy" (2018) https://www.sacssp.co.za/NDSD_CCPP_19_DECEMBER.docx (accessed 2019-01-01) 47.

increasing number of OACs in its wake.[46] Traditional methods of caring for a child such as kinship care are no longer necessarily readily available for children in need of care.[47] When making a decision to place an OAC in appropriate alternative care, it is of utmost importance that attention be paid to the current status of the child-welfare system within the country, before any determination can be made regarding such placement.[48] The decision made concerning such placement must be appropriate for the child concerned and must meet the best interests of such child.

6 THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD

Viable solutions to fulfil the standard of a child's best interests must be sought and effected.[49] The flexibility of the criterion of the best interests of a child is necessarily indeterminate since current factors need to be considered at the time a decision is made; factors relevant to the particular child need to be weighed and balanced to ensure compliance with the standard of paramountcy of the child's best interests. Several factors reflected above have led to the current position in which many children in South Africa find themselves. It was highlighted that the principle of a child's best interests is well established in both national and international law. However, concerns have been raised about the indeterminacy of the principle and which forum is best placed to ensure that these interests are met. OACs are vulnerable. Placing a child in an institution is generally considered to be detrimental to a child, but it is accepted that in certain instances the circumstances may be such that a particular child's best interests are served when placed in such care.[50] The nature of institutional care in South Africa is representative and illustrative of the fact that this form of care does not provide a nurturing, caring environment in which a child can develop to their full potential. While state institutions might have a certain role to play in caring for children, evidence of the negative long-term impact of growing up in such care is well documented by different disciplines.[51] All

---

46 Van der Walt *Intercountry Adoption and Alternative Care: A Model for Determining Placement in the Best Interests of the Child* 2.

47 Mhlungu https://www.news24.com/citypress/voices/the-damaged-family-structure-in-african-societies-is-a-result-of-lack-of-land-20180323; Williamson "Caring for Orphans: A Child's Place Is in a Family. Children First" 2002 6(44) *Social Work/Maatskaplike Werk* 24–25. See also, Foster and Williamson "A Review of Current Literature on the Impact of HIV/AIDS on Children in Sub-Saharan Africa" 2000 14(3) *AIDS* S275–S284; Roby "Children in Informal Alternative Care" 2011 *UNICEF* 41.

48 Van der Walt *Intercountry Adoption and Alternative Care: A Model for Determining Placement in the Best Interests of the Child* 178–179.

49 Davel "Intercountry Adoption from an African Perspective" in Sloth-Nielsen (ed) *Children's Rights in Africa – A Legal Perspective* (2000) 264.

50 Dozier, Zeanah, Wallin and Shauffer "Institutional Care for Young Children: Review of Literature and Policy Implications" 2012 *Review of Literature and Policy Implications Social Issues and Policy Review* 1 19.

51 Wolfson Vorster "Is Government Ignoring the Impact on Our Children of Growing Up in Children's Homes?" (19 December 2019) https://www.dailymaverick.co.za/opinionista/2019-12-19-is-government-ignoring-the-impact-on-our-children-of-growing-up-in-childrens-homes (accessed 2022-05-10); Yorke *The Experience of Caregivers in Registered Child*

reach the same conclusion: placement of a child in care in an institution, must at all times be considered only where absolutely necessary and as a measure of last resort.

Given the globalisation of the placement of children by intercountry adoption, the Hague Convention recognises the practice as an international phenomenon. Provision is made in the Convention for the creation of a system of cooperation between states, to ensure the safeguarding of children's rights, granting children protection against exploitation of their rights, and providing a permanent solution for a child in need of alternative care.[52] While the potential for atrocities exists, it is submitted that following the enactment of the Hague Convention, strict rules, regulations, safeguards and procedures have been put in place to guard against any attempt to exploit children.[53]

Where, following a weighing and balancing of all relevant factors, the authorities concerned agree that intercountry adoption meets a child's best interests, such an adoption will be processed and monitored in terms of the provisions of the Hague Convention. These provisions, when properly regulated and monitored, should serve to allay the fears and concerns that might arise when considering the placement of a child abroad. The banning of intercountry adoptions or placing a moratorium on such placements where it becomes apparent that irregularities have occurred in the process can serve to protect children from trafficking, where it is clear that the process has not been effected in terms of the provisions of the Hague Convention protections. However, as is the instance in Kenya, placing an indefinite moratorium on intercountry adoptions, should not be used under the guise of protecting children's interests where it is evident that registered and unregistered institutions are mushrooming to accommodate the children left without any other form of care.[54] The relevant authorities must guard against the same occurring in South Africa.

This is clearly in contradiction to the recognition, development, and protection of children's rights in international law. In light hereof, it is evident that the South African legislature and judiciary, and all other relevant authorities, are obliged to ensure that all steps must be taken to ensure that the standard of the best interests of a child are met. It is submitted that a model of best-interests determination will be an aid in ensuring and protecting children when they are placed abroad. The following recommendations, in the form of a model, are based on a strictly regulated system, with accredited bodies that are subject to monitoring. Furthermore, where the placement is in terms of intercountry adoption, the provisions of the Hague Convention set a minimum standard that must be adhered to before, during and after the placement of a child abroad.

and Youth Care Centres in Gauteng, South Africa, During the First 21 Years of Democracy (dissertation, University of Pretoria) 2016 9 and 15.

