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DOES THE PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT OF 1998 PROVIDE ADEQUATE FAMILY HOME PROTECTION TO INSOLVENT DEBTORS OR IS IT STILL PIE IN THE SKY? (PART 1)

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SUMMARY

Although some legal systems provide some protection of the homestead or family home for the debtor when his or her estate is insolvent, such direct protective measures are absent in South African insolvency law. Such protection during insolvency can be provided by means of some level of exemption of the family home or homestead of the insolvent like in the insolvency laws of the USA, or by providing protection of occupancy to the insolvents and his or her dependants as is the case in England and Wales.

In view of the developments in light of the right to housing as provided for in section 26 of the Constitution concerning the protection of the primary residence of a debtor in South African individual debt collecting and execution procedures, the question will be posed in Part 1 of this article if the same principles should apply in the case of a court hearing an application for compulsory sequestration, especially if the debtor raises the point that the sequestration order may render him or her homeless, should also be considered by such court. In this respect, no direct authority for this proposition could be found yet. (Commentators have argued for some time that the position of the homestead of the debtor in insolvency needs attention of the legislature as well but there has not been real progress in this regard to date.)

However, there are a few judgments where the applicability of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act) after sequestration of the insolvent's estate has been considered. Part 2 of the article will therefore be devoted to discuss developments in this regard and to consider what problems are encountered in applying the PIE Act during insolvency of the debtor and also if this Act provides sufficient protection to insolvent debtors to prevent them from being evicted from "their" homes where they cannot afford alternative accommodation.

Against this background, the two parts of the article deal with different aspects of the issue under discussion. Ultimately the two parts are thematic to provide some answers to the pertinent question, namely if the PIE Act can provide effective interim and/or adequate protection to an insolvent debtor who may be evicted from his or her (former) homestead – in particular in the absence of direct measures in insolvency

law, which protect insolvents and their dependants under these circumstances. In raising this question pertinent issues regarding the application of the PIE Act in insolvency also will be considered.

1 INTRODUCTION

As briefly discussed below in a case of the insolvency of a debtor some legal systems provide a level of protection of the homestead or family home. Such protection can be achieved either by means of excluding or exempting the homestead or some percentage or amount of its equity from the insolvent estate's assets or by allowing the insolvent and his or her dependants to continue to occupy the property for a certain period and/ or until they find alternative accommodation. South African law, however, does not provide any direct protection in insolvency law.

Within the ambit of individual debt collecting and execution procedures the South African courts have developed a certain amount of protection for consumer debtors in this regard by applying section 26 of the South African Constitution in relation to the applicable attachment and execution rules. In brief, this protection entails a judicial discretion to be exercised before the primary residence of a debtor is attached with a view to selling it in execution. In the event of relevant circumstances the court, exercising such discretion, may refuse to declare the primary residence especially executable. These measures do not apply to the sequestration process as such, although alternative measures such as debt relief in terms of the National Credit Act[1] in some instances may be of assistance. Commentators have argued for some time that the position of the homestead of the debtor in insolvency needs attention of the legislature as well but there has not been real progress in this regard to date.[2] Part 1 of this article will therefore consider the background and will offer some answers to the applicability of section 26 of the Constitution during the application for compulsory sequestration.

There are a few cases, however, where the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[3] featured after sequestration of the insolvent estate. The main aim of this article therefore is to consider pertinent aspects arising from the PIE Act and to determine what protection it can provide insolvent debtors to prevent them from being evicted from "their" homes where they cannot afford alternative accommodation. (This aspect will mainly be discussed in Part 2 of the article.)

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1 Act 34 of 2005. See further in general on the National Credit Act Scholtz, Otto, Van Zyl, Van Heerden and Campbell *Guide to the National Credit Act* (2019 update) 12–197 ff; Otto and Otto *The National Credit Act Explained* 3ed (2015) par 30.9.

2 See for instance Steyn *Statutory Regulation of Forced Sale of the Home in South Africa* (doctoral thesis, University of Pretoria) 2012 586 ff; Steyn "Treatment of a Debtor's Home in Insolvency: Comparative Perspectives and Potential Developments in South Africa" 2013 *International Insolvency Law* 144 ff; Van Heerden, Boraine and Steyn "Perspectives on Protecting the Family Home in South African Insolvency Law" in Omar *International Insolvency Law: Reforms and Challenges* (2013) 227 ff; and Evans "Does an Insolvent Debtor Have a Right to Adequate Housing" 2013 *SA Merc LJ* 119 ff.

3 Act 19 of 1998 (PIE Act or PIE).

In order to deal with this issue the article will consider case law relevant to the discussion and salient aspects of the PIE Act against a brief background of the legal position in the USA and England, the development of homestead protection within the ambit of individual execution procedures in South Africa and relevant aspects and consequences of a sequestration order.

It is now a fact that the PIE Act also finds application in the post sequestration phase of an insolvent estate and a number of judgments have emanated from this development. This article, however, is not intended to provide a comprehensive discussion of the PIE Act as such but discusses features and issues relating to the Act and its application in insolvency law.

Four judgments in particular inspired the theme of the article. *ABSA Bank v Murray*[4] serves as an early and important example where the PIE Act was applied in the after sequestration phase and where the insolvents raised reasons why they should not be evicted from the homestead. In *Botha NO v Kies*[5] the Court noted that the defences (perhaps rather the protective measures) of the PIE Act may be availed by an insolvent debtor faced with an eviction order by the trustee under particular circumstances. The court found in *Body Corporate of Redberry Park v Sukude NO*,[6] an application for compulsory sequestration, that the applicant had not established that there would be advantage to creditors if the debtor's property is sold in execution, and it appeared to the court that the wish to circumvent the provisions of the PIE Act motivated the application for sequestration (relative to the eviction of persons from the dwelling unit).The Supreme Court of Appeal in the judgment of *Mayekiso v Patel NO*[7] considered various aspects of the PIE Act that may be relevant in a sequestration situation. In this case the insolvents raised among others, defences provided for in the PIE Act in an attempt to extend their occupation of the family homestead.

Against the contextualised background provided above, the question is considered if the PIE Act can provide effective interim and/or adequate protection to an insolvent debtor who may be evicted from his or her (former) homestead – in particular in the absence of direct measures in insolvency law that protect insolvents and their dependants under these circumstances. In raising this question pertinent issues regarding the application of the PIE Act in insolvency will also be considered.

4 2004 (2) SA 15 (CPD).
5 Unreported case no 40111 of 2012 (GP).
6 [2015] JOL 33408 (KZD).
7 2019 (2) SA 522 (WCC).

2 BRIEF COMPARATIVE NOTES ON THE AMERICAN AND ENGLISH HOMESTEAD PROTECTION MEASURES[8]

2 1 General

It is important to note that some insolvency systems make provision for the protection of the homestead or family home.[9] This protection is achieved either by excluding such home or some of the equity therein from the insolvent estate or by protecting the continued occupancy by the insolvent and his or her spouse and dependants. These protective measures are based on policy considerations and are driven by socio-economic factors peculiar to a particular society. For the purposes of this article a few salient aspects of the American and English approaches to the protection of the family homestead will be considered, but by no means is it a comprehensive comparative study of these systems.

2 2 United States of America

The United States insolvency law largely is codified in the Federal Bankruptcy Code of 1978 as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[10] Bankruptcy for a consumer debtor can be initiated in terms of Chapter 7 of the Bankruptcy Code that amounts to "straight bankruptcy", the liquidation of the non-exempt estate assets, or by a repayment plan in terms of Chapter 13.

As far as homestead protection is concerned the Code, in principle, provides for an exemption of the property used as the primary residence of the insolvent in relation to the extent that it is not mortgaged.[11] The exemption also relates to movable property used for residential purposes like a mobile home or trailer.[12]

Where a state has not opted-out of the federal bankruptcy law in relation to exemptions section 522 of the Bankruptcy Code applies so as to exempt a prescribed amount etcetera regarding the primary residence.[13] Currently, the exemption amount in terms of the federal law is $25.510,00. The consequence of this rule is that the equity in the homestead is exempt up to

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8 See Steyn *Statutory Regulation of Forced Sale of the Home in South Africa* ch 7 for a consideration of the prevalent legal positions in the USA, UK, Canada and New Zealand; Steyn 2013 International Insolvency Review (*IIR*) 146 ff; Van Heerden, Boraine and Steyn in Omar *International Insolvency Law: Reforms and Challenges 233* ff; and Evans 2013 *SA Merc LJ* 124 ff.

9 See Steyn *Statutory Regulation of Forced Sale of the Home in South Africa* ch 7; Steyn 2013 *IIR* 144.

10 Abbreviated as BAPCPA.

11 Ferriel and Janger *Understanding Bankruptcy* 3ed (2013) 416 and 417.

12 *Ibid*.

13 § 522(d)(1), US Bankruptcy Code 1978, as amended by BAPCPA. This amount has been set to be increased since 2010 and subsequently every three years so as to reflect inflation as determined by the U.S. Department of Labor's Consumer Price Index; see Ferriel and Janger *Understanding Bankruptcy* 417.

the prescribed amount but not the homestead itself. Where a state opted-out it may prescribe its own exemption rules pertaining to the primary residence resulting in a variety of options and exemptions operating in the USA. The amount of the homestead exemption in some states is simply too small however to permit the debtor to keep his home[14] but at least permits a debtor to keep a portion of the proceeds of the sale of his or her home.[15] The value of the exemption varies between states; Texas and Florida, for instance, are rather "liberal" in their approach and basically have no cap on the value of a homestead that may be exempted by their residents.[16] In Texas the homestead exemption has no dollar value limit as such but is limited to a 10 acre exemption for an urban homestead and a 100 acre exemption for a rural homestead.

Ferriel and Janger[17] provide a practical example, where the insolvent's home is worth $100 000,00 but is subject to a mortgage of $75 000,00 – then the insolvent holds equity of $25 000,00 in that house. It may be that the applicable exemption in a particular state is $15 000,00, in which case this amount is exempt from the insolvent estate. When it comes to the distribution of the proceeds the mortgagee in principle will get the mortgaged amount of $75 000,00, the insolvent may keep the exempt amount of $15 000,00 and the balance of $10 000,00 is used to be distributed to other creditors. In order to keep the home the insolvent must reach a deal with the mortgagee as well as the trustee. Where financially possible for the insolvent for instance, it can be done by refinancing or via the reaffirmation of the debt with the mortgagee, as well as by selling other exempt property to assist in this regard. This *scenario* seems to be more prevalent when the debtor files for a Chapter 13 repayment plan in terms of the Bankruptcy Code than in a straight bankruptcy provided for in Chapter 7.[18]

The differences in the exemption rules of the various states have been summarised as follows:[19]

- Some states provide 100% exemption while others provide little or none.[20]
- In some states married couples may double the protected exempt amount, while in others not.
- In some states you need to file a declaration of homestead before filing for bankruptcy but in others the protection is an automatic consequence of filing.

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14 Ferriel and Janger *Understanding Bankruptcy* 416–417.

15 *Ibid*. Since many States have opted-out of the Federal provision the amount of the homestead exemption varies from one State to another.

16 *Ibid*.

17 Ferriel and Janger *Understanding Bankruptcy* 417.

18 *Ibid*.

19 See Asset Protection Planning "Homestead Exemptions by State and by Territory" https://www.assetprotectionplanners.com/planning/homestead-exemptions-by-state/ (accessed 2020-01-20).

20 Asset Protection Planning https://www.assetprotectionplanners.com/planning/homestead-exemptions-by-state/ and see the *table* provided with the exempt amounts in the various states which have adopted their own exemption rules.

- Although the majority of states, which have opted-out of the federal rules and the debtor, must follow the state exemption rules, some states afford the debtor with an option to choose between federal and the state's exemption rules.

It should be noted that the important 2005 amendments to the Bankruptcy Code, among others section 522(*b*)(3)A of the Bankruptcy Code, were enacted in order to discourage debtors from relocating to another state with a more favourable dispensation in this regard shortly before filing for bankruptcy.

To summarise, the general principle in the USA is that the primary homestead or a portion of the equity in it may be exempt from the insolvent estate of the debtor but since states may opt-out of the exemption in the Federal Bankruptcy Code the specific rules differ from state-to-state.

2 3 England and Wales[21]

Currently, in the English system, there are various rules to protect the family home or an interest in such property both in insolvency as well as outside the realm of formal insolvency or bankruptcy.[22] The position regarding the protection of the family home or the continued occupation of it depends on whether or not the debtor formally had been declared bankrupt. In pre-bankruptcy it will be considered if it is reasonably possible for the debtor to rectify any default with a view to keeping the house.[23]

The point of departure of bankruptcy is that the bankrupt estate consists of all the property belonging to or vested in the bankrupt at the commencement of bankruptcy.[24] Since "property" is defined broadly so as to include every description of property or interest, the (family) home also in principle forms part of the estate. This circumstance is relevant where the insolvent (bankrupt) jointly owns a house, for instance with a spouse or partner since both then hold a beneficial interest in such property. In terms of section 306 of the Insolvency Act, 1996 the bankrupt's home is also property that vests in the trustee on his or her appointment and who then has an obligation to realise its value for the benefit of the creditors.

Where the property consists of an interest in a house, which at the date of bankruptcy is the sole or principal residence of the bankrupt and the spouse or former spouse of the bankrupt in general the trustee has a three-year time limit, calculated from the date of the bankruptcy order, to sell the property in

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21 See Steyn *Statutory Regulation of Forced Sale of the Home in South Africa* 460 ff; Steyn 2013 *IIR* 144; Van Heerden, Boraine and Steyn in Omar *International Insolvency Law: Reforms and Challenges* 227 ff; Fletcher *The Law of Insolvency* 5ed (2014) 221 ff; Seally and Milman *Annotated Guide to the Insolvency Legislation* 7ed (2003) 359 ff.

22 Steyn 2013 *IIR* 154 refers to the Administration of Justice Acts of 1970 and 1973 that allow a court to stay or suspend execution against a mortgaged property which is a dwelling-house where it appears likely within a reasonable period to pay the sums due or to remedy any other default. See also Steyn *Statutory Regulation of Forced Sale of the Home in South Africa* 460 ff; Fletcher *The Law of Insolvency* 221 ff; Seally and Milman *Annotated Guide to the Insolvency Legislation* 359 ff regarding the position in England and Wales.

23 See in general the Administration of Justice Acts of 1970 and 1973.

24 See s 283(a) of the Insolvency Act, 1996.

terms of section 283A of the Insolvency Act, 1996.[25] Fletcher indicates that the beneficial interest of the non-bankrupt spouse or partner of the bankrupt attaches to the proceeds of the sale.[26] The beneficial interest of the bankrupt may be sold to the spouse or partner of the bankrupt. This interest, however, may be lost to the estate should the trustee fail to realise it within the three-year period in which case it reverts to the bankrupt.

Broadly speaking, a distinction is drawn between a case where the debtor is the sole owner of the property[27] and where the home is owned jointly by the debtor and his spouse or civil partner.[28] Various statutes may be applicable, depending on the particular situation and on so-called "home rights" that are enacted in the Family Law Act, 1996.[29] The Insolvency Act, 1986[30] provides for a general protection of occupancy in the family home for a 12 month period in bankruptcy but a further postponement may be allowed in exceptional circumstances.[31] Where an order is made after this 12 month period the court will assume, unless the circumstances of the case are exceptional, that the interests of the creditors outweigh all other circumstances.[32]

In essence, and where the bankrupt is entitled to occupy the home on the strength of a beneficial interest or interest in the property, he or she has a right of occupation as well as does any person under the age of 18 who occupied the home with the bankrupt at the time of the bankruptcy proceedings.[33] Where the bankrupt occupies the property, he or she may be evicted only with the leave of the court on application of the trustee in terms of section 337(4) of the Insolvency Act, 1996. Where the bankrupt has such a right but does not occupy the premises, he or she may apply to court to authorise continued occupation since such a right amounts to a charge with a priority akin to an equitable interest in the property.[34]

Where the spouse or civil partner or former spouse or civil partner has acquired a right of occupation in the matrimonial home in terms of the Family Law Act, such a right is binding under section 336(2) of the Insolvency Act, 1996 against the trustee and forms a charge against such home. In terms of

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25 The trustee must take these steps.

26 Fletcher *The Law of Insolvency* 222 and see ss 331–332 of the Insolvency Act, 1996.

27 Evans 2013 *SA Merc LJ* 119 123 notes that the spouse probably has occupational rights in this instance.

28 Steyn *Statutory Regulation of Forced Sale of the Home in South Africa* 461 462; Steyn 2013 *IIR* 154; Van Heerden, Boraine and Steyn in Omar *International Insolvency Law: Reforms and Challenges* 227 ff; Evans 2013 *SA Merc LJ* 129 ff.

29 Steyn *Statutory Regulation of Forced Sale of the Home in South Africa* 462 with reference to s 82 of the Civil Partnership Act, 2004 that amended the Family Law Act, 1996 to make the rules applicable to civil partnerships in the same way as these apply to marriages.

30 See ss 335A and ss 336–337 of the Insolvency Act, 1996.

31 Evans 2013 *SA Merc LJ* 123 and Pawlowski and Brown "Applications for Sale of the Family Home After One Year of Bankruptcy – A Creditor's Prerogative" 2015 *Nottingham Insolvency and Business Law* 517.

32 Ss 335A(3), 336(5) and 337(6) of the Insolvency Act, 1996.

33 Steyn *Statutory Regulation of Forced Sale of the Home in South Africa* 468–469 where s 337(1)(*a*) and (*b*) are discussed.