52 Louw "Adoption of Children" in Boezaart *Child Law in South Africa* (2018) 485; Davel in Sloth-Nielsen *Children's Rights in Africa* 262; Baird "Stuck in the Pipeline: An Analysis of the Hague Convention and Its Effects on Those in the Process of International Adoptions" 2012 *Journal on International and Comparative Law* 216 222.

53 Louw in Boezaart *Child Law in South Africa* 507.

54 Van der Walt *Intercountry Adoption and Alternative Care: A Model for Determining Placement in the Best Interests of the Child* 343.

While the State is aware of the failings of the system of child welfare in South Africa, little has been done to provide a solution to the problem.[55] It is also well established that adoption is on the decline in South Africa.[56] The CA has done little to clarify the position of intercountry adoption as a form of alternative care.[57] Like the relevant conventions on alternative care and the Hague Convention, little effort has been made to clarify and resolve the ambiguous place of intercountry adoption *vis-á-vis* national options for alternative care.

7 PROPOSED MODEL TO DETERMINE THE BEST INTERESTS OF A CHILD IN SOUTH AFRICA IN THE CONTEXT OF PLACING SUCH CHILD IN ALTERNATIVE CARE

Currently, decisions to place a South African OAC in alternative care are guided by the best-interests principle in determining the most appropriate placement. This approach has inherent difficulties, and the author submits that the current position, which includes staffing concerns within the Department of Social Welfare and the indeterminacy of the best-interests principle, indicates a system in South Africa that is failing to determine what placement best meets the needs of the child concerned. In this penultimate section, the model or framework referred to above is presented. This framework embraces a holistic approach to the best-interests-of-the-child principle and incorporates lessons learned from the current position in South Africa. The South African courts and legislature have rightly endorsed the notion of the best interests of the child being paramount does not mean that they are not subject to reasonable limitations.[58] In light hereof, it is submitted that an adequate theory of family law in South Africa is one that views an individual both as a distinct individual and as a person fundamentally involved in relationships of dependence, care and responsibility with other family members. It is the weight and importance attached to the factors in the case under consideration that will determine the outcome in any particular case.

A worldwide lack of parental care is a common occurrence of the twenty-first century, especially in developing countries. It cannot be disputed that the future of vulnerable children worldwide, as in South Africa, hangs in the balance. The devastating impact of the HIV pandemic has led to a dramatic rise in the number of vulnerable children, with developing nations showing

---

55 Schmid "Responding to the South African Child Welfare Crisis" 2006 23(1/2) *Canadian Social Work Review* 111–127 https://www.jstor.org/stable/i40078576 (accessed 2022-05-10).

56 In November 2013, a review of the Registry of Adoptable Children and Parents indicated that there were a mere 297 unmatched parents for the 428 unmatched children available for adoption. Customary beliefs that reject adoption of a child keeps adoption statistics low in South Africa. Child protection statistics note that 1 033 children in South Africa were adopted nationally between 1 April 2017 and 31 March 2018.

57 38 of 2005.

58 Moyo "Reconceptualising the 'Paramountcy Principle': Beyond the Individualistic Construction of the Best Interest of the Child" 2012 *African Human Rights Law Journal* (*AHRLJ*) 142.

the highest statistics of children left without parental care.[59] Unprecedented numbers of children in South Africa are orphaned or abandoned as a consequence of AIDS, leaving the relevant authorities struggling to find appropriate alternative care placements that serve the concerned children's best interests. Chirwa highlights that,

> "[a]s more and more children become orphans or lack parental care, states have not established sufficient alternative care options to accommodate the needs of these children." [60]

Despite efforts in the international and domestic arena to enact legal means to ensure that the best interests of the child are served in all actions concerning a child who is the subject of placement in alternative care, not all placements of South Africa's OACs are meeting the needs of such children. A model or framework is proposed as a means of assessing the placement of an OAC that best serves such a child's interests. The model provides guidelines when considering placement by intercountry adoption in light of alternative care options. In this context, it is important to examine whether the current interpretation of subsidiarity serves a child's best interests. When properly regulated and executed, intercountry adoption may provide the only appropriate alternative to institutionalisation in circumstances where domestic country adoption is not feasible. Emphasising the abuses rather than the benefit of intercountry adoption amounts to scapegoating the process for lack of effort on the regulatory plane. The propriety and integrity of adoption should be the ultimate guide in all legislative efforts. However, a total ban or suspension of intercountry adoptions amounts to an abdication that negatively impacts the best interests of otherwise adoptable children – in many instances, adoptable children who have no real chance of being adopted in their own country owing to their age and/or medical conditions will remain in CYCCs.

The proposed model or framework is designed to assist all those involved in making a decision to place an OAC in appropriate alternative care, and those involved in the processing of such placement. It is accepted that all decisions are based on the determination as to what constitutes the best interests of a particular child, given all circumstances relevant to such child. The model distinguishes between substantive factors and procedural factors and safeguards.

7 1 Substantive factors

The best-interests principle forms a foundation for establishing the rights of any child in South Africa (and elsewhere in terms of international law).[61] Both

---

[59] Elflein ("HIV/AIDS Worldwide – Statistics & Facts" (18 December 2023) https://www.statista.com/topics/773/hiv-aids-worldwide/#topicOverview (accessed 2024-12-11) reports that South Africa has the highest death rate in the world from AIDS.

[60] Chirwa "Children's Rights, Domestic Alternative Care Frameworks and Judicial Responses to Restrictions on Inter-Country Adoption: A Case Study of Malawi and Uganda" 2016 *AHRLJ* 117 119.

[61] *S v M* 2008 (3) SA 232 (CC) par 12 and 14; Liebenberg "Human Development and Human Rights South African Country Study" (2000) http://hdr.undp.org/sites/default/files/sandraliebenberg.pdf (accessed 2020-08-20).

the South African Constitution and the CA are in line with the international-law provisions regarding the importance of guaranteeing that the best-interests principle will be applied whenever a decision is to be taken concerning a child. Ratification of relevant international instruments, as discussed in the research, places an obligation to incorporate the international provisions into national law, something that South Africa has adhered to with the enactment of the CA and the Constitution. In terms of the domestic promulgation, an obligation arose to put in place mechanisms that will facilitate consideration of the best interests of the child and legislative provisions specify measures to ensure that those with the authority to make decisions regarding children consider the "best interests" rule as a matter of procedure. However, much has been written on the indeterminacy of the principle itself, some seeing the flexibility[62] of the principle as its strength, and others criticising the potential and inherent dangers of leaving decisions to the subjective determination of the authority concerned.

The CA made provision for a list of factors to be taken into consideration. To ensure that all children in need of care are placed in alternative care after careful consideration is indeed given to relevant factors by the authorities involved, the following is proposed.

7 1 1 Approach to determining the best interests of a child

- Each case must be considered on an *ad hoc* basis, taking into consideration all the factors and circumstances of that particular case.[63]
- Children are bearers of rights, and as such their rights must be respected, promoted, safeguarded and ensured.[64]
- The child's best interests are considered to be of paramount importance in any matter concerning a child.[65]

---

62 Skiveness "The Child's Best Interest Principle Across Child Protection Jurisdictions" (31 August 2018) https://link.springer.com/chapter/10.1007/978-3-319-94800-3_4#auth-Marit-Skivenes (accessed 2024-11-12) 62.

63 *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC); *S v M supra* par 24; United Nations Children's Fund (UNICEF) and Government of Kenya *Guidelines for the Alternative Family Care of Children in Kenya* (2014) 16.

64 Sloth-Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law" 1994 *SAJHR* 401 405; Robinson "The Right of Child Victims of Armed Conflict to Reintegration and Recovery" 2012 *Potchefstroomse Elektroniese Regsblad/ Potchefstroom Electronic Law Journal* (*PER/PELJ*) 46 150; Bekink "'Child Divorce': A Break from Parental Responsibilities and Rights Due to the Traditional Socio-Cultural Practices and Beliefs of the Parents" 2012 *PER/PELJ* 178 178; Louw *Acquisition of Parental Responsibilities and Rights* (LLD thesis, University of Pretoria) 2009 15; Mezmur "Intercountry Adoption as a Measure of Last Resort in Africa: Advancing the Rights of a Child Rather Than the Right to a Child" 2009 *Sur Revista Internacional de Direitos Humanos* 82 88; Zermatten "The Best Interests of the Child: Literal Analysis, Function and Implementation Working Report" 2010 *International Journal of Children's Rights* (*Int'l J Child Rts*) 369 370.

65 *S v M supra* par 25 and 42; Moyo 2012 *AHRLJ* 164–165; Mezmur 2009 *Sur Revista Internacional de Direitos Humanos* 92.

7 1 2 Measures to ensure that the best interests are met

- Legislative, judicial and administrative measures must be put into place to ensure that the best interests of a child are met.[66]
- Consideration must be given to providing national legislative guidelines listing factors that must be considered when making a determination.[67]
- In all determinations regarding placing a child in alternative care, it is the principle of a child's best interests that must be considered first and foremost.[68]

---

66 Moyo 2012 *AHRLJ* 153.

67 S 7 of the CA provides that the following factors must be taken into consideration:
"(*a*) the nature of the personal relationship between–
(i) the child and the parents, or any specific parent; and
(ii) the child and any other care-giver or person relevant in those circumstances;
(*b*) the attitude of the parents, or any specific parent, towards–
(i) the child; and
(ii) the exercise of parental responsibilities and rights in respect of the child;
(*c*) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
(*d*) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from–
(i) both or either of the parents; or
(ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
(*e*) the practical difficulties and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
(*f*) the need for the child–
(i) to remain in the care of his or her parent, family and extended family; and
(ii) to maintain a connection with his or her family, extended family, culture or tradition;
(*g*) the child's–
(i) age, maturity and stage of development;
(ii) gender;
(iii) background; and
(iv) any other relevant characteristics of the child;
(*h*) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
(*i*) any disability that a child may have;
(*j*) any chronic illness from which a child may suffer;
(*k*) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
(*l*) the need to protect the child from any physical or psychological harm that may be caused by–
(i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
(ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
(*m*) any family violence involving the child or a family member of the child; and
(*n*) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child."

68 Mezmur 2009 *Sur Revista Internacional de Direitos Humanos* 86.

- A holistic, all-inclusive approach must be adopted to determine what is in the particular child's best interests.

7 1 3 The role that the child and State play in the determination

- The child has the right to be heard. As the child matures, their capacities develop, and consideration of their personal wishes, views and preferences must be taken into consideration.[69]
- Every child has the right to family and parental care; where such care is not an option, the State must ensure that the child is placed in appropriate alternative care.[70]
- Steps must be taken to ensure that the determination of what constitutes appropriate alternative care is made timeously.
- All rules, policies, and systems for determining a child's best interests must be child-centred and family-focused.[71]

The importance of being raised in a family environment cannot be underestimated.