34 Steyn *Statutory Regulation of Forced Sale of the Home in South Africa* 469 with reference to s 337(2)(*a*) and (*b*) of the Insolvency Act, 1996.

section 336(4) the court has the discretion to make an order that it thinks just and reasonable and after considering the following:

- The interests of the creditors;
- Any contributing conduct of the spouse or civil partner or former spouse or civil partner of the bankruptcy;
- The financial resources and needs of the spouse or civil partner or former spouse or civil partner;
- The needs of any children; and
- All circumstances of the case other than the needs of the bankrupt.[35]

Steyn[36] mentions that the extent of protection of the family home depends largely on the courts' conception of what constitutes "exceptional circumstances" for the purposes of sections 335A, 336 and 337. She[37] refers to in *Re Citro*[38] where the judge followed a "less sympathetic approach":

> "As the cases show, it is not uncommon for a wife with young children to be faced with eviction in circumstances where the realization of her beneficial interest will not produce enough to buy a comparable house in the same neighbourhood or indeed elsewhere. And, if she has to move elsewhere, there may be problems over schooling and so forth. Such circumstances, while engendering a natural sympathy in all who hear of them, cannot be described as exceptional. They are the melancholy consequences of debt and improvidence with which every civilised society has been familiar."[39]

There are examples of cases where the courts adopted a more "sympathetic" approach in considering family hardship as constituting circumstances that are "exceptional".[40] Various legislative amendments, more particularly the coming into force of the Human Rights Act 1998[41] created an opportunity for the development of a broader interpretation of "exceptional circumstances" under the Insolvency Act, 1986 to include all instances where the family home and the rights of children are at issue.[42]

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35 These may include the needs of the elderly or ailing, although they are not mentioned expressly – *see Claughton v Charalambous* [1998] BPIR 558 as referred to by Evans 2013 *SA Merc LJ* 126 fn 29.

36 In Steyn 2013 *IIR* 155.

37 Steyn 2013 *IIR* 156.

38 [1991] Ch 142 CA. This case was decided under the legislation applicable before the coming into force of the Insolvency Act 1986.

39 157A–D.

40 See for instance the judgments in *Re Gorman* [1990] 1 WLR 616; *Claughton v Charalambous* [1999] 1 FLR 740; *Re Raval* [1998] BPIR 384; and *Re Bremner* [1999] BPIR 185; *Re Bremner* [1999] 1 FLR 912 referred to by Van Heerden, Boraine and Steyn in Omar *International Insolvency Law: Reforms and Challenges* at 236 fn 65. See also Omar "Security Over Co-Owned Property and the Creditor's Paramount Status in Recovery Proceedings" 2006 *Conveyancing and Property Lawyer* 157 and see Pawlowski and Brown 2015 *Nottingham Insolvency and Business Law* 517 ff.

41 Such as the provisions of the European Convention on Human Rights, including Article 8 of Schedule 1 of the Convention which provides that "[e]veryone has the right to respect for his private and family life, his home and his correspondence", which also applied to England and Wales as then members of the EU.

42 Richman "Using the Human Rights Act to Save the Family Home" 2000 *New Law Journal* 1102 1104. See also *Mortgage Corporation v Shaire* [2000] EWHC 452 (Ch); [2001] Ch 743 par 73 (but note this was not a bankruptcy – see Steyn 2013 *IIR* 156).

Steyn[43] points out that the court's remark in *Barca v Mears*[44] that the approach adopted by the majority in *Re Citro*[45] may not comply with the European Convention on Human Rights[46] and may need to be revisited is significant in this context.[47]

Where the value of the bankrupt's interest in a house[48] is less than a prescribed minimum[49] – currently GBP 1000[50] – a court must dismiss an application by the trustee for an order for sale or repossession or a charging order in terms of section 313 of the Insolvency Act 1986. This principle thus prevents the sale of a bankrupt's home where the nett equity is so low that it has no benefit to creditors.

Other types of tenancies that are considered protected tenancies in terms of section 283(3A) of the Insolvency Act 1986, for example an assured tenancy or a secured tenancy in terms of the Housing Act 1985, in principle are excluded from the bankrupt's estate.

There are separate protective measures concerning an insolvent who rents a property for residential purposes regarding the protection of his or her right to tenancy. In relation to this matter and how it is addressed in English insolvency law, Spooner[51] in criticising the current state of affairs, remarks that "[i]nsolvency policy makers have paid surprisingly little attention to this issue, in contrast to the frequent policy consideration of the treatment of a property-owning debtor's home."

It is worth noting the enactment of the 1996 Insolvency Act was preceded by a review committee's report on insolvency law and practice[52] under the chairpersonship of the late Sir Kenneth Cork. As to the socio-economic context the report states that the family home or its residual value has frequently been the major asset of a consumer debtor and it took note of the

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43 Steyn 2013 *IIR* 156.

44 [2004] EWHC 2170 (Ch). Other relevant cases reported since the enactment of the Human Rights Act 1998 include *Donohue v Ingram* [2006] EWHC 282 (Ch); *Nicholls v Lan* [2006] EWHC 1255; 1243; *Allan v Foenander* [2006] EWHC 2101 (Ch); *Martin-Sklan v White* [2006] EWHC 3313; *Turner v Avis* [2007] 4 All ER 1103; [2007] EWCA Civ 748 – see Van Heerden, Boraine and Steyn in Omar *International Insolvency Law: Reforms and Challenges* 237 fn 68.

45 Namely, however disastrous the consequences of bankruptcy may be to family life they cannot be relied upon under s 335A(3), Insolvency Act if they simply are the usual kind of consequences of bankruptcy.

46 See fn 41 above.

47 Par 39–43 of the judgment.

48 The dwelling-house must be the sole or principal residence of the bankrupt or his or her spouse, former spouse, civil partner or former civil partner to be covered by this provision; see s 313A, Insolvency Act 1986.

49 This is in terms of s 313A, Insolvency Act 1986. See further Walters "Personal Insolvency Law After the Enterprise Act: An Appraisal" 2005 5 *Journal of Corporate Law Studies* 65; Omar 2006 *Conveyancing and Property Lawyer* 169.

50 Fixed in terms of Article 2, Insolvency Proceedings (Monetary Limits) (Amendment) Order 2004 (SI 2004/547).

51 Spooner "Seeking Shelter in Personal Insolvency Law: Recession, Eviction and Bankruptcy's Social Safety Net" 2017 *Journal of Law and Society* 374 390–391.

52 Cork *Insolvency Law and Practice Report of the Review Committee* (1982) and hereinafter the "Cork Report".

shortage in accommodation as well as the cost of housing.[53] Acknowledging the interests of creditors, the report also took cognisance of the considerable hardship that a sudden or premature eviction can cause to the debtor's family. The report proposed that the court should have a wide discretion to enable it to make an order that is just and equitable in a great variety of circumstances that may arise.[54] In exercising its discretion the court may be expected to give consideration to the following factors, among others:

(a) the means available to the family (other than the debtor himself);
(b) how much of the debtor's income is to be contributed to the creditors, and how much is likely to be left for him and his family;
(c) the suitability of the standard of amenity provided by the present family home and the available alternatives;
(d) any offer by the debtor to move if given help (whether out of the proceeds of the sale or otherwise) in rehousing the family;
(e) the amount likely to be realised by the sale of the debtor's interest in the family home in relation to the disturbance caused;
(f) the need for the family to remain in a specific area for business or schooling reasons;
(g) any personal hardship caused to an individual creditor by a proposed postponement; and
(h) any arrangements that may have been made with a mortgagee of the premises.

The "family home" concept was defined in the Cork Report[55] as a dwelling in which there is or are living the debtor and his wife, the debtor or his wife with (in either case) a dependant child or children, the debtor's wife, or the debtor and a dependant parent of the debtor or of his wife who has been living there as part of the family on the basis of a long-term arrangement.[56]

Steyn[57] points out that the Insolvency Act, 1986 did not accept all these proposals, but it reversed the effect of the Matrimonial Homes Act, 1967 in that formerly this Act provided that the occupational rights of family members' were void against the trustee in bankruptcy.

2 4 Summary

It is clear from the discussion above that both the United States and English legal systems make provision for the protection of the homestead or at least

53 Par 1114–1121.
54 Par 1122–1123.
55 Par 1124.
56 Note the criticism of the use of a term "family home" and the type of traditional relationships that it symbolises since there are single adulthood households and a range of co-habiting couples, regardless of gender, or who have not registered a civil partnership that would trigger the protective measures in bankruptcy – see Fox "Creditors and the Concept of the "Family Home": A Functional Analysis" 2006 *Legal Studies* 214–215; Hunter "The Nature of a Rescue Culture" 1999 *Bus L* 506 and Keay "Balancing Interests in Bankruptcy Law" 2001 *Common L World Rev* 221; Steyn *Statutory Regulation of Forced Sale of the Home in South* Africa 490 fn 419 and 420.
57 Steyn *Statutory Regulation of Forced Sale of the Home in South Africa* 461.

for a housing interest in insolvency. The United States system follows the approach to allow at least for a level of exemption that may include a portion of the equity of the primary residence of the insolvent, whereas the English system in principle allows for a kind of protection that permits the insolvent and or his spouse and other related family members to remain in possession of the family home at least for a 12 month period. The way in which the protection is granted in England may differ fundamentally but in essence the notion of family home protection is not a new concept. An insolvent in the United States either in some states keeps his or her house (the primary residence) or in others at least gets a portion of the equity, if any, that may assist them to acquire accommodation. In the English system the protection in principle is meant to be temporary but the insolvent also has the opportunity during this period to find other accommodation or to make a debt arrangement with the mortgagee should the family home be mortgaged. Under certain circumstances, for instance, where the value of the property is below a certain threshold, the bankrupt will be able to keep it.

3 DEVELOPMENTS IN SOUTH AFRICAN INDIVIDUAL EXECUTION PROCEDURES RELATING TO ATTACHMENT OF THE HOMESTEAD[58]

Broadly speaking, the process of individual execution at the behest of a judgment creditor entails the attachment and judicial sale in execution by the sheriff of the property of the judgment debtor in order to realise the value and to utilise the proceeds to satisfy a judgment sounding in money in circumstances where the estate of the insolvent has not been sequestrated.[59]

This procedure amounts to an individual debt collecting or debt-enforcement and execution procedure, since the process must be utilised by every individual creditor in relation to the debt owing to him or her. Where the debtor is insolvent creditors probably revert to a collective procedure by applying for the sequestration of the estate of the debtor in the case of a

[58] See Theophilopolous, Van Heerden and Boraine *Fundamental Principles of Civil Procedure* 3ed (2015) 404 ff where this aspect is discussed and on which this section is largely based (hereinafter "Theophilopoulos, Van Heerden and Boraine"). See further Brits *Mortgage Foreclosure Under the Constitution: Property, Housing and the National Credit Act* (doctoral thesis, US) 2012; Brits 2014 *TSAR* 288; Brits "Protection for Homes During Mortgage Enforcement: Human Rights Approaches in South African and English Law" 2015 *SALJ* 566; Brits "Executing a Judgment Debt Against Immovable Property Occupied as a Family Home in Customary Law: Nedbank Limited v Molebaloa" 2019 *SA Merc LJ* 348; Brits *Real Security* (2016) 68–100; Van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa* 10ed (2019 update) regarding the commentary on s 66 of the Magistrates Courts Act and magistrates' court rules 5 and 43A; Van Loggerenberg *Erasmus: Superior Court Practice* (2019 update) D1-631–D1-632; Steyn *Statutory Regulation of Forced Sale of the Home in South Africa* ch 5; Steyn "Executing Against a Mortgaged Property – A Transformed, Yet Evolving, Landscape: Firstrand Bank Ltd v Mdletye (KZD) and Firstrand Bank T/A First National Bank v Zwane (GJ)" 2019 *SALJ* 446.

[59] An attachment in execution creates a judicial mortgage (*pignus judiciale*) in favour of the judgment creditor.

natural person as provided by the Insolvency Act.[60] From commencement of sequestration the insolvent estate's property vests in the trustee as from his or her date of appointment.[61] Commencement of sequestration causes a *concursus creditorum* and no creditor as from commencement is able to continue with the individual collecting and execution process. In *Walker v Syfret*[62] the court explained the key concept of *concursus creditorum* as follows:

> "The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order."

In case of individual attachment of immovable property, and for the purposes of this discussion in particular the attachment of the judgment debtor's home, this situation has become a subject of great importance in the context of the individual debt collecting and execution procedures.[63] The genesis for this development is to be found in section 26(3) of the Bill of Rights contained in the Constitution, which provides that "no one may be evicted from their home without an order of court made after consideration of all the relevant circumstances". The right to attachment and execution of a judgment debt by a creditor therefore was qualified by the Constitutional Court in the judgment of *Jaftha v Schoeman; Van Rooyen v Stoltz*[64] in which the court held that the Magistrates' Court attachment process, specifically as set out in section 66 of the Magistrates' Courts Act as it then read, was unconstitutional in so far as it did not provide for judicial supervision over the attachment of immovable property.

In the *Jaftha* case the state-subsidised homes that were not subject to mortgage bonds of two indigent persons became the objects of execution for judgment debts following default judgment. The Constitutional Court found that any legal process or measure which deprives persons of their pre-existing access to adequate housing is unconstitutional because it limits the right to housing as defined in section 26(1) of the Constitution. To overcome the problem of execution without judicial oversight, the Constitutional Court proposed a remedy by reading into section 66 judicial oversight of the execution process – specifically that magistrates must consider carefully the facts of each case in order to determine before a writ of attachment in

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60 Act 24 of 1936 (the Insolvency Act).

61 S 20 of the Insolvency Act.

62 1911 AD 141 166. See also *Corporate of Empire Gardens v Sithole* 2017 (4) SA 161 (SCA) par 9.

63 See in general, Brits *Statutory Regulation of Forced Sale of the Home in South Africa* (doctoral thesis, US) 2012 and Steyn *Statutory Regulation of Forced Sale of the Home in South Africa*. This section is concerned with execution as such, but the developments regarding evictions are relevant for a comprehensive understanding of the broader issue, namely the arbitrary evictions from their homes – see in general Bilchitz and Mackintosh "Pie in the Sky: Where is the Constitutional Framework in High Court Proceedings? *Marlboro Crisis Committee v City of Johannesburg*" 2014 *SALJ* 521. Also see other publications referred to in fn 58 above.

64 2005 (1) BCLR 78 (CC).

respect of immovable property is issued in terms of section 66 whether execution will be reasonable and justifiable in the circumstances.[65]

The court[66] listed certain factors that may be considered when adjudicating such a matter. These factors, as augmented by subsequent judgments,[67] without being a complete list, are relevant when considering such requests and they are summarised as follows:[68]

- Whether the rules of court have been complied with;
- Whether there are other reasonable ways in which the judgment debt can be paid;
- The circumstances under which the debt had been incurred;
- Any attempts made by the debtor to pay off the debt;
- The financial situation of the parties;
- The amount of the debt;
- Whether the debtor was employed or had a source of income to pay off the debt;
- The availability of alternatives which might allow for the recovery of debt but did not require the sale in execution of the debtor's home, for example, paying off the debt in instalments;
- Whether there is any disproportionality between execution and other possible means to exact payment of the judgment debt;[69]
- Any other factor relevant to the particular facts of the case before the court.

It must be noted in respect of a plaintiff-creditor's claim directed at executing residential property of the defendant-debtor that section 5(1) of the Magistrates' Court Act has been amended and now requires that the

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65 The *Jaftha* judgment caused judicial oversight to become the norm in order to obtain a proper attachment and execution order against the house of a debtor, as well as did subsequent amendments to s 5 and 66 and to rule 43A of the Magistrates' Court Act 32 of 1944 and the Magistrates' Court Rules (MCR). See for background Van Heerden and Boraine "Reading Procedure and Substance into the Basic Right to Security of Tenure" 2006 *De Jure* 319. In *SANI v FirstRand Bank Ltd* 2012 (4) SA 370 (WCC) par 3 and 50, the court held that an execution that was finalised prior to s 66 being declared invalid first must be set aside before the sale in execution subsequent to transfer of such property can be undone.

66 *Jaftha* judgment 162A–F.

67 After an initial judgment in *Standard Bank of South Africa Ltd v Saunderson* 2006 (2) SA 264 (SCA) par 19–21 where the court regarded it as unlikely that a s 26 defence could ever cause a foreclosure action to be denied, subsequent cases indeed found such factors, especially where the amount in arrears was disproportionately small in comparison to the impact of losing one's home – see *ABSA Bank Ltd v Ntsane* 2007 (3) SA 554 (T) and *Firstrand Bank Ltd v Maleke* 2010 (1) SA 143 (GSJ) as referred to and discussed by Brits *Real Security Law* (2016) 72–73 and see further cases referred to at 73 fn 334. See also Brits 2015 *SALJ* 566; Brits 2018 *SA Merc LJ* 348; Steyn 2018 *SALJ* 566; and Muller, Brits, Pienaar and Boggenpoel *Silberberg and Schoeman's: The Law of Property* par 16.3.6 for a further discussion of relevant cases etc.

68 Van Loggerenberg *Erasmus: Superior Court Practice* (2019 update) D1-631–D1-632 and *Jaftha* 163 A–B. See further Van Loggerenberg *Erasmus: Superior Court Practice* D1-632 ff regarding various practices that emerged in the different division of the High Court prior to the further amendment of HCR 46 in 2017.