7 1 4 The importance of a family environment

- The importance of family integrity and a preference for avoiding the removal of the child from their home must be supported.[72]
- The importance of being raised in a family environment must be considered.[73]
- Where it is in the child's best interests, the OAC should be placed within the extended family environment.[74]
- Decision-makers should determine whether the extended family played any role in the OAC's life before their need for placement and, if so, whether such extended family would be in a position to ensure that the

---

69 Perumal and Kasiram "Living in Foster Care and in a Children's Home: Voices of Children and Their Caregivers" 2008 *Social Work/Maatskaplike Werk* 163; Moyo 2012 *AHRLJ* 165.

69 Moyo 2012 *AHRLJ* 165 and 172; United Nations Children's Fund (UNICEF) and the Government of Kenya *Guidelines for the Alternative Family Care of Children in Kenya* 30.

70 Mezmur 2009 *Sur Revista Internacional de Direitos Humanos* 84.

71 Reyneke "Realising the Child's Best Interests: Lessons From Child Justice Act to Improve the South African Schools Act" 2016 19 *PER/PELJ* 3–4. See also Mezmur 2009 *Sur. Revista Internacional de Direitos Humanos* 98.

72 Moyo 2012 *AHRLJ* 159; Mezmur 2009 *Sur Revista Internacional de Direitos Humanos* 86.

73 Assim *In the Best Interest of Children Deprived of a Family Environment: A Focus on Islamic Kafalah as an Alternative Care Option* (LLM dissertation, University of Western Cape) 2013 5.

74 Perumal and Kasiram 2008 *Social Work/Maatskaplike Werk* 162; Moyo 2012 *AHRLJ* 170; Myers "Preserving the Best Interests of the World's Children: Implementing the Hague Treaty on Intercountry Adoption Through Public-Private Partnerships" 2009 *Spring Rutgers Journal of Law and Public Policy* 780 783–784; Assim *In the Best Interest of Children Deprived of a Family Environment: A Focus on Islamic Kafalah as an Alternative Care Option* 24; Mezmur 2009 *Sur Revista Internacional de Direitos Humanos* 97.

child is nurtured in the secure family-like environment to which the child has a constitutional right.[75]

- An environment where the child can feel consistently loved and safe, with a sense of belonging and self-worth, must be sought for the child.[76]
- Where possible, priority must be given to finding a long-term family environment that meets the needs of the child concerned, based on the child's own circumstances.[77]

All cases must be considered on an *ad hoc* basis. A consideration of the various factors that play a role in making a determination follows.

7 1 5 The weight attached to factors varies according to particular circumstances

- The weight ascribed to factors such as race, culture, ethnicity and language must be considered.[78]
- Continuity is a factor to be considered when determining the placement of a child in alternative care. Due regard must be given to the child's ethnic, religious or linguistic background in this regard.[79]
- Section 9 of the Constitution embraces the principle of non-discrimination and the right to equality. As a child is granted the same rights and protection as everyone else, section 9 is of particular importance when considering the impact of the child's race and culture on any placement insofar as serving the best interests of the child is concerned.[80]

---

[75] Mthombeni *Factors in the Family System Causing Children to Live in the Streets: A Comparative Study of Parents' and Children's Perspectives* (master's dissertation, University of Pretoria) 2010 38; Lim *Legally Recognising Child-Headed Households Through a Rights-Based Approach: The Case of South Africa (LLD thesis, University of Pretoria)* 2009 128; Motaung *The Difficulties Experienced by Caregivers of Aids Orphans* (master's dissertation in Educational Psychology, North-West University) 2007 4.

[76] Berry and Malek "Caring for Children: Relationships Matter" in Jamieson, Berry and Lake (eds) *South African Child Gauge* (2017) 51.

[77] Assim *In the Best Interest of Children Deprived of a Family Environment* 3 and 22; Mezmur 2009 *Sur Revista Internacional de Direitos Humanos* 86.

[78] Moyo 2012 *AHRLJ* 153; Pretorius *Inter-Country Adoptions and the Best Interests of the Child* 40; Mezmur 2009 *Sur Revista Internacional de Direitos Humanos* 88 and 92.

[79] Assim *In the Best Interest of Children Deprived of a Family Environment* 22.

[80] S 9 of the Constitution provides as follows:

"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

- Diverse factors and competing interests must be balanced to determine the child's best interests.[81]
- The age of the child plays a pivotal role in determining what is in their particular best interests.[82] Considering the same factors for two different children might well result in a different conclusion being reached for each child, on the basis that what is in the best interests of a very young child, for example, might not be appropriate for an older child.[83]
- Assurance must be given that a child removed from their home will be given care, treatment and guidance that will assist the child in developing into a self-sufficient adult.[84]

The principle of subsidiarity is well established and recognised in international and national law. A consideration of its application follows.

7 1 6 The principle of subsidiarity as a factor in determining a child's best interests

- The principle of subsidiarity must be considered but is subordinate to the principle of a child's best interests and must be seen as a factor in determining a child's best interests in a given circumstance.[85]
- The following are generally recognised as serving the best interests of a child:
  a) family-based solutions are generally preferred to institutional placements;[86]
  b) permanent solutions are generally preferable to inherently temporary ones;[87] and
  c) national solutions are generally preferable to those involving another country.[88]
- Temporary care should only be considered when permanent care is not an option.[89]
- Where placement by intercountry adoption is considered, the age of the child is a factor in determining whether such placement is in the child's best interests.

---

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

81 Pretorius *Inter-Country Adoptions and the Best Interests of the Child* 42.

82 Moyo 2012 *AHRLJ* 165 and 172.

83 Schwartz "Religious Matching for Adoption: Unraveling the Interests Behind the 'Best Interests' Standard" 1991 *Family Law Quarterly* 184. See also Pretorius *Inter-Country Adoptions and the Best Interests of the Child* 69.

84 Moyo 2012 *AHRLJ* 152; Carter and Van Breda "The Design of a Protocol for Assessing Prospective Foster Parents in South Africa" 2016 *Social Work/Maatskaplike Werk* 217.

85 Pretorius *Inter-Country Adoptions and the Best Interests of the Child* 10–11; Mezmur 2009 *Sur Revista Internacional de Direitos Humanos* 92.

86 Pretorius *Inter-Country Adoptions and the Best Interests of the Child* 64. It must be noted that this cannot be said to be a hard-and-fast rule applicable in all instances.

87 Mezmur 2009 *Sur Revista Internacional de Direitos Humanos* 87.

88 Mezmur 2009 *Sur Revista Internacional de Direitos Humanos* 86–87 and 98.

89 OVC Support "Alternative Care for Children" (2016) https://ovcsupport.org/resource/alternative-care-for-children/ (accessed 2020-08-15).

- Any placement of an OAC in a CYCC must be considered in light of the best-interests principle.[90]
- When assessing domestic placements other than adoption in South Africa, consideration should be given to whether the current status of such systems serves the best interests of the child.

7 1 7 Evaluation of appropriate care

- Consideration must be given to the impact of the HIV/AIDS pandemic on the home environment of the potential caregivers:[91]
  a) Are the caregivers infected?
  b) What impact does this have on their ability to provide nurturing care and stability?
- Continuity of the relationship between caregiver and child must be sought and promoted.[92] The potential of the child to have secure attachments with a person or persons in the placement should be determined.[93] Permanency planning must include:
  a) the facilitation of opportunities for the child concerned to develop positive attachments to the caregiver;[94]
  b) the maintenance of positive connections and social support systems that the child can rely on throughout their life;
  c) the maintenance and strengthening of the cultural and racial identity of the child, depending on the age of the child concerned; and
  d) the facilitation of those relational, physical or legal arrangements that may be needed for children who are being prepared for independent living.
- Consideration must be given to whether the proposed caregivers have a serious and earnest intention to care for the child, as opposed to the intention to use such a caring role as a guise to access social assistance as poverty alleviation for the caregiver.[95]
- A multidisciplinary approach is needed to ensure that a particular decision is in fact in a child's best interests. A continuum of differentiated combinations of effective integrated care and support services must be in place and available to a child in need thereof.

The fundamental rights of the child must be met. These include the right of children to health care, safety and education.

---

90 Assim *In the Best Interest of Children Deprived of a Family Environment* 28; Mezmur 2009 *Sur Revista Internacional de Direitos Humanos* 95.

91 Motaung *The Difficulties Experienced by Caregivers of AIDS Orphans* 45.

92 Myers 2009 *Spring Rutgers Journal of Law and Public Policy* 816.

93 Marais and Van der Merwe "Relationship Building During the Initial Phase of Social Work Interventions With Child Clients in a Rural Area" 2015 *Social Work/Maatskaplike Werk* 147; Berry and Malek in Jamieson *et al South African Child Gauge* 51 and 53; Assim *In the Best Interest of Children Deprived of a Family Environment* 18; UNICEF and the Government of Kenya *Guidelines for the Alternative Family Care of Children in Kenya* 20.

94 Berry and Malek in Jamieson *et al South African Child Gauge* 55.

95 Carter and Van Breda 2016 *Social Work/Maatskaplike Werk* 217.

7 1 8 Right of access to health care, safety and education

- A child has the right to health care, safety and/or protection. These rights include, but are not limited to:
  a) the mental and physical health needs of the child; and[96]
  b) the mental and physical health of the parents.
- Vulnerabilities caused by different underlying risks need to be determined before a decision is reached: each child, depending on their level of vulnerability, will require different levels or intensities of support and services to mitigate the risks, and every attempt must be made by the multidisciplinary task team to mitigate their impact on the child.
- The child must have access to social security.[97]
- The determination must recognise the child's right to access education.[98]

The effectiveness of the child-welfare system plays an important role in ensuring a determination that is in the best interests of the child in a given instance.

7 1 9 The need for an effective child-welfare system

- A childcare system must offer effective and trained[99] care and support services, which must be readily available to a child who requires such support in light of the specific risks, age and developmental stage of each child. An effective system includes, but is not restricted to the following:
  a) a sufficient number of social workers employed by the DSD;[100]
  b) regular past-placement calls to allow the social worker concerned to properly assess the success (or otherwise) of the placement;
  c) continuity of staff as far as is reasonably possible to allow for relationship-building potential between the social worker, the foster child and the foster caregiver;
  d) ability and capacity to assess foster caregivers;[101]
  e) full assessment of foster caregivers as prospective foster care parents to a specific child;[102] and

---

96 *Ibid*.

97 UNICEF and the Government of Kenya *Guidelines for the Alternative Family Care of Children in Kenya* 30.

98 Sarumi *The Protection of the Rights of Children Affected by HIV/AIDS in South Africa and Botswana: A Critical Analysis of the Legal and Policy Responses* (LLD thesis University of KwaZulu-Natal) 2013 13 and 20; Pretorius *Inter-Country Adoptions and the Best Interests of the Child* 65; Carter and Van Breda 2016 *Social Work/Maatskaplike Werk* 217.