69 See for instance *ABSA Bank Ltd v Ntsane supra*; and *Gundwana v Steko Development CC* 2011 (3) SA 608 (CC).

summons contain a notice drawing the defendant's attention to section 26(1) of the Constitution of 1996 regarding the basic right of access to housing. The defendant is then bound to place information before the court to support such a claim when he or she pleads that an order for attachment will infringe this basic right. Magistrates' Court Rule 5[70] and section 66 of the Magistrates Court Act have been amended to align to the *Jaftha* judgment by requiring judicial oversight before the primary residence becomes subject to an attachment order. A new Magistrates' Court rule, MCR 43A, requires a court to consider all relevant factors, before execution is granted against immovable property which is the primary residence of the judgment debtor.

In subsequent cases the effect of the *Jaftha* decision was considered in the realm of High Court procedures regarding the execution of residences that were mortgaged. It seems as though the courts were more reluctant to protect the execution of mortgaged property than is the case of property not subject to a mortgage bond as in the *Jaftha* case; there seems to be a general view that a person who can afford a mortgage bond probably is more affluent and may have greater means to find alternative accommodation than the vulnerable type of debtor as in the *Jaftha* case. In most subsequent cases the creditor-plaintiff obtained a default judgment in terms of High Court Rule[71] 31(5) and obtained an order whereby such residences were declared especially executable in terms of the former HCR 46. These two rules were thus used together to obtain a judgment by default and to declare immovable property especially executable.

After a number of further judgments[72] the Constitutional Court ruled in *Gundwana v Steko Development CC*[73] unconstitutional the former process in terms of which the registrar of the High Court granted default judgment and declared immovable property subject to a mortgage bond (i.e. the home of the defendant-debtor) especially executable. This judgment led to the first amendments of HCR 31 and the proviso to sub-rule 31(5)(b) read with HCR 46(1)(a)(ii) which require the registrar in applications for default judgment concerning the primary residence of the debtor to refer the matter to the court before it can be declared especially executable.[74]

The addition of HCR 46A again amended the relevant rules of the High Court in 2017to deal more comprehensively with execution against residential immovable property. In essence rule 46A applies where any residential immovable property of the debtor is to be executed against.[75] The

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70 Hereinafter MCR.

71 Hereinafter HCR.

72 With regard to HCR 31(5) the Supreme Court of Appeal previously held that the registrar of the High Court may continue to grant default judgment declaring especially hypothecated immovable property executable when such judgment is applied for on the basis of a debt flowing from the mortgage bond over the property. Although a full bench of the then WLD ruled that the *Jaftha* case would affect HCR 46(1) and that judicial supervision of this procedure had to be read into this rule, the Supreme Court of Appeal in *Standard Bank of South Africa Ltd v Saunderson supra* par 19 found it unnecessary so to do.

73 *Supra* par 41, 49–50 and 53.

74 See Muller *et al Silberberg and Schoeman's: The Law of Property* 24 fn 219 for case references where relevant circumstances were applied following these amendments to HCR 46(1)(a)(ii).

75 See HCR 46A(1). This rule is similar to MCR 43A.

court hearing the matter, then determines if the immovable property is the primary residence of the judgment debtor and if so, considers alternative means available to the judgment debtor to satisfy the debt other than execution against the primary residence. HCR 46A(2)(b) makes it clear that execution against the primary residence may not be authorised by the court unless the court having considered all the relevant factors considers the execution warranted. The registrar of the court also may not issue a writ of execution against the residential property of the judgment debtor unless a court ordered execution.[76] The application to court must include full information concerning the market value of the property and debts in relation to it, such as the balances still due and owing to a mortgagee (if any) and other charges against it, such as rates and taxes or other levies.[77] The judgment debtor as a matter of course has an opportunity to oppose the application or otherwise may make submissions that are relevant to the making of an appropriate order by the court.[78] The court hearing the matter has wide powers in granting an order,[79] which may include the conditions of sale (perhaps this includes that the judgment debtor may remain in occupancy for some time after the sale), setting a reserve price for the property to be ultimately sold in execution[80] and order execution or refuse or any other appropriate order.

Van Loggerenberg[81] points out that apart from the prescribed information relating to the market value etc. of the primary residence the court may call for other documents, which it considers necessary and this information constitutes "relevant information" in terms of HCR 46A(5), but the author indicates that the following relevant factors can be gleaned from the new HCR 46A, namely:

(a) Alternative means by the judgment debtor to satisfy the debt other than execution in terms of HCR 46A(9)(ii);

(b) Person occupying the primary residence and their circumstances in terms of HCR 46A(9)(b)(vi);

(c) Effect of the inclusion of appropriate conditions in the conditions of a possible sale in execution of the judgment in terms of HCR 46A(8)(a); and

(d) Any other factor the court may deem necessary for the protection of both the execution creditor and the judgment debtor in terms HCR 46A(9)(b)(ix).[82]

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76 HCR 46A(2)(c).

77 HCR 46A(5).

78 HCR 46A(6).

79 HCR 46A(8) and (9).

80 It is to be noted that properties were sold far below market value in execution sales where the property was sold without reserve. In an attempt to address this aspect the new HCR 46A makes provision to enable a court to set a reserve price. Debtors clearly were prejudiced if the property was sold below market value since they still are saddled with the balance of the debt.

81 *Erasmus: Superior Court Practice* D1-632-1.

82 It is clear that the court must consider the position of the creditor and the debtor – see for instance at 1611 where the court in the *Jaftha* judgment referred to the principle of *pacta sunt servanda* as well in the ambit of considerations to be considered by the court.

The learned author submits that the relevant circumstances developed by earlier cases referred to above and before HCR 46 was amended, may also be relevant to the extent that they are not included already in the relevant factors listed in HCR 46A.[83] He makes the important point that such factors are not exhaustive and every case must be considered in terms of its own facts.[84]

As stated before, South African courts initially were somewhat reluctant to give debtors' resident in mortgaged homes the same sort of blanket protection as given to the indigent debtors with state-subsidised houses in *Jaftha*. Still, in *ABSA Bank Ltd v Ntsane*[85] as mentioned before, the court was prepared to protect a mortgagor, though notably, the arrear amount owing to the mortgagee was very little. It is now clear that a court has to consider whether execution of a debtor's home, regardless of whether or not it is subject to a mortgage bond, infringes his or her right to housing or other basic rights enshrined in the Constitution. The reasons for this necessity are to be found in the *Gundwana* judgment in which the Constitutional Court stated that the *Jaftha* factors do not constitute a complete list, and in the amendment of High Court Rule 46 that now provides that when the property sought to be attached is the primary residence of the judgment debtor no writ of attachment shall be issued unless the court, having considered all the relevant circumstances, orders execution against the property.

In passing, it must be noted that in case of bonded property the rights of the mortgagee-creditor remain important and must be weighed against the constitutional right of the debtor not to be deprived of his or her home without due process being followed by a court of law. Pertinent to such an enquiry will be if an arrangement can be made regarding the repayment of the mortgage bond. Apart from the aforementioned safety valves built into individual execution procedures following the developments subsequent to the *Jaftha* judgment, a debtor may avail him- or herself of other measures such as the statutory debt relief measures provided in the National Credit Act that allow a debt rearrangement with the creditor.[86] Steyn[87] states

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83 Van Loggerenberg *Erasmus: Superior Court Practice* D1-632-1.

84 *Ibid*.

85 *Supra* and cases and other references in fn 67 above. *Nedbank Ltd v Fraser and four other cases* 2011 (4) SA 363 (GSJ).

86 See s 86 of the National Credit Act and instances where the courts refused applications for voluntary surrender under circumstances where debt review in terms of the National Credit Act could provide solutions – perhaps more advantageous to the creditor(s) than sequestration, see *Ex Parte Ford* 2009 (3) SA 376 (WCC) as discussed by Van Heerden and Boraine "The Interaction Between the Debt Relief Measures in the National Credit Act 34 of 2005 and Aspects of Insolvency Law" 2009 *PELJ* 161. In a recent but peculiar application for voluntary surrender, namely *Jordaan v Jordaan* [2020] JOL 46613 (FS) the court also refused an application for voluntary surrender while considering the granting of a sequestration order and its effect on the house of a debtor co-owned by him and his ex-wife. The wife opposed the voluntary surrender application while being under debt review herself. The court however raised issues concerning the rights of the occupants of the house in view of s 26 of the Constitution and the fact that the sequestration will cause the loss of the house – par 8–11. With reference to the *Ford* judgment the court also considered the fact that debt relief may be a solution better than sequestration, – par 12.

87 Steyn 2013 *IIR* 165 where the author refers to some support for this approach in a number of listed judgments.

> "[c]onsumer debt relief measures may offer an alternative to sequestration and hold the potential to avert the forced sale of a debtor's home in circumstances where the debtor has a regular income that will allow him to service his debt over a longer period."

At least this is a statutory measure that could assist a debtor to keep the house but of course it will depend on the financial position of the debtor if such a rearrangement will be feasible or not in the circumstances. The essence is that the debtor is provided with a process that may enable him or her to keep the house, while rescheduling the debt.[88] Clearly, where this is not possible the issue of the debtor and his or her dependants being rendered homeless becomes very important in order to take into consideration his or her continued occupation of the house.

In a recent case, *Jordaan v Jordaan*,[89] the court alluded to the effect that a sequestration order may have on the rights of occupancy relating to a property used as the primary residence by the ex-wife of the debtor-applicant and their children in an application for voluntary surrender for his estate by the ex-husband. The property was their family home and apparently registered in their names in half undivided shares each. Yet, as part of the divorce settlement the debtor (ex-husband) granted his former wife and the respondent in this application, his undivided share in the property as well. (At the time of the application the ex-wife's share was not yet registered in her name.) The property was also subject to a mortgage bond, so the applicant had secured debt in the form of the mortgage bond as well as having concurrent creditors. The house was the main asset to be used to settle his debts by means sequestration, but the ex-wife occupied it, who was herself under debt review, and their children. The ex-wife opposed the application for voluntary surrender on the basis that the sequestration of the insolvent estate of the debtor-applicant may cause her and the children to be evicted from the house. She indicated that she had paid the mortgage bond instalments and is trying to continue to do so while under debt review. This fact was an important consideration for the court in not granting the sequestration order.[90] In its judgment the court discussed the impact of section 26 of the Constitution *etcetera* but it must be noted that the debtor-applicant was not occupying the property himself. The court also considered the fact that the respondent acquired a personal right in the property (to claim transfer of the 50% undivided share), and the court held in paragraph 10 that this right "precedes any right that the applicant's creditors may have in the property". This case opens up further discussions regarding the protection of the homestead or primary residence at the time of hearing the sequestration application as such, but this is not the main focus of this article – although it remains an important aspect in the broad consideration of the protection of the primary residence of a vulnerable debtor and / or his dependants.

To summarise, as a result of the developments in case law the court rules have been amended as mentioned above, to deal with attachment and

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88 See references to the *Ex parte Ford supra* and *Jordaan v Jordaan supra* judgments in fn 86 above.

89 *Supra*.

90 Par 8–10.

execution against the primary residence of a debtor. The line of decisions clearly influenced the development of the individual execution process relating to residential property used as the primary residence by the debtor. It is submitted that the individual execution procedures as provided for in legislation and the rules of court must be read with the Constitutional Court's approaches in mind.

South African case law and legislative developments thus show a progression towards the protection of a debtor's section 26 Constitutional rights against arbitrary deprivation – "arbitrary" in it being effected without a court's exercising its discretion to declare the home of a judgment debtor used as his or her primary residence especially executable. Most importantly, case law recognises that there may be special circumstances in which a debtor's right of access to adequate housing and security of tenure should be upheld even when his or her creditor has a valid claim and has obtained judgment against the debtor. Also, it must be noted that the current protective measures in the rules of the high and magistrates' courts following a line of judgments relate to the attachment and execution against the primary residence being immovable property of the judgment debtor. There is no direct provision relating to movable property, such as a caravan, used as a dwelling or shelter by the debtor being subject to the same judicial oversight and it is questionable if the same kind of development will follow in this respect. Also, it is a general rule that movable property first must be executed upon for settlement of a judgment debt before immovable property is attached.[91]

Also, it must be noted that the ideal situation is to grant the debtor an opportunity to make alternative repayment plans with the judgment creditor in order to keep the house (primary residence) but at the same time a debtor who clearly cannot repay any part of a debt and who is rendered homeless by attachment and an execution sale of the home may convince a court to allow continued occupation. The duration of the last mentioned continuing stay is not spelled out and it may be open to the creditor to seek attachment and execution at a later stage for instance should the financial position of the debtor improve.

Although the sentiments and factors to be considered as discussed above should be relevant after sequestration in relation to the family home or primary residence of the insolvent, the cases referred to in this section and the legislative amendments did not affect insolvency procedures in terms of the Insolvency Act as such.

4 SOME RELEVANT SOUTH AFRICAN INSOLVENCY LAW PRINCIPLES

As far as South African insolvency law is concerned it must be understood that the insolvency law does not provide for any type of protection to the insolvent debtor and his or her dependants in relation to the family home or primary residence either by way of dispensations such as those in the USA

91 See HCR 45 and 46.

or in England or such as the progressive measures in our debt execution law.[92]

Nevertheless, it is important to have a broad understanding of the structure of insolvency law in order to see the extent to which there may be room for protecting the interests of the insolvent and to prevent the insolvent and/or the dependants rendered homeless.[93] It must be noted that insolvency, like individual execution procedures as discussed above in paragraph 3, causes a forced sale but of all the realisable assets of the insolvent with the view of distributing the available proceeds to the creditors in accordance with the distribution rules of the Insolvency Act since the sequestration order brings a *concursus creditorum* about. In this respect the developments concerning the primary residence protection in individual debt execution may be relevant. If the primary residence cannot be saved before a sequestration order is granted, the question is to what extent the continued occupation of the insolvent and his or her dependants can be maintained – at least until they are in a position to find alternative accommodation. As mentioned in paragraph 1 before, the PIE Act may be applicable – depending on the facts of the case – and the aim of this article is to consider various aspects of this option. In order to gain a better understanding of various relevant aspects from an insolvency point of view, a basic overview of the structure of insolvency law is provided.[94]

Formal insolvency is nevertheless initiated by a successful application for voluntary surrender by the debtor or by means of a compulsory sequestration application by a creditor. In both instances the applicant must satisfy the court that the statutory procedural and substantive requirements for the respective applications have been met before a sequestration order will be granted.[95] In both instances the granting of the sequestration order is at the discretion of the court in spite of proof that in principle the requirements have been met.[96]

It must be noted that the debtor may apply for a sequestration order by means of an application for voluntary surrender. Among other requirements, the debtor-applicant must prove to the court that his or her estate factually is insolvent, that there will be sufficient free residue to meet the costs of sequestration and that sequestration would be to the advantage of creditors.[97] The courts have discretion to grant the order or not and, in particular, by considering the advantage for a creditor's requirement should decide if sequestration is the best option under the circumstances. Where there is a better alternative to settle the debt, for instance by way of debt

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92 For a discussion on the socio-economic and welfare aims of consumer insolvency see in general Spooner 2017 *Journal of Law and Society* 374 ff.

93 See Steyn *Statutory Regulation of Forced Sale of the Home in South Africa* ch 6 for a more comprehensive discussion of the insolvency related aspects.

94 For a comprehensive discussion of South African insolvency law, see in general Kunst, Boraine and Burdette *Meskin the Law of Insolvency* (2019 update) (loose leaf) and Bertelsmann, Calitz, Evans, Harris, Kelly-Louw, Loubser, De la Rey, Roestoff, Smith Stander and Steyn *Mars: The Law of Insolvency* 10ed (2019).

95 See ss 4–6 of the Insolvency Act regarding the requirements for voluntary surrender and ss 7–12 for the requirements for compulsory sequestration.

96 See ss 6(1) and 12(1) of the Insolvency Act respectively.

97 Ss 3–6 of the Insolvency Act.

review in terms of the National Credit Act, the court may refuse the application. In such instances the courts have considered such an option[98] and in a recent case considered the effect of the sequestration of the debtor-applicant's estate on the section 26 constitutional housing rights of his ex-wife and children, where he and his ex-wife held the property in a half-share undivided share each.

In a case of a compulsory sequestration application brought by a creditor or creditors against the debtor it may well be asked if in exercising its discretion the court should consider a plea by the respondent that the sequestration order may cause the loss of his or her primary residence that will leave him or her homeless?[99] In brief, the requirements to be covered in the application in terms of section 10 of the Insolvency Act and to be proved by the applicant-creditor are that:

(a) the applicant qualifies as a creditor who has *locus standi* to bring such an application;[100]
(b) the debtor is factually insolvent or committed an act of insolvency in terms of section 8 of the Insolvency Act;
(c) facts exist which establish that there would be reason to believe that sequestration would be to the advantage of the creditors.

Where these requirements have been met nevertheless there may be special circumstances such as abuse of process which convince the court not to grant the order.[101] Currently, there is no direct and clear authority that a court should consider the fact that sequestration following a compulsory sequestration application renders the insolvent homeless, and such a plea by the respondent-debtor will be weighed against the entrenched advantage for creditors-principle that is a hallmark of our rather pro-creditor insolvency system.[102] Yet, as a matter of principle, the question may be posed if the same kind of principles provided in the rules of the court following the judgments in *Jaftha* and subsequent cases should not be considered in case of especially compulsory sequestration applications as well. What definitely is clear is that in view of the court's discretion when hearing an application, it should consider if there are better alternatives than sequestration to deal with the debt situation. In this regard the possibility should be considered for instance of debt rearrangement in terms of the National Credit Act. If the

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98 See for instance *Ex Parte Ford supra* and *Jordaan v Jordaan supra* discussed under heading 4 and referred to in fn 86 above.

99 See in general the references to commentators in fn 2 and 58 above.

100 A creditor who has a liquidated claim of at least R100 or where a number of creditors apply jointly where the total of their claims in aggregate is not less than R200 alone may bring such an application to court – see s 9(1) of the Insolvency Act.

101 See also *Kleinfontein Boerebelange Koöperatief Bpk v Zeevaart* [2014] JOL 32455 (GP) par 29–33; *Millward v Glaser* 1950 (3) SA 547 (W) 553–554; *Chenille Industries v Vorster* 1953 (2) SA 691 (O) 700; *Realizations Ltd v Ager* 1961 (4) SA 10 (D) 11–12; *Cyril Smiedt* (*Pty*) *Ltd v Lourens* 1966 (1) SA 150 (O) 155–156; *Benade v Boedel Alexander* 1967 (1) SA 648 (O) 655–656.

102 Steyn *Statutory Regulation of Forced Sale of the Home in South Africa* 339 with further references to discussions on this aspect. It must be noted that our system is largely a pro-creditor system and the interests of the creditors remain of paramount importance due to the statutory prescribed advantage of creditors-principle – See Smith *Insolvency Law* 3ed (1988) 1–4.

debtor raises this or another debt arrangement proposal or option as a possible solution to deal with the debt situation, the court should take it into consideration. However, it is stressed that the court will have to consider this arrangement from the vantage point of the advantage of the creditor's requirement, but a carefully crafted argument based on section 26 of the Constitution supported by relevant facts may convince the court not to grant the sequestration order. As discussed above,[103] these considerations in fact were considered in a very recent judgment where the court considered that the order probably would cause the eviction of an ex-wife and their children from the house in which both parties held a 50% undivided share. It must be noted that this case presents a very peculiar set of facts and the debtor did not occupy the house, but the judgment has opened possibilities to raise the matter of eviction in opposing compulsory sequestrations as well. Clearly, where there is no reasonable prospect of an advantage to creditors an application for sequestration, either by way of voluntary surrender or compulsory sequestration should not succeed.

When a sequestration order succeeds, a *concursus creditorum* ensues, the insolvent is divested of his or her estate, and it vests in the Master of the High Court until a trustee is appointed.[104] On the appointment of the trustee, the machinery of the insolvency law is in completely set into motion and the insolvent estate property or assets, bar certain protected and exempt or excluded assets, then vest in the trustee.[105] However, the insolvent retains a reversionary interest in the estate.[106] After his rehabilitation the insolvent, where the debtor was not actually insolvent or in cases where the assets increased in value, is entitled to any residue of the estate after all debts have been paid.[107] In terms of a composition with creditors, it is possible for the insolvent to regain control of a part or the whole of the estate from the date determined in the composition.[108] Where a sequestration order has been set aside, the insolvent also regains control of the estate.[109]

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103 See fn 86 and heading 4 above.

104 It seems that it has been accepted that for all purposes the trustee becomes the owner of the estate assets – see *De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9(A) and *Harksen v Lane NO* 1998 (1) SA 300 (CC) but from a theoretical point of view it is not clear if the vesting of the estate property in the trustee as envisaged by s 20 of the Insolvency Act causes the trustee to become the real "owner" in the common law sense of the word of such property. The trustee nevertheless for practical purposes is deemed to be the owner and he or she acquires statutory powers to deal with such property including the right to realise it to the benefit of the creditors but on their instruction or that of the Master and within the confines of the Insolvency Act. For a comprehensive discussion of this issue, see Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* (doctoral thesis, University of Pretoria) 2008 210–217. See also *Botha NO v Kies supra* par 8; *Starbuck NO v Halim* unreported case no 12535 of 2015 (GP) par 7 and 8.

105 Smith *Insolvency Law* 3 and see s 20(1)(*a*) of the Insolvency Act 24 of 1936. Further, see *De Villiers NO v Delta Cables (Pty) Ltd supra* 15G–H; *Harksen v Lane NO supra* par 35; *Fourie NO v Edkins* 2013 (6) SA 576 (SCA) and Evans and Steyn *"Property in Insolvent Estates – Edkins v Registrar of Deeds, Fourie v Edkins and Motala v Moller"* in 2014 *PELJ* 2746 for a discussion of these aspects.

106 S 20(1)(*a*) of the Insolvency Act.

107 Ss 116, 124(3) and (5) and 129(2) of the Insolvency Act.

108 S 120(2) and see ss 123(1) and (2) of the Insolvency Act.

109 *Mahommed v Lockhat Bros & Co Ltd* 944 AD 241.

The insolvent estate comprises the "property" of the insolvent except for the protected (excluded or exempt) categories. In terms of the definitions of key terms contained in section 2 of the Insolvency Act, "property" includes movable or immovable property wherever situated within the Republic and includes contingent interests in property other than the contingent interests of a fidei commissary heir or legatee. In principle, all property falling under this definition vests in the trustee except assets specifically excluded. The family home or house of the insolvent is not so excluded or otherwise protected in terms of insolvency law.

It is important to note that the assets of the insolvent's spouse as defined in section 21(13) of the Insolvency Act also may vest with the trustee.[110] Thus, this section is relevant to this discussion since it provides that the additional effect of the sequestration of the separate (and solvent) estate of one of the two spouses shall be to vest the assets of the solvent spouse in the Master and upon his or her appointment in the trustee who may deal with it as if it was property of the sequestrated estate.[111] It may be that in this instance, the family home is registered in the name of the solvent spouse. The solvent spouse may claim a release of assets to which he or she has a valid title but if such claim is unsuccessful or if it is not claimed, such assets will be sold as part of the estate as if they are assets of the insolvent spouse although subject to the rights of creditors of the solvent spouse (where the parties are married in community of property section 21 will not apply and the joint estate will be sequestrated since both will become insolvents, in which case the family home in any event forms part of the joint estate and section).

Although the family home or primary residence of the insolvent is not excluded or exempt from the insolvent estate property, certain property is excluded from the estate such as the income the insolvent earned after sequestration (if any) and to the amount required for his or her support and that of the insolvent's dependants.[112] If this is the case, it will be an important factor to determine if the insolvent can afford alternative accommodation. Section 82(6) of the Insolvency Act excludes the wearing apparel and bedding of the insolvent and the whole or such part of his or her household furniture, tools, and other essential means of subsistence as the creditors, or if no creditors have proven a claim, the Master may determine. The trustee before the second meeting of creditors and with the consent of the Master may allow the insolvent a moderate sum of money or such moderate quantity of goods out of the estate as appear to be necessary for the support

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110 S 21(13) the term "spouse" includes not only a wife or husband in the legal sense, but also a wife or husband by virtue of any marriage according to any law or custom, and also parties living together as husband or wife although not legally married.

111 This section survived a constitutional attack in the judgment of *Harksen v Lane NO supra* but the view persists that this provison is unconstitutional and should be removed from our insolvency law – see Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 207 and 361. Although various points of view exist regarding the question if such property vested in the same way in the trustee as those of the insolvent spouse, it is assumed for purposes of this discussion that the legal status will be similar except where such property is successfully reclaimed by the solvent spouse. See Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* 207 ff for a comprehensive discussion of this aspect.

112 S 23(3) and (9).

of the insolvent and his or her dependants. Any such support must be reported to the creditors at the second meeting of creditors and they may direct the trustee to provide further support if any, in terms of section 81(1)(*e*) read with section 81(3)(*a*). Clearly, it depends on the availability of money and relevant goods but in practice will not necessarily meet the needs of the insolvent and his or her dependants regarding housing *etcetera*.

In relation to movable property the sheriff makes an inventory and attaches such property after the commencement of sequestration.[113] Such movable assets must be attached and depending on the nature of the assets be kept in a suitable place or a suitable person must be appointed to hold them in custody. The same principle does not apply to immovable assets but the Master and the trustee have duties to ensure its preservation. What is clear is that all estate property, movable and immovable, as defined in section 2 of the Insolvency Act vests in the Master until the appointment of the trustee from which moment it vests in him or her in terms of section 20 of the Insolvency Act.[114]

The trustee has a statutory power in terms of section 69 of the Insolvency Act to take charge of the movable property of the estate and claim estate property from the insolvent or any other person(s) in possession by applying for a search warrant with a view to finding and taking possession of such assets. The trustee thus effectively is empowered to apply for a search and seize warrant.

Apart from the estate property or assets, including the family home, vesting in the trustee as from his or her appointment in terms of section 20 of the Insolvency Act, the trustee has a statutory duty to realise such property including the family home and to the benefit of the creditors.[115]

The Insolvency Act contains a number of provisions dealing with the sale of insolvent estate property. The general rule is that the trustee should realise the property as directed by the creditors at the second meeting of creditors but there are a number of other ways to sell the property as well.[116] Section 82 of the Insolvency Act provides that, subject to the provisions of sections 83 (realisation of securities for claims) and 90 (rights of the Land Bank) the trustee as soon as he or she is authorised to do so at the second meeting shall sell all the property of the estate in such manner and upon such conditions as the creditors may direct.

Where a provisional trustee has been appointed he or she may not, without the authority of the Master sell the property of the estate.[117] The Master at any time before the second meeting of creditors may authorise the

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113 S 19 of the Insolvency Act.

114 See further par 7 in the forthcoming Part *2*.

115 *Gluckman v Wylde* 1933 EDL 322.

116 See s 82 of the Insolvency Act. In *Mookrey v Smith NO* 1989 (2) SA 707 (C) 711 the court found that a consequence of this section is that the trustee requires the authority of either the Master or of the creditors to sell the property of the insolvent estate and termed the trustee a statutory agent.

117 S 18(3) of the Insolvency Act.

sale of property on such conditions and in such manner as the Master may direct.[118]

After his appointment the (final) trustee reports to the creditors at the second meeting of creditors concerning the state of affairs in the insolvent estate and proposes a liquidation plan to them with a view to obtaining their direction. Creditors may prescribe the manner of and the conditions for the sale of property after the second meeting[119] and must give their consent if the trustee takes over a security at the value placed thereon by the creditor when proving his or her claim.[120] In practice creditors usually accept the proposals of the trustee in this regard.

If the creditors at the second meeting have not given any instructions the trustee shall sell the property by *public auction* or *public tender* after notice in the Gazette[121] and after such other notices and upon such conditions as the Master may direct. The property is usually sold by means of a public auction since the tender process is deemed to be too cumbersome. It must be noted that the Insolvency Act does not refer to the sale as a sale in execution.

The Insolvency Act of 1936 still forms the backbone of South African insolvency law, especially as it relates to consumer debtors but the South African Law Reform Commission started a review of insolvency law in 1987. The last formal report of this commission was published in 2000.[122] Suffice to say the protection of the family home or primary residence of the insolvent in insolvency as such does not feature in this report.

The question may be asked if the debtor's house (or primary residence) forming part of the estate can be "repurchased" by the insolvent or a family member after sequestration. In theory, and unless the sequestration order is set aside, in which case the estate assets will revert to the insolvent, the insolvent may propose a composition offer to the trustee to be put to the creditors.[123] If the statutory requirements can be met and if the creditors accept an offer that provided for the insolvent to regain (specific) property, the re-vesting of the house with the insolvent is a possibility.[124] Usually without an external funder the composition is not an option. Rehabilitation based on a composition as provided for in section 124(3) will re-vest estate property in the insolvent as provided for in the composition. In general, however, after rehabilitation of the insolvent, any estate assets that have not been realised remain vested in the trustee, but the insolvent may apply for a vesting order.[125]

In summary, the position basically is that the continued occupation by the insolvent debtor and his or her dependants following sequestration is in the

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118 See s 80bis of the Insolvency Act.

119 S 82 of the Insolvency Act.

120 S 83(11) of the Insolvency Act.

121 *Muller v De Wet NO* 2001 (2) SA 489 (W) decided that notice of a public auction must be given in the *Gazette*, whether the creditors have given directions as to the manner of the sale or not.

122 The *Report on the Review of the Law of Insolvency Project* 63 of 2000, consisting of an Explanatory Memorandum (vol 1) and a proposed Insolvency Bill (vol 2).

123 S 119 of the Insolvency Act.

124 S 120(2) of the Insolvency Act.

125 S 129 (3)(*c*) of the Insolvency Act read with s 25(1).

hands of the trustee who should act on the instruction of the creditors in this regard. It is submitted that the mere fact that the insolvent continues to occupy the family home (or rather his or her primary residence) after sequestration will not make the occupation unlawful *per se* but it will be a factual question if the insolvent has the permission of the Master or the trustee in whom the property vests respectively after sequestration to determine whether or not such occupation is lawful. The trustee in principle, may demand the insolvent (and family members) to vacate.[126] Should the insolvent refuse to do so, the trustee will have to bring an application for eviction in terms of the PIE Act.[127]

The position of the trustee differs from that of the sheriff in the case of individual attachment and execution procedures since the Insolvency Act makes it clear in section 20(1) that the estate property vests in the trustee. In this respect it must be noted that the trustee has a duty to act in the best interests of the creditors and to realise the property to their benefit.[128]

To conclude, the protection of the family home or primary residence of the insolvent may arise at the time of application of a sequestration order and bar certain special cases[129] it may arise rather in compulsory sequestration applications by a creditor than in case of voluntary surrender where the debtor applies. Currently, there is a question if the same considerations following developments since the *Jaftha* judgment also will be relevant and entertained by the court hearing the application should the debtor oppose the application on that basis, but it is submitted that a case can be made.[130] It is important to note that the court has discretion to grant the sequestration order or not but in principle will grant it when the statutory prescribed requirements are met. The sequestration order however will not be granted if it amounts to an abuse of process and, as in the case of *Ntsane*,[131] a court should be hesitant to grant the order if the sole purpose of the creditor applicant is to circumvent the attachment requirements set in the individual execution process or where the remaining debt is disproportionate when compared with the value of the property. Clearly, where the debtor can make a reasonable offer to repay following a debt rearrangement either following a debt review process or otherwise, without the estate being sequestrated, the court also should take that into consideration and must do so since it may be to the advantage of creditors. In order to keep the house this route will be beneficial to the debtor and even to the creditors depending on the facts.

Nevertheless, since this aspect of the sequestration process is not clear, it seems once the final sequestration order is granted the debtor at best may be able to rely for instance on the so-called defences in the PIE Act when confronted with an eviction application by the trustee.[132] As briefly discussed

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126 See discussion of case law in par 7 and 8 in the forthcoming Part 2.

127 *Ibid*.

128 See *Botha NO v Kies supra* par 25.

129 See *Jordaan v Jordaan supra* but note and as discussed above the case concerned the rights of housing of the ex-wife of the debtor-applicant.

130 Especially in view of the judgment referred to in fn 129.

131 See the discussion in heading 3 above, although it must be noted that *Ntsane* and *Gundwana* dealt with the individual debt execution process and not with sequestration.

132 See discussion in par 7 and 8 in the forthcoming Part 2.

above the insolvent may enter into a composition and may qualify for a re-vesting of (some) property after rehabilitation but such cases are few and far between. In many instances the primary residence of the debtor will be the only available asset of value to satisfy the debts owed the creditors. The ongoing insolvency review project to date has not addressed directly the rights of housing of an insolvent.

5 CONCLUSION REGARDING PART 1

As indicated in the introduction above[133] South African insolvency law does not provide direct protection for insolvents regarding their family home after sequestration, for instance by excluding it or some of its equity from the insolvent estate, or provide for continued occupation after sequestration as is the case in some other legal systems.[134]

However, in view of section 26 of the Constitution South African law has developed rules to protect the right to housing as guaranteed in the Bill of Rights.[135] This development was initiated by case law but the genesis remains the basic rights enshrined in the Bill of Rights. The cases dealing with this matter concern the socio-economic rights of persons in particular the right to housing by vulnerable and insolvent debtors whose estates were not sequestrated. It should be clear that many in fact were not eligible for sequestration due to the statutory requirements for this process. The judgments, including those of the Constitutional Court, caused rules of individual attachment and execution to be amended in order to provide for judicial oversight in cases of individual execution of the residence of the debtor.[136] This development of case law following the important *Jaftha* judgment resulted in legislative amendments to the high courts' and magistrates' courts procedures dealing with these matters by introducing due process in deciding if execution of the primary residence of the debtor should proceed or not in particular circumstances. Factors to be considered by courts adjudicating such requests are referred to in paragraph 3 above.

As mentioned these procedures currently are not applicable in a sequestration application and the question is if these considerations spill over to sequestration applications and, more importantly for this article, if there are any other measures, which protect vulnerable insolvents faced with the prospect of being rendered homeless after the sequestration of their estates.[137] It remains a question if a court hearing a sequestration application will consider similar factors such as those argued in cases of applications for attachment and execution in this instance. In a recent case, namely *Jordaan v Jordaan*,[138] an application for voluntary surrender did open the door in an indirect way for such an investigation and approach in the future.

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133 Heading 1 above.
134 Heading 2 above.
135 Heading 3 above.
136 *Ibid*.
137 Heading 4 above.
138 Heading 3 above.