99 Cantwell *The Principle of Best Interests of the Child in Intercountry Adoption* (2014) 23; National Adoption Coalition Submission to the Parliamentary Portfolio Committee Children's Second Amendment Bill: [B 14B–2015] (2015) 5.

100 Dhludhlu and Lombard "Challenges of Statutory Social Workers in Linking Foster Care Services with Socio-Economic Development Programmes" 2017 *Social Work/Maatskaplike Werk* 165; Carter and Van Breda 2016 *Social Work/Maatskaplike Werk* 210.

101 Carter and Van Breda 2016 *Social Work/Maatskaplike Werk* 210.

f) social workers who have a concrete understanding of foster care. (Given the ever-increasing number of children placed in foster care, assessment and placement of children in foster care have become an important aspect of a social worker's function. To be effective, such social workers require a concrete understanding of foster care, an ability to assess the parties concerned and conduct a post-placement assessment. As such, the training of social workers on a tertiary level must be of a standard to ensure social workers are fully equipped professionally to enter a career where assessments for foster-care placements play such a large role. This will enable social workers to:
   i. accurately select foster parents;[103]
   ii. provide appropriate support to foster parents and foster children; and
   iii. train foster parents to fulfil the important role they play in the foster children's lives, including but not limited to emotional support.[104]

- Where a child is to be placed in foster care, the foster caregivers and the child concerned must be properly prepared before such placement takes place.
- Role-players from different professional sectors must be accessible to the child concerned, to ensure a coordinated and holistic response to a child who requires these services.[105]
- Determining appropriate alternative care must be made timeously.[106]

7 2 Procedure

Whenever a decision is to be taken that will affect a child needing care, the process must carefully consider the possible impacts (positive and negative) of the decision on the child concerned and must give such impact primary consideration when weighing the different interests at stake. However, this is simply a procedural rule. Article 3(1) of the CRC imposes the introduction of this step in the decision-making process but does not impose a particular outcome. It is incumbent on the legislature to provide measures to ensure that those having authority to make decisions regarding the placement of a child must consider the best-interests rule as part of the peremptory procedure. Measures should also ensure that these persons are sufficiently trained to apply this nuanced principle in exercising discretion or making recommendations or decisions. Important aspects of the procedure are considered below.

[102] *Ibid.*
[103] Carter and Van Breda 2016 *Social Work/Maatskaplike Werk* 218.
[104] Carter and Van Breda 2016 *Social Work/Maatskaplike Werk* 216–217.
[105] Marais and Van der Merwe 2016 *Social Work/Maatskaplike Werk* 155.
[106] Berry and Malek in Jamieson *et al South African Child Gauge* 52.

7 2 1 The procedure must be transparent and verifiable

- The process of determining a child's best interests in placing them in alternative care must at all times be transparent.
- All determinations made must be verifiable.
- A multidisciplinary approach must be taken to ensure that a particular decision is in fact in the child's best interests.
- Where the father of the child concerned is an unmarried father who is deemed "fit and proper" to adopt his child, or alternatively where other family members are deemed fit to adopt the child, notification must be given that he or they have thirty days from the date of serving of such notification, to apply to adopt the child concerned.
- The various authorities must all be quite clear on the role they play in ensuring that the best interests of the child are not compromised during the determination and process of the placement of the child.

7 2 2 The procedure must ensure that the provisions of the CA are met with respect to determining that the child is adoptable, that informed consent of the parent or parents is acquired, and that standards as determined by the CA are met

- A procedure must be in place for the identification of children who lack parental care.
- Where a child is to be adopted, it is incumbent on the authorities to determine if the parent or parents have given informed consent to the adoption of their child.

7 2 3 A register on adoptable children and prospective adoptive parents

In terms of the provisions of the Hague Convention, as incorporated into the CA, a register must be opened at the DSD[107] that includes the following:

a) a record of any child who has been considered to be adoptable in terms of the CA;
b) a record of prospective adoptive parents who meet the requirements of the CA as "fit and proper" adoptive parents;
c) when a child has been adopted, removal of their name from the register; and
d) maintenance of the register with due diligence by the Director-General of Social Welfare.

[107] The Department of Social Development is the South African government department responsible for actions aimed at supporting family life and the strengthening of families in the country.

7 3 Intercountry adoption and the best interests of the child

The model above provides a recommended framework to be applied when any determination is made regarding the placement of an OAC in alternative care. Following exposition of the dire circumstances to which OACs are exposed, it would be remiss not to consider the solution that intercountry adoption has to offer a child in need of care. Domestic adoptions are low in number and on the decline, and conditions in alternative care of a temporary nature, do not, on the whole, comply with serving a child's best interests. While the debate continues concerning the role that intercountry adoption has to play in ensuring that the best interests of an OAC are met, it is submitted that consideration must be given to the current capacity and facilities available in a child's country of origin, before reaching a conclusion on intercountry adoption as an option for placement. Such a decision cannot be made theoretically. The reality of current conditions in the country of origin is a major factor to be considered when determining what serves the child's best interests. It is submitted that South Africa would be failing its children by not considering intercountry adoption as a viable option for alternative care. However, private intercountry adoptions are not recommended. It is contended further that real and serious concerns regarding abuse, child trafficking and profiteering can be allayed, provided that the substantive and procedural provisions of the model above and below are strictly adhered to. Stringent regulation in terms of the provisions of the Hague Convention on placements abroad creates potential for the safe international placement of children in need.