The Insolvency Act prescribes the granting of a sequestration order but it is submitted that a case could be argued on the lines of the *Jaftha* and subsequent cases should the facts regarding the personal circumstances of the insolvent be similar. In the ambit of the advantage of creditor's principle the respondent-debtor (owner) may argue a case that the sequestration in any event will not be to the advantage of creditors or may indicate alternative arrangements or procedures that could be used in place of a sequestration order. The facts will determine what is or is not possible in this regard.

It seems the protection relating to attachment and execution initially applied to indigent home owners but the courts also had to deal with more affluent property owners, such as those who could afford mortgage bonds over the residences.[139] In such instances there are the rights of the secured creditors, the mortgagees, and it seemed the courts were reluctant to provide similar protection. On the other hand it must be conceded that a debtor who can afford a mortgage bond may well be in a better financial position than the atypical debtor in the *Jaftha* matter. After initial hesitation later judgments did consider the plights of those with bonded property as well. It is submitted that the developments in the situation where the debtor's estate is not sequestrated either protects his or her continued occupation of the primary residence and/ or it affords the debtor an opportunity while still in occupation to enter into a debt rearrangement with the debtor at such time when for instance his or her financial position has improved in order to do so. Nevertheless, the measures developed in this instance were designed to prevent the debtor being rendered homeless and courts hearing such cases should seek solutions that protect the debtor as well as the interests of the creditor. It is submitted that this further development in fact strengthens the argument that the same consideration should also be considered at the time of hearing a compulsory sequestration application.

In order to have a fuller understanding of the basic requirements to apply for a sequestration order and its consequences in so far as it may be relevant to the homestead of the debtor, the relevant aspects of insolvency law have also been discussed in paragraph 4 above. This section also forms a link between Part 1 and Part 2 of the article since it is important to bear these principles in mind when considering the position of the debtor at the time of the application for compulsory sequestration of his or her estate as well as the position regarding the estate assets etc. following the granting of a sequestration order since the PIE Act may well become relevant during this phase.

[139] Heading 3 and 4 above.

BEYOND LITERAL UNDERSTANDING: "WOMB THEFT" AS METONYM – AN INTERPRETATION OF THE LANGUAGE USED TO DESCRIBE CAESAREAN KIDNAPPINGS*

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SUMMARY

The author's attention has, in recent years, been drawn to an article with the headline, "Womb theft accused testifies", and to another titled "Sentence reduced for attempted womb theft". Both articles referred to "womb theft" as the appropriation of a fetus from an expectant woman by a female perpetrator who fakes a pregnancy, and then brutally kills the pregnant woman in order to appropriate the unborn child to keep as her own. Such criminals literally slash open an expectant woman's womb to reach for the fetus in what can be described as a bizarre replication of a Caesarean section procedure. The author was not entirely clear on what writers meant by "womb theft", which, defined literally, indicates that the object of theft is the womb/uterus and not a fetus/newborn. If a womb in its literal sense qualifies to be an object of theft, a writer could surely foresee the confusion that would follow headlines such as "Sentence reduced for attempted womb theft" or "Womb theft accused testifies." The failure to do so exposes a conceptual skew in the discursive construction of the nature of the crime. There has been little research into problems in the language used to describe Caesarean kidnappings from the standpoint of those interested in improving legal language construction. Perhaps a special category of figurative language is required to explain how "womb theft" is used and understood here. The author pursues this task through metonymic analysis, a method that has found little application in legal theory in the South African context. The author argues that figurative expressions are repeatedly used without critical reflection, thereby confusing the recipient and obscuring communication rather than enlightening it. The author does not argue that the use of metonym in legal contexts should be eradicated since, in some instances, they enhance the understanding of legal concepts; instead, legal scholars must see through figurative language, and develop critical dialogue on the stylistic use of metonym and in so doing, master the art of legal communication.

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1 INTRODUCTION

Headlines typically lure readers to purchase a newspaper using an interesting headline. However, after reading a piece that caught their attention, readers sometimes realise that it was not what they expected. In a number of instances, the author has bought a newspaper or a book because of an exciting title, only to find out that her anticipation was deluded as the newspaper or book did not convey what was hoped for. Misleading titles are therefore nothing new.

In recent years, the author's attention was drawn to article headlines that read, "Womb theft accused testifies"[1] and "Sentence reduced for attempted womb theft".[2] Given that uterine/womb transplants have become useful in the treatment of infertility, and that uteri are in contemporary times believed to be objects of theft to satisfy the commercial market for the treatment of infertility,[3] a reader could have assumed that the articles would concern a subject of this nature but that was not the case in either of the mentioned articles. Having a background in medical law, the author would also have anticipated a discussion on secret hysterectomies performed by doctors on female patients – for example, in Uzbekistan.[4] Conversely, it turned out that "womb theft" referred to the crime of appropriation of a fetus from a pregnant woman – commonly known as Caesarean kidnappings.[5] Both articles referred to "womb theft" as the phenomenon of appropriation of a fetus from an expectant woman by a female perpetrator who fakes a pregnancy, and then kills the pregnant woman in order to appropriate the unborn child to keep as her own. The criminal slashes open the expectant woman's womb to reach for the fetus in what can be described as a bizarre replication of a Caesarean section procedure.[6] This is performed without any access to professional medical assistance.[7] In all reported cases, the perpetrators are females who, in most cases, are infatuated with having a baby.[8] Before

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1 Independent Online "Womb Theft Accused Testifies" https://www.iol.co.za/news/womb-theft-accused-testifies-1742872 (accessed 2018-11-05).

2 UPI Top News "Sentence Reduced for Attempted Womb Theft" (20 September 2012) http://www.upi.com/Sentence-reduced-for-attempted-womb-theft/61111348169364/ (accessed 2018-11-05).

3 Favre-Inhofer "Uterine Transplantation: Review in Human Research" 2018 47(6) *Journal of Gynecology Obstetrics and Human Reproduction* 213 213–221.

4 Antelava "Forced Sterilization of Women in Uzbekistan*"* (2013-12-01) *Police Report* 1–40; Antelava "Uzbekistan's Policy of Secretly Sterilising Women" (12 April 2012) https://www.bbc.com/news/magazine-17612550 (accessed 2018-07-19).

5 A literature search indicates that this contemporary practice is a globally rare crime but with precedent. The highest number of cases has been reported in the United States of America dating back from 1974, while in South Africa this type of crime is statistically unusual, but with precedent.

6 Gerberth "Fetal Kidnapping: The Extraction of a Fetus from a Pregnant Woman" 2015 29(5) *PIMagazine* 42.

7 Gerberth 2015 *PIMagazine* 42. During the attack, sharp objects, including scissors, hatchets, razors, knives and car keys are reportedly used to create incisions in order to harvest the unborn.

8 Estephie "Caesarean Kidnappings (Fetal Abduction): A Checklist" (28 April 2012) http://unknownmisandry.blogspot.co.uk/2012/04/cesarean-kidnappings-checklist.html (accessed 2018-08-18).

abducting a baby from an expectant woman, a great number of the perpetrators make an effort to prove a claim of pregnancy.[9]

It is still not entirely clear what the writers of the articles meant by "womb theft." Defined literally, "womb theft" depicts that the object of theft is the womb or uterus, and not a fetus or newborn.[10] If a womb in its literal sense qualifies to be an object of theft, the writers could surely have foreseen the confusion that would follow a headline such as "Sentence reduced for attempted womb theft" or "Womb theft accused testifies".

Why then did the writers use the expression "womb theft" in referring to the criminal appropriation of a "fetus" from a pregnant woman through a crude Caesarean section? This exposes a conceptual skew in the discursive construction of the nature of this crime. There has been little research problematising the language used to describe Caesarean kidnappings from the standpoint of those interested in improving legal language construction. Perhaps there is a special category of figurative language that offers a unique explanation of how "womb theft" is used and should be understood here. The author pursues this task through metonymic analysis, a method that has found little application in legal theory in the South African context. There is an argument that might be explored in this context that demonstrates that the use of "womb theft" denotes a metonym. It is argued that figurative expressions are repeatedly used without much critical reflection, thereby confusing the recipient and obscuring communication, rather than enlightening it.

This article has five parts, the first part being the introduction as set above. In the second part, Frede's theory of compositionality is discussed in order to lay a theoretical foundation for identifying the meaning of a word in isolation of the sentence or context. The third and fourth parts comprise the main contribution of this study – a presentation and discussion of pragmatic metonymic identification in the third part, followed in the fourth part by an analysis of the metonymic figure of speech involving the womb as the figure of analysis. Occasional but unsystematic examples of metonyms existing in English are also discussed to reinforce examples. The fifth part concludes the study by submitting that the use of metonym in legal contexts should not be eradicated since, in some instances, the added complexity enriches the understanding of legal concepts. Legal scholars must see through figurative language, and develop critical dialogue on the stylistic use of metonym to enhance the art of legal communication, thereby encouraging insights and inviting readers to view a subject from a new angle by prompting second thoughts.

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9 Aquette *Fetal Attraction: A Descriptive Study of Patterns in Fetal Abductions (Masters Dissertation,* Regis University) 2012 8, 32.

10 The legal question that this position raises is whether a womb/uterus is property capable of being stolen. The issue of proprietary rights in human biological material is therefore inevitable in the course of this article.

2 THE LITERAL MEANING OF "WOMB THEFT"

The traditional view on literal meaning involves taking words to have their usual or most basic sense. Frege's theory of compositionality states that a huge number of sentences of ordinary language may be understood by a competent speaker or hearer without any knowledge of the author of the sentence, where it was said, at what time or the reasons that it was said.[11] That is to say, the interpretation of a sentence or text is an autonomous process that has no need of knowledge of its extralinguistic context.[12] This explanation is partly embodied in Katz and Fodor's semantic theory, which stipulates that an ideal speaker of a language would know the meaning of an expression or sentence without any information about its context.[13] In other words, the meaning of a sentence is its interpretation in a "null context," such as the anonymous letter situation. In Katz's words:

> "The anonymous letter situation is the case where an ideal speaker of a language receives an anonymous letter containing just one sentence of that language, with no clue about the motive, circumstance of transmission, or any other factor relevant to understanding the sentence on the basis of its context of utterance."[14]

All sentences or expressions have literal meanings that are exclusively determined by the meanings of their component words.[15] The literal meaning of an expression or sentence determines certain circumstances, which, if satisfied, will make the sentence an objective or true statement. Certain expressions may have more than one literal meaning – for example, ambiguous sentences where an expression may be capable of being interpreted in more than one literal way.[16] The literal meaning of an expression should be sharply distinguished from cases where an utterance may depart from the literal sentence through the use of devices such as metaphor, irony or idiom.

"Womb theft", if defined literally, depicts that the object of theft is the womb, thereby skewing our understanding of Caesarean kidnappings since the object of theft or appropriation in Caesarean kidnappings is in fact a fetus.[17]

A study of the anatomy of the female reproductive system shows that the womb, also known as the uterus, is "the organ in the body of a woman or

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11 Janseen "Frege Contextually and Composionality" 2001 10 *Journal of Logic, Language, and Information* 116 117.

12 Janseen 2001 *Journal of Logic, Language, and Information* 116 117.

13 Katz *Propositional Structure and Illocutionary Force: A Study of the Contribution of Sentence Meaning to Speech Acts* (1980) 14.

14 *Ibid*.

15 *Ibid*.

16 *Ibid*.

17 Although not the focus of discussion in this article, at this level of interpretation, we are presented with a legal question as to whether body organs – including, in this case, the womb – are an object of theft, and particularly whether organs of the human body are the subject of property rights.

other female mammal in which a baby develops before birth".[18] The literal interpretation of "womb theft", as explained above, provides us with an objectivist account of understanding what the object of appropriation is – the womb, and not the fetus. However, it may well be conceivable to lay down some practical assumptions against which readers might understand and apply the literal meaning of "womb theft".

On closer scrutiny, what comes to mind are the politics of the womb – in particular, the ruthless and flourishing practice of the seizure of uteri. Secret hysterectomies performed by doctors on female patients, for example in Uzbekistan, are a fine example of what can be termed "womb theft". In 2002, a BBC investigation exposed a massive government programme that mandated doctors to sterilise women in Uzbekistan without their knowledge or consent.[19] Doctors are reported to have made off with uteri during consultations while, in some cases, tying the necessary tubes instead, after coercing pregnant women to give birth by way of Caesarean section.[20]

At another level of interpretation, surgical techniques through uterine transplantation have become useful in the treatment of infertility, especially in communities where the surrogate mother concept is unacceptable.[21] Through successful womb transplants, scientists have brought new hope to women unable to have children.[22] Uteri have become objects of theft to satisfy the commercial market for the treatment of infertility.[23] Transplantation medicine has an impact on the way we experience ourselves as personified subjects.[24] Human bodies become aggregates of replaceable and exploitable parts, and potential assets for others to crave.[25] These organs are transformed into commodifiable "objects of desire".[26]

The question whether a human uterus is property that is capable of being stolen is considered next. This position raises two main questions: whether a uterus can be stolen – that is, whether a uterus is classifiable as property for the purposes of law; and, if so, who is deprived of the enjoyment of property.

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18 Cambridge Dictionary "Meaning of Womb in English" https://dictionary.cambridge.org/dictionary/english/womb (accessed 2018-0719).

19 Antelava https://www.bbc.com/news/magazine-17612550.

20 *Ibid*.

21 Favre-Inhofer 2018 *Journal of Gynecology Obstetrics and Human Reproduction* 213–221.

22 *Ibid*.

23 Pearl "Why Uterus Transplants Are a Bad Idea for Women" https://aeon.co/ideas/why-uterus-transplants-are-a-bad-idea-for-women (accessed 2019-05-17).

24 Zwart "Transplantation Medicine, Organ-Theft Cinema and Bodily Integrity" 2016 9 *Subjectivity* 151.

25 *Ibid*.

26 *Ibid*.

2 1 Can a womb be classified as an object of theft?

The investigation into whether the human body is property involves complex and philosophical dimensions.[27] An understanding of the origin and underlying principle for the "no property" rule is essential to evaluate its current relevance. At common law, the human body and its parts are classified as *res extra commercium* – things outside the commercial sphere.[28] Separated bodily materials provide another ambiguous classification, since the law has traditionally considered separated bodily materials as *res nullius* – belonging to no one – until such material is brought under the control of the first person who obtains possession of the separated human tissue.[29]

The law exhibits an uneasiness in making sense of the human body in the context of ownership and property, as the notion of owning oneself (and one's tissues) suggests that people are capable of objectifying themselves, and that they are thus predisposed to objectification by others.[30] The current legislation refuses to acknowledge property rights in body parts directly.[31] In particular, the Human Tissue Act[32] does not address property rights in human organs directly. Reflecting on the position of property rights in the Human Tissue Act, Slabbert notes:

> "Some sort of 'reading in' of property rights is through section 18(bb) that addresses the removal of tissue from a living body sanctioned by the use thereof for the purposes designated in section 19."[33]

Section 19 specifies that tissue that has been detached from the body must be used for transplantation thereof in the body of another living person or for the production of a therapeutic, diagnostic or prophylactic.[34] Legislation acknowledges property rights in human organs for gift purposes but rejects these rights for commercial purposes.[35] The Human Tissue Act[36] prohibits ownership of human organs from an individual based on a theoretical belief that the human body surpasses ownership.[37] The National Health Act[38] similarly does not speak of ownership in human organs directly.[39] Since such

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27 Mohamed, Nöthling-Slabbert and Pepper "The Legal Position on the Classification of Human Tissue in South Africa: Can Tissues Be Owned?" 2013 6(1) *SAJBL* 16.

28 *Ibid*.

29 *Ibid*.

30 *Ibid.*

31 Slabbert "'This is My Kidney, I Can Do What I Want With It' – Property Rights and Ownership of Human Organs" 2009 30(3) *Obiter* 510.

32 65 of 1983.

33 Slabbert 2009 *Obiter* 510.

34 S 19 of 65 of 1983; and Slabbert 2009 *Obite*r 510.

35 Slabbert 2009 *Obite*r 511.

36 65 of 1983.

37 Slabbert 2009 *Obite*r 511.

38 61 of 2003.

39 Slabbert 2009 *Obite*r 510.

rights are not available to a person, the human body cannot be regarded as property.

On such a matter, South African jurisprudence may be influenced by legal reasoning in another similar jurisdiction, or at least one whose history may be observed as being closely linked. In this light, English law can be instructive. In the case of human remains that are the subject of work and skill, it has been argued that where a person has lawfully exercised some work or skill on a human body, or a part of a human body, that is in his or her lawful possession and that has attained some characteristics distinguishing it from an ordinary corpse pending burial, such a person obtains a right to maintain possession of the body or body parts.[40] Although possession is not ownership, limited rights of possession may nevertheless possibly be had in a corpse or in body parts and such rights may be enforceable against third parties.[41] Where such rights are available to a researcher, a corpse may well be regarded as property. This view is supported by the decision in *Doodeward v Spence,* where the court noted that when combined, the work performed in preserving the fetus, and the pecuniary value acquired, ensured that the body was regarded as property.[42] This principle has been applied in England in the matter of *R v Kelly*,[43] in which the Court of Appeal found that various body parts that had been dismembered, conserved and put on display for the purpose of teaching, had attained sufficient characteristics to be considered as "property" under the Theft Act.[44] In coming to this conclusion, the judge was clear that the common "no property rule" remains "good law" that could only be reformed by Parliament.

2 2 Linguistic constraints of literal meaning

The analysis above aims to show how linguistic structures may constrain the expression and intention of speakers and may call for more information than that conveyed in explicit articulation. The literal meaning of "womb theft" does not apply clearly to the crime under discussion (Caesarean kidnappings), unless perhaps with some further assumptions. "Womb theft" in its literal sense hinders our understanding of Caesarean kidnappings. "Womb theft" in the literal sense is a different crime altogether as the object of theft is the womb and not the fetus.

At this level of text analysis, it is clear that the excerpts from the headline are deceptive and do not accurately portray the context of both articles. In a self-absorbed world in which most people scan headlines in search of what interests them, a layperson may interpret the expression "womb theft" in the ordinary sense and miss the real message.

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40 Mohamed *et al* 2013 *SAJBL* 19; and Slabbert 2009 *Obite*r 510.
41 *Doodeward v Spence* [1908] 6 CLR 906.
42 *Doodeward v Spence supra* 414.
43 *R v Kelly* [1998] 3 All ER 741.
44 *R v Kelly supra* 632. Also see Theft Act 1968.

3 METONYMY IN LEGAL DISCOURSE

Why then did the writers use the expression "womb theft*"* in referring to the crime of appropriation of a newborn from a pregnant woman through Caesarean section? Perhaps a special category of figurative language is required to explain how "womb theft*"* is used and understood. It is arguable that the use of womb denotes a metonym.

Legal discourse as a field has been studied by several linguists and legal experts.[45] Until recently, the figurative nature of legal register, and its great potential, has been entirely overlooked by linguists.[46] Although legal experts realised the significance and influence of metonymy years ago, linguists have been slow to follow.[47] The last couple of decades have seen a broad contribution by cognitive sciences to almost all areas of research and work.[48] In their groundbreaking work in cognitive semantics, George Lakoff, Mark Johnson and Steven Winters, as well as several other authors who build on their work, highlight that cognitive linguistics may contribute meaningfully to the study of law, and to the development of legal systems.[49]

In their work on cognitive semantics, George Lakoff and Mark Johnson assess metonomy as linguistic beautification, selected freely to add emphasis to language and therefore peripheral to core meaning.[50] They argue that our perception of reality is mediated through our conceptual system, and conceptual systems consist of metonyms.[51] We can barely communicate, let alone describe or even comprehend our existence or the world around us, without representative expressions.[52]

A typical definition for metonym states that "A stands for B with which A is closely associated."[53] The relatively popular definition of conceptual metonymy derived from Lakoff states that metonymy involves "using one entity to refer to another that is related to it."[54] Another widespread definition of metonymy in cognitive linguistics states:

> "Metonymy is a cognitive process in which one conceptual entity, the vehicle, provides mental access to another conceptual entity, the target, within the same domain, or idealized cognitive model (ICM)".[55]

The appeal of the aforementioned definition lies in its unitary character, and in the clear way in which it appears to differentiate between metonymy and

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45 Imamović "Metaphor and Metonymy in Legal Texts" 2013 14 *Jezikoslovlje* 295 295.
46 *Ibid*.
47 *Ibid*.
48 *Ibid*.
49 *Ibid*.
50 Lakoff and Johnson *Metaphors We Live By* (1980) 3.
51 Lakoff and Johnson *Metaphors We Live By* 36.
52 Ebberson "Law, Power and Language: Beware of Metaphors" 1999 *Scandinavian Studies in Law* 260.
53 Panther and Radden *Metonym in Language and Thought* (1984) 91.
54 Lakoff and Johnson *Metaphors We Live By* 35.
55 Kövecses and Radden "Metonymy: Developing a Cognitive Linguistic View" 1998 9(1) *Cognitive Linguistics* 39.

metaphor in that metonymy is a shift within one domain while metaphor is a shift across domains.[56]

In metonymic processes, the mapping of two entities is recognised within a single conceptual domain.[57] This is to say that the name of one entity is used to refer to another entity that is contiguous to it.[58] Therefore, metonymy can be considered as having a reference function.[59] The source domain is associated with the target domain by imposing a perspective on it.[60] Differently stated, the domain source is not a substitution for the target but it simply activates the target domain from a given perspective.[61] When applied to inferencing, this means that both domains contribute to the overall contextual meaning of a statement or utterance.[62]

Metonymy is centered on contiguity, which is actual proximity or association.[63] In other words, the substitution of one term with another term depends on a kind of association or relation between the two terms.[64] Contiguity always constitutes the definitional core of metonymy, but in different forms.[65] In prototypical classification of conceptual contiguity, it appears innately straightforward to postulate space/spatial or material contiguity as the prototypical core in conceptualisation.[66] Apart from spatial contiguity and material contiguity, Ding notes that metonymy is also based on time contiguity and causal contiguity.[67]

Two dimensions structure the classification of metonyms.[68] The first of these dimensions, "strength of contact", allows us to extend the prototypical core in the direction of containment, contact and adjacency.[69] The second dimension involves the "boundedness" of one or two of the contiguous entities; it allows us to conceptualise a bounded object as a part of an unbounded one.[70]

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56 Peirsman and Geerraerts "Metonymy as a Prototypical Category" 2006 17(3) *Cognitive Linguistics* 271.

57 Athanasiadou and Lampropoulou "A Conceptual Metonymy Account of Count and Non-Count Nouns: A Study of Modern Greek Nouns from the Domains of Eating and Drinking" 2014 *Major Trends in Theoretical and Applied Linguistics* 234.

58 *Ibid*.

59 *Ibid*.

60 Krišković and Tominac "Metonymy Based on Cultural Background Knowledge and Pragmatic Inferencing: Evidence from Spoken Discourse" 2009 *Fluminensia* 49–72.

61 *Ibid*.

62 *Ibid*.

63 Athanasiadou and Lampropoulou 2014 *Major Trends in Theoretical and Applied Linguistics* 234.

64 *Ibid*.

65 Peirsman and Geerraerts 2006 *Cognitive Linguistics* 278.

66 *Ibid*.

67 Ding "Rethinking the Cognitive Study of Metonymy" 2015 5(9) *Theory and Practice in Language Studies* 1837.

68 Peirsman and Geerraerts 2006 *Cognitive Linguistics* 278.

69 *Ibid*.

70 *Ibid*.

Conceptual metonymy as a significant way of thinking and human cognitive tool infiltrates all facets of language.[71] In the field of cognitive linguistics, preliminary research into metonymy concentrated on matters such as the meaning of metonymy, the classification of metonymy, the relationship between metonymy and metaphor, and the conceptual nature of metonymy.[72] Contemporary studies on metonymy as a conceptual phenomenon show a diversifying trend[73] that includes studies in the context of pragmatics, textual studies in literature, and in-translation research, all of which generate a new field of vision in the research of conceptual metonymy.[74]

A further characteristic of metonyms is that they are not random phenomena or arbitrary occurrences; they are systematic and can be seen in our culture in the following representative examples where:[75]

- the whole represents a part and a part represents the whole;[76]
- a container represents the contained;[77]
- the location is used for the located;[78]
- a cause represents the effect;[79]
- an author represents the book;[80]
- the sign represents the signified;[81]
- the producer signifies the product;[82] and
- an object is used to refer to the user.[83]

The aforementioned concepts can be classified systematically in interrelated groups.[84]

In a prototypical classification, individual examples can be associated with more than one type of metonymic concept at the same time.[85] This characteristic, which may be called "multiple motivation", applies to many of the representative examples of metonymies cited above.[86] The theory of

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71 Gibbs "Figurative Thought and Figurative Language" 1994 *Handbook of Psycholinguistics* 411–446.

72 Ding 2015 *Theory and Practice in Language Studies* 1837.

73 *Ibid*.

74 *Ibid*.

75 Athanasiadou and Lampropoulou 2014 *Major Trends in Theoretical and Applied Linguistics* 240. Also see Lakoff and Johnson *Metaphors We Live By* 38.

76 Panther and Radden *Metonym in Language and Thought* 103.

77 Changing Minds.org "Metonymy" http://changingminds.org/techniques/language/figures_speech/metonymy.htm (accessed 2019-07-19).

78 Peirsman and Geerraerts 2006 *Cognitive Linguistics* 278.

79 Changing Minds.org http://changingminds.org/techniques/language/figures_speech/metonymy.htm

80 *Ibid*.

81 *Ibid*.

82 Fass "A Method for Discriminating Metonymy and Metaphor by Computer" 1991 17(1) *Computational Linguistics* 56.

83 *Ibid*.

84 Peirsman and Geerraerts 2006 *Cognitive Linguistics* 279.

85 Peirsman and Geerraerts 2006 *Cognitive Linguistics* 286.

86 *Ibid*.

prototype is not limited to the use of one of the listed metonymic concepts; it permits solid examples to have multiple motivations.[87]

4 "WOMB THEFT" AS METONYM: CONTAINER FOR CONTENTS

The article now demonstrates that, in discussions on Caesarean kidnappings, reference to "womb" denotes a metonymic source domain in substitution of the "fetus", which is the metonymic target domain.

"Womb" corresponds straightforwardly to the "container for contents" category, giving access to the fetus through the container-contents metonym, also known as the containment ICM metonymy. In the containment ICM, importance is given to the notion of a container that functions as the vehicle through which we mentally access the respective substance, which is the target.[88] As a rule, we are more interested in the contents of a container than in the container; for this reason, metonyms that target the contents via the container are commonly found.[89]

A typical example of the container-contents subtype is seen in the relation between a kettle and the water inside it.[90] The container-content type is the second major type of spatial metonym.[91] The transfer of meaning usually flows from the container to its contents.[92] This type is different from the whole-part type because the container reference does not refer to the container-plus-the-contents, but only to the contents.[93] For example, if one says that "the dam has dried up", the "dam" refers in fact to the water inside the dam.

The reason that we keep the container-contents type separate, not only from the whole-part type but also from other types of metonym, is that this type, penetrates deeply within a language, and extends widely over languages, a fact that points to the cognitive importance of the category.

To say that "the kettle is boiling"[94] is a typical instance of a referring function that permits the name of the container to refer to the contents of the container.[95] The meaning of this sentence is not that the kettle, as such, is boiling but that the water in the kettle is boiling.[96]

There are many examples of this metonymic type, from the most protypical down to the marginal. Further typical examples include, "He drank

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87 *Ibid*.

88 Athanasiadou and Lampropoulou 2014 *Major Trends in Theoretical and Applied Linguistics* 240.

89 Panther and Radden *Metonym in Language and Thought* 41.

90 Panther and Radden *Metonym in Language and Thought* 103.

91 *Ibid*.

92 *Ibid*

93 *Ibid*.

94 *Ibid*.

95 Tylor *Linguistic Categorization* (2003) 7. Also see Carrion, Barcelona, Pannain *Conceptual Metonym: Methodological, Theoretical and Descriptive Issues* (2018) 138.

96 Tylor *Linguistic Categorization* 7.

three bottles"[97] and "Dave drank the glasses", where "glasses" are the containers.

There is a relationship here between a "container" (a glass) and its typical "contents" (a liquid): this relationship is the metonymic concept of a container being substituted for its contents.

The entities below are less prototypical as containers but they show the same transfer pattern of reference:

a) "She (re)arranged the *bookshelf/closet*.
b) The *cistern* is running over.
c) The *lecture hall* burst in laughter."[98]

The same metonymic mapping is observed where "womb" can receive inflection from the "container for contained" category. In the female body, the womb contains the fetus and in the author's view, "womb" is here the container, which stands as foregrounded, while the contained (the fetus) is being backgrounded. The uterus, or womb, is a hollow, pear-shaped organ in a woman's lower stomach between the bladder and the rectum. It sheds its lining each month during menstruation.[99] A fertilised egg (ovum) becomes implanted in the uterus, and the fetus develops.[100] There is therefore a strong linguistic motivation to use the "container for contained" category as the womb contains the fetus.

The precise relation between container and contained seems to be a continuum that can be described in terms of "strength of contact".[101] In the case of containment, however, this relation is a little looser: mostly the contents can easily be removed from their container.[102] It is thus "strength of contact" that determines the place of a particular metonymy on the continuum.[103]

Metonymic analysis offers a means to excavate hidden claims and conceptual frameworks that work alongside explicit messages.[104] Conceptual metonymic identification – the approach followed above – proceeds from a view of metonymic imagery far removed from a layperson's sense that it enhances meaning, showing that metonyms can be "generative", creating novel meaning by defining problems in a certain way and in so doing framing how they are perceived and addressed.

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97 Panther and Radden *Metonym in Language and Thought* 103.
98 *Ibid*.
99 Stanford "Anatomy: Fetus in Utero" https://www.stanfordchildrens.org/en/topic/default?id=anatomy-fetus-in-utero-85-P01189 (accessed 2020-01-19).
100 Stanford https://www.stanfordchildrens.org/en/topic/default?id=anatomy-fetus-in-utero-85-P01189.
101 Peirsman and Geerraerts 2006 *Cognitive Linguistics* 281.
102 *Ibid*.
103 *Ibid*.
104 Lakoff and Johnson *Metaphors We Live By* 3–6.

It is now fairly proven in cognitive science and linguistics that metonyms are a vital instrument used to organise thought.[105] It is human nature to use metonyms when attempting to understand new concepts.[106] However, metonyms may also selectively guide, or misguide, our cognitive processes.[107] By emphasising one aspect of a concept, a metonym may blind us to other aspects that are inconsistent with the metonym.[108] Conceptual metonymic analysis allows us to see multiple messages in a text, with one meaning being presented in explicit terms while another meaning is conveyed simultaneously through conceptual metonym.

5 CONCLUSION

It is clear from this article that public discourse on crime can be packed with metonyms and that there is a need for critical thinking as metonym shapes our thoughts in ways we might have not realised. The contribution highlights how an uncritical approach to content analysis contributes towards a collapse in the writer's intentions.

In this article, the literal and metonymic meanings of "womb theft" have been analysed. The author concludes that preferring the literal interpretation fails to expose the writer's intention and thoughts in the article titled "Sentence reduced for attempted womb theft". This analysis has revealed that a literal interpretation of "womb theft" delivers meaning that is distant from what the writer intended to convey. Through the use of metonymic analysis, decoding fragments of linguistics, this enquiry has discovered the language conveyor's intention or conceptual meaning when referring to "womb theft". By scrutinising the concept "womb theft" within an imaginary framework, it has been understood that some metonyms are employed not only to describe a crime but also to reflect and epitomise a certain societal or cultural matter.

This contribution aims to stimulate critical thinking and interpretation of concepts among legal scholars with the hope of cultivating the capacity to understand an underlying meaning.

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105 Gore "Judicial Use of Metaphors for New Technologies" 2003 2 *Journal of Law, Technology & Policy* 403.

106 Gore 2003 *Journal of Law, Technology & Policy* 403.

107 *Ibid*.

108 Gore 2003 *Journal of Law, Technology & Policy* 403.

RECONCILING CUSTOMARY LAW AND CULTURAL PRACTICES WITH HUMAN RIGHTS IN UGANDA

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SUMMARY

Customary law has been part of Ugandan law for many years. Section 2 of the Local Council Courts Act, 2006 defines "customary law" to mean "the rules of conduct established by custom and long usage having the force of law and not forming part of the common law nor formally enacted in any legislation". Ugandan courts have explained the relationship between customary law and other laws. In 1995, Uganda adopted a constitution that includes, among other things, a bill of rights that prohibits discriminatory and degrading laws and customs. This was informed during the making of the Constitution by the arguments of many Ugandans that discriminatory and degrading customary practices and laws should be abolished by the Constitution. In this article, the author illustrates the steps that have been taken by the drafters of the Constitution, Parliament (through legislation) and courts to outlaw discriminatory and degrading cultural practices. The author recommends ways in which some of these measures could be strengthened.

1 INTRODUCTION

Customary law has been part of Ugandan law for many years and was recognised by the British colonialists.[1] Section 2 of the Local Council Courts Act[2] defines "customary law" to mean "the rules of conduct established by custom and long usage having the force of law and not forming part of the common law nor formally enacted in any legislation". In *Magbwi v MTN (U) Limited*,[3] the High Court, without referring to the Local Council Courts Act, explained customary law as follows:

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1 During colonialism, "[a] system of native courts operated alongside the courts administering received law. They were established in a hierarchy corresponding to the local government administrative structure, the lowest at sub-county level and the highest at district level. They were composed of both chiefs and unofficial members. In criminal cases the courts had power to order sentences of up to six months imprisonment. Both county and district native courts had original and appellate jurisdiction. Appeals lay from district native courts to the district commissioner and then to the High Court. The High Court could also try a case to which customary law applied as a court of first instance" (*Report of the Constitutional Commission* (1992) par 17.10. See also par 17.140).

2 Local Council Courts Act, 2006.

3 (Civil Appeal No. 0027 of 2012) [2017] UGHCLD 53 (12 April 2017).