Safeguards that have been implemented are discussed below.

7 3 1 The role of the Central Authority

Section 257(1)(*a*) of the Children's Act provides that the Central Authority in South Africa is the Director-General of the Department of Social Welfare. The functions of the Central Authority are based on provisions of the Hague Convention as incorporated nationally in the CA and its regulations. The core obligations of the Central Authority include communication, cooperation and sharing of information with other relevant central authorities. In carrying out these obligations, certain standards must be met to ensure the protection and promotion of a child's best interests. The following safeguards and principles apply:

- The Central Authority is the designated supervising body tasked with ensuring that all possible measures are taken to protect the rights and best interests of a child who is to be placed abroad.
- Where either state is a non-Hague-Convention country, the regulatory provisions and standards of the Hague Convention must be adhered to.
- Adoption must be finalised in the sending country where a child is to be placed abroad in intercountry adoption.

- The process of placing the child in alternative care must take place timeously.[108]
- The authority must also take into consideration the express wishes and opinions of the child, where applicable.
- Where placement by intercountry adoption takes place, all such placements must be made in accordance with the strict regulatory provisions of the Hague Convention. No concessions should be considered.[109]
- The Central Authority of both the sending and the receiving state must:
  a) collect, preserve and exchange information pertaining to a child and prospective adoptive parents;
  b) determine who is a fit and proper adoptive parent for an adoptable child;
  c) promote the development of adoption counselling;
  d) provide efficient procedures for the management of adoption, including but not limited to:
     i. recognition of certain foreign adoptions; and
     ii. general regulation of intercountry adoption; and
  e) provide evaluation reports regarding experiences with intercountry adoptions.
- Where one state is not a Hague Convention State Party, it is incumbent on the Central Authority of the state that is a State Party to ensure that steps are taken to ensure the safety and protection of the child in the form of bilateral or multilateral treaties and agreed follow-up procedures. All procedures, standards and safeguards of the Hague Convention must be adhered to.
- The Central Authority must maintain and promote relationships, cooperation and communication between the competent authorities with regard to intercountry adoptions within the state, to protect children and to achieve the objectives of the Hague Convention.[110]
- Internal monitoring is required, obliging the competent authority within each state to notify the Central Authority if it is concerned that an aspect of the Hague Convention has not been adhered to, or, alternatively, where there is a potential that an aspect of the Hague Convention will not be adhered to.
- Certified copies of all adoption working agreements concluded must be submitted to the Central Authority for approval.
- Annual audited financial statements must be submitted to the Central Authority, reflecting fees received and payments made in respect of intercountry adoptions.
- Before submitting the report, the Central Authority must determine whether intercountry adoption is in the best interests of the minor child concerned. In addition, the court must be able to conclude that:

---

[108] Myers 2009 *Spring Rutgers Journal of Law & Public Policy* 803.
[109] Bojorge "Intercountry Adoptions: In the Best Interests of the Child?" 2002 *QUTLJJ* 269.
[110] Pretorius *Inter-Country Adoptions and the Best Interests of the Child* 7.

a) the central authorities of the receiving state and South Africa have agreed to the adoption;[111]
b) the child is not prevented from leaving South Africa;[112]
c) the child's name has been listed in the RACAP[113] for at least 60 days; and[114]
d) a fit and proper adoptive parent is not available in South Africa.[115]

Thereafter, the court may grant the adoption order, or not.[116]

7 3 2 The correct forum must determine whether placement by intercountry adoption is in the best interests of the child

- The Children's Court, which has jurisdiction to hear adoption applications in South Africa, must consider and balance all factors and information obtained in making a determination on how best to secure stability in a child's life by means of adoption or placement in alternative care.
- Checks and balances that disperse authority among different government offices and public/private partnerships should be used to protect against exploitation and fraudulent activities when placing a child abroad.[117]

8 CONSIDERATIONS IN CURRENT-DAY SOUTH AFRICA

When considering alternative care for an OAC in present-day South Africa, the concerns with the existing childcare system in South Africa cannot be ignored. Careful regard must be had to the current interpretation of subsidiarity. One cannot ignore the large numbers of children placed in crowded state institutions, nor the ever-increasing number of OACs in temporary foster care in South Africa. One must take cognisance of conflicting views about the desirability of intercountry adoption, as well as the serious challenges faced by childcare services in developing countries. The problem identified herein is that serving an OAC's best interests' risks being thwarted by the importance given to the principle of subsidiarity in international instruments, national legislation, prevailing debate and the practical administration of alternative-care decisions. With this in mind, it is submitted that it is impossible to overemphasise the role and impact that the current political, economic and social climate in South Africa has on any debate concerning the role that intercountry adoption could have in providing a secure and stable environment for a child in need thereof. Following

111 S 261(4) of the CA.
112 S 261(5)(*c*) of the CA.
113 Register on Adoptable Children and Prospective Adoptive Parents.
114 S 261(5)(*g*) of the CA
115 *Ibid*.
116 S 261(5) of the CA.
117 Myers 2009 *Spring Rutgers Journal of Law and Public Policy* 814 and 817.

research on the relationship between the two sometimes-competing principles of subsidiarity and best interests of the child, it is apparent that in current-day South Africa, enforcing a local hierarchical placement on the basis of subsidiarity, before considering intercountry adoption as a viable option, can in no way be said to meet the universally accepted standard that a child's best interests are paramount. To place undue emphasis on keeping a child in South Africa at all costs, especially at the cost of the child's welfare, is, it is submitted, ideological. A South African court cannot simply disregard or give "lip service" to the Hague Convention but should refer to, analyse and assess its principles when dealing with cases resembling or directly related to intercountry adoption. Moreover, its principles should be used by the courts to inform the development of the common law with regard to prospective intercountry adopters acting in contravention of the international law to which South Africa is bound. Given the flexibility in the interpretation of what constitutes a child's best interests, a model is proposed as a means of assessing whether a particular placement of an OAC best serves the child's interests. The model proposes guidelines to assist those involved in deciding to place a child while ensuring that their best interests are met.