> "Customary law … concerns the laws, practices and customs of indigenous peoples and local communities. It is, by definition, intrinsic to the life and custom of indigenous peoples and local communities. What has the status of 'custom' and what amounts to 'customary law' as such will depend very much on how indigenous peoples and local communities themselves perceive these questions, and on how they function as indigenous peoples and local communities. Defining or characterising 'customary law' typically makes some reference to established patterns of behaviour that can be objectively verified within a particular social setting or community which is seen by the community itself as having a binding quality. Such customs acquire the force of law when they become the undisputed rule by which certain entitlements (rights) or obligations are regulated between members of a community."[4]

The nature of customary law and its relationship with other laws in Uganda are explained in the following terms by the Constitutional Commission:

> "The judiciary administers a system of laws which in Uganda includes the Constitution, statutes enacted by Parliament, common law principles derived from English law and customary law. Customary law is essentially local in character having evolved from the traditions of the varied tribes of Uganda. Although almost entirely unwritten, customary law continues to provide a primary reference for the regulation of the lives of most Ugandans in respect of basic activities and relationships including family life and property rights, land and livestock. It is recognized as enforceable law, particularly in the field of civil disputes, provided it is not in conflict with statutory law and not repugnant to justice and equity."[5]

In *Dima Domnic Poro v Inyani*,[6] the High Court highlighted the central role customary law plays in the lives of many Ugandans, especially those in rural areas. The court observed:

> "Customary laws and protocols are central to the very identity of many local communities. These laws and protocols concern many aspects of their life. They can define rights and responsibilities on important aspects of their life, culture, use of and access to natural resources, rights and obligations relating to land, inheritance and property, conduct of spiritual life, maintenance of cultural heritage, and many other matters. Customary practices of inheritance impact directly on the right to culture (of course excluding rules which treat people unequally or which limit other rights in a way which is unreasonable and goes against the spirit of the rest of the fundamental rights). In many traditional communities in a rural setting, a majority of the people identify with customary laws of inheritance and conduct their lives in conformity with them."[7]

The court, after highlighting the tension between customary law and written law,[8] added:

> "The crucial consequence of such strict application [of written law] is that it creates tensions between the legal and customary transmission of rights in land, in respect of land governed by customary law. In the rural traditional community setting, interwoven into all interactions between family and

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4 *Magbwi v MTN (U) Limited supra* 10. See also *Odongo v Ojera* (Civil Appeal No. 0053 of 2017) [2019] UGHCLD 1 (21 February 2019).

5 *Report of the Uganda Constitutional Commission* (1992) par 17.2.

6 (Civil Appeal No. 0017 of 2016) [2017] UGHCCD 154 (30 November 2017).

7 *Dima Domnic Poro v Inyani supra* 9.

8 *Dima Domnic Poro v Inyani supra* 9.

> community members are the dual concepts of shame and respect. Shame and respect create the parameters for interactions and create the framework for customary law. One reason that customary law is more often used than written law in relation to family and community relations is that it embodies the notions of shame and respect. Where conflicts exist between customary law and written law, customary law generally prevails in the villages because written law often fails to reflect the reality of the villagers' lives. Enactments which disregard the value and strength of these cultural norms are barely embraced. Without an understanding of these fundamental norms of behaviour, such enactments and the decisions based on them quickly become irrelevant. In the result, legal rules do not automatically change or override customary law. Rather, legal rules support change and the desire for change, but real change only occurs when it is no longer shameful or disrespectful to behave in the manner mandated by the legal rule. The better option therefore is to make determinations of transmission of rights to land held customarily within a framework of interdependence between customary law and statutory law rather than exclusively on the basis of statutory law. The struggle of maintaining customary law as a legal system while adhering to the expectations of statutory law and developments in the modern world reflects another battle: that between an idyllic world and the reality of traditional societies."[9]

The fact that customary law (sometimes referred to as traditional law),[10] is not codified means that, *inter alia*, it is difficult for some people to know what it is exactly. As one Constituent Assembly delegate submitted during the making of the Ugandan Constitution,

> "[t]he dual legal system in Uganda where customary and statutory laws are practiced simultaneously are confusing. Customary laws which are often discriminatory against women take precedence over our statutory laws because the latter is always shrouded in mystery."[11]

According to section 46 of the Evidence Act,[12] a court may call an expert to give an opinion on the existence of a custom.[13] There have been cases in which courts have called expert witnesses to give evidence on the existence or otherwise of a customary practice.[14] In some cases, courts have, in the absence of evidence, declined to express an opinion on the existence or

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9 *Dima Domnic Poro v Inyani supra* 10.

10 *Dima Domnic Poro v Inyani supra* 10. See also *Proceedings of the Constituent Assembly* (1994–1995) 1308.

11 Proceedings of the Constituent Assembly 869.

12 Chapter 6 of the Laws of Uganda.

13 S 46 provides that "[w]hen the court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of that custom or right, of persons who would be likely to know of its existence if it existed, are relevant".

Explanation – The expression "general custom or right" includes customs or rights common to any considerable class of persons." For the interpretation of s 46, see *Odongo v Ojera supra*; *Hadadi Mohamed Rajab v Muzamil Mohamed Rajab* (Civil Suit No. 188 of 2015) [2019] UGHCFD 48 (26 August 2019) par 14; *The Administrator General v George Mwesigwa Sharp* (Civil Appeal No 6 of 1997) [1998] UGCA 14 (19 November 1998).

14 *Musamali v Musamali* (HCT-04-CV-CA-0001/2001) [2006] UGHCFD 1 (4 April 2006); *Wonaku v Makoba* (Civil Revision No. 0004-2012) [2012] UGHC 91 (10 May 2012); (The Court dealt with the issue of dowry as one of the aspects of valid Kigisu customary marriage).

otherwise of a custom or cultural practice.[15] However, the High Court held that no such evidence is needed where "the culture or custom has gained such notoriety as to be taken judicial notice of".[16] For example, in *Uganda v Asiimwe,*[17] the High Court took judicial notice of "the generosity and accommodative nature of the Ugandan culture".[18] Uganda has many ethnic groups and some customary practices found in one group do not exist in others.[19] In other words, it is not possible to talk of a single body of customary law. It is therefore important that Ugandans respect each other's customary practices.[20] Even before colonialism, there were sanctions for disobeying established customs and traditions.[21] The recognition of customary law by the colonialists was not absolute. Customs were recognised on condition that they were not repugnant to natural justice (the so-called repugnance clause). One of the reasons that Ugandans detested the judicial system introduced by the British colonialists was that

> "the received law remained foreign to the majority of people. It was not (and is still not) in harmony with the norms and customs of African peoples."[22]

After independence, the "whole [foreign law] legal system should have been transformed to suit our [Ugandan] own culture, norms and customs."[23] This system had to be replaced by laws and institutions that recognise the customs of Ugandans. One of the ways in which this objective was to be achieved was through adopting a constitution that, not only recognised customary law, but also outlawed oppressive customary or cultural practices. It is against this background that the Constitution includes many provisions that are relevant to the issue of customary law.

The purpose of this article is to highlight the measures taken, and being taken, in Uganda to abolish oppressive customary and cultural practices. These measures are: the adoption of a constitution that prohibits oppressive customary practices; the enactment of legislation prohibiting some customary practices; petitioning courts to declare some customary practices unconstitutional; and courts, on their own, declaring some customary practices unconstitutional. The author discusses the issue of courts with jurisdiction over customary law matters and also highlights some of the challenges facing the government in enforcing the relevant legislation. Recommendations on how such laws could be better enforced are made.

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15 In *Mugisha v Rusiisi* (HCT) [2013] UGHCCD 99 (25 July 2013), the court declined to rule that there is a culture of Banyankole being attached to their cows; and see *Katakuwange Mulwanyi Michael v Mulwanyi Michael* (Civil Appeal No 41 of 2008) (Civil Appeal No 41 of 2008) [2010] UGHC 114 (29 September 2010) on the existence of a customary lease.

16 *Mugisha v Rusiisi supra* 5.

17 (High Court Criminal Session Case No. 143 of 2001) [2002] UGHCCRD 11 (2 December 2002).

18 *Uganda v Asiimwe supra* 3.

19 *Proceedings of the Constituent Assembly* 2362.

20 *Proceedings of the Constituent Assembly* 2313 and 2095.

21 *Report of the Constitutional Commission* par 28.16.

22 *Report of the Constitutional Commission* par 19.13.

23 *Report of the Constitutional Commission* par 17.75.

2 THE CONSTITUTIONAL APPROACH TO ABOLISHING OPPRESSIVE CUSTOMARY PRACTICES

As mentioned above, the Ugandan Constitution recognises customary law but also prohibits oppressive customary practices. It is imperative to refer briefly to the drafting history of the Constitution to have an understanding of the background to the inclusion of the relevant provisions in the Constitution. An understanding of this history promotes an appreciation of the context in which Ugandans have approached the issue of the constitutionality or otherwise of some customary practices.

2 1 Customary law and practices and the drafting history of the Ugandan Constitution

In the late 1980s, Uganda embarked on a process of enacting a new constitution to replace the 1967 Constitution that had been substantially based on the one adopted at independence without public participation. In order to ensure that as many people as possible participated in the constitution-making process, the government established the Constitutional Commission.[24] The Commission's mandate was to:

> "study and review the [1967] Constitution with a view to making proposals for the enactment of a national Constitution that will, *inter alia* … (ii) establish a free and democratic system of government that will guarantee the fundamental rights and freedoms of the people of Uganda."[25]

The Commission visited many parts of Uganda to collect people's views on the issues to be addressed in the new Constitution. It also received submissions from different people, institutions and organisations.[26] One of the issues addressed in the Commission's report is customary law or practices. The report shows that even before colonialism, customary law recognised some rights such as the right to life[27] and the right to equality.[28] Customary law also regulated the manner in which wars were waged and conducted.[29] Some of the people who made submissions to the Constitutional Commission were very critical of the fact that the legal system

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24 Uganda Constitutional Commission Statute No. 5 of 1988.

25 *Report of the Constitutional Commission* par 4.

26 *Report of the Constitutional Commission* 8–12.

27 *Report of the Constitutional Commission* par 7.18(a).

28 *Report of the Constitutional Commission* par 7.18(b).

29 *Report of the Constitutional Commission* par 7.18(d): "Traditional society had commonly developed humanitarian rules in war. Laws and customs often spared lives of children, women and the disabled, the sick and the old during any inter-tribal fighting. War was undertaken between the able-bodied men of different tribes. Women and children would be taken as part of the war loot but would normally not be killed or maimed. From their condition of captured people, prisoners of war could gradually be assimilated into the victorious society and if they proved persons of quality they could often climb the ladder of social leadership to very high positions."

introduced by the British did not recognise some customary law. The Commission reported that people were concerned that

> "the foreign nature of the law relates to the failure of much of the statute law to take into account Ugandan cultural norms. People raised special concerns about particular laws such as those on marriage, divorce, adoption etc. which they said do not conform with the customs and norms of the African culture. As such, laws have remained foreign to the people, many of whom have continued observing their own culture and ignored the received law."[30]

Although Ugandans were of the view that the new Constitution should recognise customary law, they wanted oppressive customary practices abolished. For example, on the issue of the relationship between some customary practices and human rights, especially women and children's rights, the Commission reported:

> "Women are discriminated against by oppressive and old fashioned traditions, customs and practices in the various tribes and communities which tend to reduce them to the status of children. They are concerned about laws which discriminate against them in several aspects: property ownership, marriage, separation, divorce, custody of children and inheritance. They are concerned about negative male attitudes, formed through the centuries, which minimise the importance of women and ignore their full dignity, ability and contribution to society. They are concerned about their roles in marriage and family which have been taken for granted and not properly recognized or remunerated. Society has not enabled them to realise their full potential for their own development and that of the nation. They are also concerned about religious bodies and cultural institutions which deny them equality with men."[31]

The Commission also reported that some people were concerned that some men invoked customary practices to deprive widows of property acquired during marriage[32] and that "[t]he right to marry and form a family has often been interfered with by tribal customs on grounds of race, tribe, creed or socio-economic status".[33] The Commission also reported that many people were of the view that the Constitution should recognise the right to culture.[34] The Commission indicated that the majority of the submissions were opposed to the argument, made by some people in their submissions, that

> "no limitations [should be put] on the right to culture, each society or tribe being seen as the best judge of its own culture and the practices or customs which it exhibits."[35]

This view was opposed because, *inter alia*, cultural practices were dynamic and some were contrary to human rights.[36] The Commission concluded by outlining the principles that people suggested should be used in determining whether or not a cultural practice should be retained:

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30 *Report of the Constitutional Commission* par 17.27.
31 *Report of the Constitutional Commission* par 7.64.
32 *Report of the Constitutional Commission* par 7.65.
33 *Report of the Constitutional Commission* par 7.73(d).
34 *Report of the Constitutional Commission* par 7.132.
35 *Report of the Constitutional Commission* par 7.132.
36 *Report of the Constitutional Commission* par 7.133.

> "(a) No cultural practice should dehumanise, discriminate or offend against the human rights and freedoms of the individual, whether man or woman, child or adult; (b) No practice or custom should threaten or weaken nation-building; (c) No practice should be anti-development, anti-morality or anti-human equality or dignity; (d) No practice should be imposed by force on any member of society or section of that society."[37]

Against that background, the Commission recommended that the new constitution should provide the following on the issue of the right to culture:

> "(a) Every person should have the right to enjoy, practise, profess, maintain and promote any culture, language, tradition or creed or religion but subject to the provisions of the Constitution and to the condition that the rights so protected do not offend against the rights of others or the national interest. (b) All customary practices which dehumanise, discriminate or are injurious to the integral well-being of a person should be prohibited. All cultural practices and traditions should be under effective control of the Constitution and the laws of the country. They should not go against any provisions of the Constitution. (c) Culture should always develop to fit smoothly into the contemporary values and aspirations of society. It should recognise and respect especially the rights and equality of women and the rights of children and other sections of society."[38]

It is against that background that the Commission recommended that the new constitution should recognise customs and traditions on condition that they are not oppressive and in particular that they were not contrary to the rights in the Bill of Rights.[39] In particular, the Commission recommended that "[l]aws, cultural practices and customs which are against the dignity, equality, welfare or interests of women should be prohibited by the new Constitution, the laws of the country and the relevant cultural groups in the country".[40] The Commission also highlighted a number of oppressive customary practices and called for their abolition. These included relatives dispossessing widows and children of their property upon the death of the husband or father,[41] and widow inheritance.[42] Apart from enacting the Constitution to abolish oppressive customary practices, the Commission also called upon the Uganda Law Reform Commission to repeal or amend laws that criminalised "various customary legal systems of the country."[43] It also recommended the establishment and/or re-establishment of the institution of traditional leaders "in accordance with the respective cultures, customs traditions, wishes and aspirations of the people concerned and subject to the provisions of the new Constitution".[44] However, traditional leaders were not to reintroduce dehumanising and oppressive cultural practices.[45] The Commission added that the law establishing traditional leaders "should not interfere in cultural practices that are not against public interest or the ideals

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37 *Report of the Constitutional Commission* par 7.134.
38 *Report of the Constitutional Commission* par 7.135.
39 *Report of the Constitutional Commission* par 7.141(a).
40 *Report of the Constitutional Commission* par 7.141(e).
41 *Report of the Constitutional Commission* par 17.180.
42 *Report of the Constitutional Commission* par 17.180.
43 *Report of the Constitutional Commission* par 17.197(d).
44 *Report of the Constitutional Commission* par 19.115(b). See also par 19.128.
45 *Report of the Constitutional Commission* par 19.129.

of the Constitution" especially the Bill of Rights.[46] The Commission concluded that customary land tenure should be maintained.[47]

The Commission's report was discussed by the Constituent Assembly whose mandate was to come up with the final constitution that would be adopted. The issues of customary law generally and customs in particular, as expected, also featured in the Constituent Assembly debates. The delegates submitted that although Uganda had to ensure human rights and freedoms were promoted and protected, they should not erode "our customs and traditions".[48] Such positive customs included male circumcision (practised by some communities),[49] parents giving a piece of land to a woman before she gets married (practised by two ethnic groups),[50] and bride price.[51] However, they also called upon the constitution to ban oppressive customs such as widow inheritance,[52] depriving widows of their husbands' property,[53] the marriage of under-aged girls,[54] female genital mutilation,[55] stripping women naked and cutting some parts of their bodies with sharp instruments,[56] forcing a woman to sleep with the body of her deceased husband before he is buried,[57] prohibiting women from eating some types of food,[58] prohibiting women from owing land,[59] prohibiting women from exercising their right to freedom of speech,[60] prohibiting women from inheriting[61] or owning property,[62] forced marriages,[63] prohibiting women from having custody of their children,[64] denying girls an education,[65] refund of bride price should the marriage break down,[66] and all other cultural practices that discriminate against or impair the dignity of women.[67] The delegates emphasised that the constitutional prohibition of oppressive and discriminatory customary practices would compel the government to adopt different measures to eliminate such practices.[68]

46 *Report of the Constitutional Commission* par 19.130.
47 *Report of the Constitutional Commission* par 25.19, 25.24, 25.59–25.63.
48 *Proceedings of the Constituent Assembly* 2108.
49 *Proceedings of the Constituent Assembly* 5837, 5840, 514 and 2010.
50 *Proceedings of the Constituent Assembly* 1284.
51 *Proceedings of the Constituent Assembly* 685. However, one delegate was of the view that bride price demeans women and should be abolished, see 862.
52 *Proceedings of the Constituent Assembly* 1423 and 5840.
53 *Proceedings of the Constituent Assembly* 1519 and 5840.
54 *Proceedings of the Constituent Assembly* 1612 and 1978.
55 *Proceedings of the Constituent Assembly* 1613, 5838, 584 and 652.
56 *Proceedings of the Constituent Assembly* 5839–5840.
57 *Proceedings of the Constituent Assembly* 5840.
58 *Proceedings of the Constituent Assembly* 5841.
59 *Proceedings of the Constituent Assembly* 762.
60 *Proceedings of the Constituent Assembly* 862.
61 *Proceedings of the Constituent Assembly* 906 and 4151.
62 *Proceedings of the Constituent Assembly* 1159, 1174 and 1951.
63 *Proceedings of the Constituent Assembly* 912.
64 *Proceedings of the Constituent Assembly* 1159 and 1174.
65 *Proceedings of the Constituent Assembly* 1174.
66 *Proceedings of the Constituent Assembly* 1988.
67 *Proceedings of the Constituent Assembly* 640, 669 and 756.
68 *Proceedings of the Constituent Assembly* 1342.