It is recommended that placing an OAC in a permanent, stable family environment would be beneficial to the nurturing of the child and would, at the same time, create an opportunity for the child to reach their full potential. Following consideration of the current status of available alternative care in South Africa, one can only conclude that prevention or discouragement of the permanent placement of a child, whether locally or by intercountry adoption, amounts to failure to secure care for the child that meets their best interests.

The CA and its amendments and regulations have incorporated and made provision for the strict regulation of alternative care of children in South Africa. The three main conventions regulating alternative care have been considered, as has the current status of alternative care in South Africa. The authorities in South Africa are struggling to place the ever-increasing numbers of OACs, especially as a result of the HIV/AIDS pandemic and the consequent high death rate of persons. One particular form of alternative care appears to remain contentious and receives little attention when making a determination to place children in need of care – namely, intercountry adoption. It is submitted in this article that intercountry adoption must be considered as part of a potential solution that serves the best interests of a vulnerable child, on the following grounds.

- International conventions and covenants recognise a child as a bearer of rights and provide that their best interests must be a priority when a decision is made to place a child in appropriate alternative. However, the rights and culture of the community as a whole may also be considered relevant when such a determination is made. Opponents of intercountry adoption often consider themselves defenders of children's human rights.
- The question of whether certain alternative care is deemed appropriate for a given child in the long term must be considered against the backdrop of existing and prevailing conditions in the South African

alternative care system, as well as in light of concerns about child trafficking and profiteering that are raised when considering placing a child abroad. It is generally accepted that when it has been determined that there is no hope of family reunification for a child under consideration, it is the duty of the relevant authorities to make a determination in the child's long-term best interests. The authorities who are involved with processing applications to adopt a child abroad have a very important role to play in determining and ensuring the promotion, protection and safeguarding of the fundamental rights of an OAC – both pre- and post-placement of the child abroad.

- It is incumbent upon the State, through its appointed authorities, to be vigilant and to ensure that all safeguards (both substantive and procedural) against child trafficking and profiteering are in place. There can be no room for error, and where any irregularity is found, stringent sanctions must be considered. Where the body responsible for such violation is an accredited body, the accreditation of such body must be carefully revised and potentially revoked. The important role played by authorities does not come to an end once a placement has been made. Following the finalisation of an adoption, be it domestic or intercountry, regular follow-up visits by the relevant authorities to the adoptive family and child are imperative and in the child's interests. Consistency is of utmost importance.
- No placement should be considered until the authorities have determined what requirements must be met to ensure compliance with the safe processing of a placement abroad, and what measures must be put in place to ensure the safeguarding of the child concerned. This needs to include post-placement assurances. The procedures have a substantive function, and, if followed carefully, negate some of the most significant criticism against intercountry adoption.

When interpreting the meaning of "last resort", reference must be made to the model and *all the factors* that must be considered when making a decision to place an OAC. What is *de facto* "last resort" must also be considered in the context of the application of the best-interests-of-the-child principle.

The article concludes that it is of fundamental importance that OACs who are struggling emotionally, economically, physically and psychologically be protected. Opponents of intercountry adoption risk failing the child who then finds themself in an environment that is not capable of providing the care they need and to which they have a right. When considering the right of the child to parental and family care in a developing country that is unable to cope with current conditions, it cannot be said that intercountry adoption must be discouraged and seen as a measure of last resort. The decision maker is charged with making a determination that adheres to the best-interests-of-the-child principle.

To repeat the words of the late former President of South Africa, Mr Nelson Rolihlahla Mandela:

> "There can be no keener revelation of a society's soul than the way in which it *treats* its children."[118]

In the context of alternative care for an OAC in South Africa, the substantive and procedural guidelines proposed need to be followed using a multistakeholder approach to determine the best interests of a child on a case-by-case basis.

[118] Address by President Nelson Mandela at the launch of the Nelson Mandela Children's Fund, Pretoria 1995 http://www.mandela.gov.za/mandela_speeches/1995/950508_nmcf.htm (accessed 2024-04-19).

EDITORIAL NOTE / REDAKSIONELE NOTA

OBITER is published triannually and welcomes contributions in English.

Contributions are received throughout the year and will be subject to peer-review prior to being accepted for publication. An English summary not exceeding 300 words must accompany the submission of full-length articles, which must preferably not exceed 7000 words.

All contributions must be sent *via* email to Adriaan.VanDerWalt@mandela.ac.za (Editor) in a file written in a recent version of Microsoft Word. It may be required that a hard copy of a contribution be sent to the following address: The Editor, *OBITER*, Faculty of Law, PO Box 77000, Nelson Mandela University, Port Elizabeth, 6031.

Page charges will be levied. The tariff is R180,00 per page.

—