Some delegates argued that apart from a constitutional outlawing of oppressive and discriminatory cultural practices, the government should put in place measures to educate people about the harmful effects of these practices.[69] However, because "it took centuries of oppressive customs and tradition to reduce the women of this country to the, position of child bearing, free labour" among other practices, "it will take quite some time to totally reverse this".[70] It was argued that although the State should prohibit oppressive customary practices, it is not its responsibility to create culture. As one delegate put it:

> "The State cannot regulate or set up laws that will govern the cultures and customs. True, there are customs and traditions that are repugnant but we all know that culture is dynamic, culture evolves, so are traditions and practices and so on. But if we say that the State will start regulating culture, in other words, the State can set up culture of its own because you have given them the power, but the State has no power to create culture, customs or traditions."[71]

Some delegates argued that there may be a need to legislate some cultural practices because

> "[m]ost of the laws we make are a result of long customs and traditions. We only legalise them, we only put them on Statutes. Take the Human Rights, for instance, most of them are the things that are a part of our culture."[72]

2 2 Constitutional provisions on customary law and practices

It is on the basis of the drafting history outlined above that the Constitution was adopted in 1995 with various provisions relevant to customary law. The Ugandan Constitution, including the stated National Objectives and Directive Principles of State Policy, recognises that in Uganda people have different customs. Thus, paragraph (iii) of National Objective III (dealing with national unity and stability) provides that "[e]verything shall be done to promote a culture of cooperation, understanding, appreciation, tolerance and respect for each other's customs, traditions and beliefs".[73] National Objective XXIV provides for "cultural objectives" and it is to the effect that:

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69 *Proceedings of the Constituent Assembly* 5841 and 1212.

70 *Proceedings of the Constituent Assembly* 398.

71 *Proceedings of the Constituent Assembly* 2009. See also 2010–2013.

72 *Proceedings of the Constituent Assembly* 4011.

73 For the legal status of the National Objectives and Directive Principles of State Policy, see *Advocates Coalition for Development & Environment v Attorney General* (Constitutional Petition No. 14 of 2011) [2011] UGCC 11 (15 November 2011); *Hon Sam Kuteesa v Attorney General* (Constitutional Reference No. 54 of 2011) [2012] UGCC 02 (4 April 2012); *Fox Odoi – Oywelowo v Attorney General* (Constitutional Petition No. 8 of 2003) [2004] UGCC 2 (30 March 2004); *Thomas Kwoyelo alias Latoni v Uganda* (Const. Pet. No. 036 of 2011(reference)) [2011] UGCC 10 (22 September 2011); *Oloka-Onyango v Attorney General* (Constitutional Petition No. 08 of 2014) [2014] UGCC 14 (1 August 2014); and *Tumuhamye v Nakamya* (Civil Suit No. 42 of 2015) [2017] UGHCCD 126 (18 September 2017).

> "[c]ultural and customary values which are consistent with fundamental rights and freedoms, human dignity, democracy and with the Constitution may be developed and incorporated in aspects of Ugandan life. The State shall – (i) promote and preserve those cultural values and practices which enhance the dignity and well-being of Ugandans; (ii) encourage the development, preservation and enrichment of all Ugandan languages; (iii) promote the development of a sign language for the deaf; and (iv) encourage the development of a national language or languages."

Although the Constitution recognises customs, this recognition is not unlimited. Customs are only recognised as long as they are not contrary to the Constitution. Thus, Article 2(1) of the Constitution provides that the Constitution is the supreme law of Uganda and, most importantly, Article 2(2) is to the effect that "[i]f any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void".[74] The Constitution prohibits discrimination (Article 21) but also obliges the State (Article 32(1)) to "take affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them". Because Ugandan women have been victims of oppressive customary practices in the past, Article 33 of the Constitution is dedicated to the rights of women generally. However, it also specifically addresses the issue of customary practices. Article 33(5) and (6) is to the effect that:

> "(5) Without prejudice to article 32 of this Constitution, women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom. (6) Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution."

The above outline shows that although customs, and thus customary law, are recognised in Uganda, they are subject to the Constitution. The inclusion of these provisions in the Constitution was informed by Ugandan history, which was characterised by oppressive cultural practices, especially against women. The Constitution on its own does not mean anything unless it is given effect to in practice, which requires legislation to be passed or courts to interpret the relevant provisions of the Constitution and relevant legislation. The challenge is that customary law is not codified and courts have had to assess, in piecemeal fashion, whether certain customary practices are contrary to the Constitution, and especially to the Bill of Rights.

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[74] See *Report of the Constitutional Commission* par 28.61: "… it must be clearly provided that the Constitution is superior to all other laws and customs, and that all acts of the executive and other governmental bodies must be consistent with it." See also par 28.63: "It should be enshrined in the Constitution that:– … (e) If any law or custom does not conform to the Constitution, the Constitution should prevail, and the other law or custom should not apply to the extent that it does not conform to the Constitution."

3 COURTS AND OPPRESSIVE CUSTOMARY PRACTICES

Courts have taken two approaches in an effort to bring an end to oppressive customary practices. The first approach is to declare such practices unconstitutional based on the cases filed by litigants, especially non-governmental organisations. The second approach is for the courts to declare some customary practices unconstitutional of their own volition. Following the first approach, courts have held that certain cultural or customary practices are contrary to the Constitution generally and to women's rights in particular. These are: the duty of women or their parents to refund bride price at the dissolution of a marriage;[75] and female genital mutilation (it violates women's rights, the right to freedom from torture or cruel inhuman or degrading treatment and Uganda's international human rights obligations).[76] This approach is understandable since the High Court, in *Lwamasaka Nkonge Prosper (Kinyenyambali) v James Magala Muteweta (Kyana)*[77] held:

> "Customary law, principles and customary/cultural leaders are not unimportant; indeed, they have a significant contribution to make in our unfolding constitutional democracy. Apart from its importance, all customary law and leadership will have to reflect and adjust to the overall changes that have occurred in Uganda's constitutional and legal system. The customs and culture that conflict with the Constitution, especially the Bill of rights or any enacted legislations shall always be challenged in the courts for invalidity. The Constitution is supreme and customary law must comply completely with all constitutional requirements."[78]

Under the second approach, courts have declared the following cultural practices unconstitutional: widow inheritance;[79] barring widows from inheriting part of the deceased husband's estate;[80] barring daughters from inheriting part of the deceased father's estate;[81] the custom approving marital rape;[82] and the custom of kidnapping a woman for the purpose of forcing her to marry her kidnapper.[83]

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75 *Mifumi (U) Ltd v Attorney General* (Constitutional Appeal No. 02 of 2014) [2015] UGSC 13 (6 August 2015); *Ochom v Okwap* (Civil Appeal No. 11 of 2012) [2014] UGHCCD 66 (7 May 2014).

76 *Law & Advocacy for Women in Uganda v Attorney General* (Constitutional Petition No. 8 of 2007) [2010] UGCC 4 (28 July 2010).

77 (Miscellaneous Cause No. 65 of 2015 & 87 of 2016) [2019] UGHCCD 140 (12 July 2019).

78 *Lwamasaka Nkonge Prosper (Kinyenyambali) v James Magala Muteweta (Kyana) supra* 8.

79 *Ebiju v Echodu* (Civil Appeal No. 43 of 2012) [2015] UGHCCD 122 (17 December 2015). See also *Nalumansi v Kasande* (Civil Appeal No. 010 Of 2015) [2017] UGSC 21 (10 July 2017) (in which the court dealt with s 30 of the Succession Act).

80 *Ebiju v Echodu supra*.

81 *Otikor v Anya* (Civil Appeal No. 38 of 2012.) [2016] UGHCLD 10 (5 May 2016).

82 *Uganda v Yiga Hamidu* (Criminal Session Case 005 of 2002) [2004] UGHCCRD 5 (9 February 2004).

83 *Uganda v Byarugaba* (Criminal Session Case No.361 of 2013) [2017] UGHCCRD 116 (15 August 2017); *Uganda v Nakoupuet* (Criminal Case No. 109 of 2016) [2019] UGCOMMC 13 (13 February 2019).

However, in the name of culture, some courts have made statements that approve of some cultural practices and are thus likely to perpetuate discriminatory cultural practices or agitate some human rights activists. These have included a statement that "[i]t should be noted that in many of the African cultures, a [sic] heir is the eldest son unless the son is a rogue."[84] It could be argued that such a cultural practice could be challenged for infringing women's rights to equality under Article 21 of the Constitution, which prohibits discrimination on many grounds, including gender and sex. In fact there is evidence that this cultural practice is under attack and may soon cease to exist. For example, in *Kolya v Kolya*[85] the deceased, in his will, bequeathed the matrimonial home to his son (the heir). The wife challenged this approach on the ground that she had contributed to the construction of the house and that it was unfair for the deceased to bequeath the house to his son. In upholding the wife's submission, the High Court held that "the deceased exulted the heir above the widow. A culture practice that where the heir inherits matrimonial home denying widows proprietary rights is discriminatory in nature."[86] The Court added that the cultural practice in question was contrary to Articles 21, 31 and 32(2) of the Constitution and to Article 5 of the Convention on the Elimination of All Forms of Discrimination Against Women.[87] In *Uganda v Katerega*,[88] the High Court convicted the accused of defiling his daughter and, in sentencing him to 25 years' imprisonment, observed:

> "Before sentence, I call upon all members of society that we should respect our traditions and customs (in Africa) which are unparreled [sic] to other peoples cultures elsewhere in Europe and America. In such places, practices which are abhorred by African cultures like sodomy and homosexuality are freely practised. But even then, Americans and Europeans don't play sexual intercourse with their own children. It is goats and cows and other wild animals that sometimes do so."[89]

Although the Constitution of Uganda does not prohibit discrimination on the ground of sexual orientation, the above observation by the judge may not be taken lightly by some human rights activists who could argue that it is discriminatory. However, this argument is unlikely to succeed because the High Court has been consistent in its view that homosexuality is an offence against morality and culture and that the jurisprudence of the European Court of Human Rights that prohibits discrimination on the basis of sexual orientation is not binding on Ugandan courts.[90] Another criticism of the court is that it appears to generalise when it held that its views were applicable to Africa as a whole. This approach is not limited to one decision. In an earlier

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84 *Uganda v Namakula* (Criminal Session Case No. 019/2013) [2016] UGHCCRD 146 (15 December 2016) 6.

85 (Civil Suit No. 150 of 2016) [2020] UGHCFD 4 (3 July 2020).

86 *Kolya v Kolya supra* 7.

87 *Ibid*.

88 (Criminal Session Case No. 0405 of 2013) [2016] UGHCCRD 1 (13 April 2016).

89 *Uganda v Katerega supra* 4.

90 *Nabagesera v Attorney General* (Misc. Cause No. 033 of 2012) [2014] UGHCCD 85 (24 June 2014). In *Mubiru Kisingiri v Uganda* (HCT-0OCR-CN-O108 - 2015) [2016] UGHCCRD 6 (19 April 2016), it was observed that sodomy is against Ugandan culture, norms and traditions.

case, the High Court also observed that "it was 'anti African Culture'" for the accused to defile the complainant in her parents' bedroom[91] and that the "accused is the victim's paternal uncle and by an African culture a parent to her."[92] Such statements could be criticised on the basis that the courts seem to be under the impression that cultural practices in all parts of Africa are similar.

Apart from declaring some customary practices unconstitutional, courts have also held that some customary practices comply with the Constitution and do not violate human rights. One of these practices is the payment of bride price (dowry).[93] For example, in *Wonaku v Makoba*,[94] the High Court, while relying on the jurisprudence of the Supreme Court, held:

> "In many communities, the cultural practice of bride price, the payment of a sum of money or property by the prospective son-in-law to the parents of the prospective bride as a condition precedent to a lawful customary marriage, is not barred by the Constitution. It is not *per se* unconstitutional. The Constitution does not prohibit a voluntary, mutual agreement between a bride and a groom to enter into the bride price arrangement. A man and a woman have the constitutional right to choose the way they wish to get married. It is unconstitutional if the parties are not left free to choose how they want to get married."[95]

Courts have also confirmed the existence and lawfulness of some cultural practices such as the appointment of a customary heir;[96] the right of the family of someone deceased to bury his or her body according to their cultural practices;[97] and that the cultural practice of keeping twins in contact is applicable even in cross-border adoption cases.[98]

The above jurisprudence shows that courts are willing to find a cultural practice unconstitutional if it is contrary to any of the provisions of the Constitution. The challenge though is that court judgments may not be read by all those who engage in such cultural practices and these practices could continue unabated, especially in rural areas. This may require legislation to be enacted specifically to address that *lacuna*.

4 LEGISLATIVE INTERVENTION

Various pieces of legislation relate directly or indirectly to customary law or cultural practices. For example, the Equal Opportunities Commission Act[99] establishes the Equal Opportunities Commission with a mandate to carry out

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91 *Christopher Kizito v Uganda* (Cr. Appeal No.18 of 1993) [1995] UGSC 12 (28 June 1995).

92 *Uganda v Anyolitho* (Session Case No. 0074 of 2010) [2011] UGHC 154 (24 October 2011).

93 *Mifumi (U) Ltd v Attorney General* (Constitutional Appeal No. 02 of 2014) [2015] UGSC 13 (6 August 2015).

94 *Supra*.

95 *Wonaku v Makoba supra* 3.

96 *Ngaaga v Matovu* (Civil Case No. 107 of 2003) [2012] UGHC 139 (18 December 2012).

97 *Nobert Mao v Attorney General of Uganda* (Constitutional Petition No. 9 of 2002) [2003] UGCC 3 (16 March 2003).

98 *In Re Victoria Babirye Namutosi* (Adoption Cause No.09 of 2017) [2018] UGHCFD 1 (19 January 2018).

99 Equal Opportunities Commission Act 2 of 2007.

many activities. Some of these activities relate to ensuring that some customs and cultural practices are in line with the Constitution generally and, in particular, that such practices are not invoked to introduce or perpetuate inequality. Thus, the functions of the Equal Opportunities Commission are to:

> "monitor, evaluate and ensure that policies, laws, plans, programs, activities, practices, traditions, cultures, usages and customs of [among others] … social and cultural communities, are compliant with equal opportunities and affirmative action in favour of groups marginalized on the basis of sex, race, colour, ethnic origin, tribe, creed, religion, social or economic standing, political opinion, disability, gender, age or any other reason created by history, tradition or custom."[100]

The Commission is also empowered to "examine any law, proposed law, policy, culture, tradition, usage, custom or plan which is likely to have effect of nullifying or impairing equal opportunities to persons in employment or enjoyment of human rights"[101] and to "prepare and publish, guidelines for implementation of equal opportunities and the avoidance of acts, practices, usage, customs, tradition or cultures that undermine equal opportunities."[102] The Commission is also empowered to:

> "rectify, settle or remedy any act, omission, circumstance, practice, tradition, culture, usage or custom that is found to constitute discrimination, marginalisation or which otherwise undermines equal opportunities through mediation, conciliation, negotiation, settlement or other dispute resolution mechanism."[103]

It is also empowered to:

> "hear and determine complaints by any person against any action, practice, usage, plan, policy programme, tradition, culture or custom followed by any organ, body, business organisation, institution or person which amounts to discrimination, marginalization or undermines equal opportunities."[104]

Although the Commission has handled many cases,[105] it is yet to deal with a matter that involves the relationship between a customary practice and access to equal opportunities.

Another piece of legislation that deals with oppressive customary practices is the Prohibition of Female Genital Mutilation Act, 2010. This Act prohibits female genital mutilation and section 10 of the Act provides that "[a]ny culture, custom, ritual, tradition, religion or any other non-therapeutic reason shall not be a defence under this Act." However, media reports indicate that despite the fact that female genital mutilation is an offence, it is still being practised in some parts of Uganda.[106]

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100 S 14(1).

101 S 14(2)(*b*).

102 S 14(2)(*f*).

103 S 14(3).

104 S 14(4).

105 See generally (for some of the decisions the Commission has published on the website) http://www.eoc.go.ug/publications-downloads (accessed 2020-02-09).

106 See for e.g., Monitor Reporter "How Culture Prepares Women to Defy FGM Law" (28 January 2019) https://www.monitor.co.ug/News/National/How-culture-prepares-women-

Section 46(1) of the Children Act[107] provides that "[a] person who is not a citizen of Uganda may in exceptional circumstances adopt a Ugandan child, if he or she – (a) has stayed in Uganda for at least three years." The rationale behind section 46(1)(*a*) was explained in the High Court case of *Re Nakawesa, Namanda & Katongole (infants)*,[108] where it was observed:

> "[t]he above requirement applies only to foreign nationals who are not members of an indigenous tribe in Uganda; and have not lived in Uganda for at least 3 years. This is so because that group of foreign nationals is not conversant with the social setting and cultural norms of Uganda. Therefore, they require at least a 3 years' stay in Uganda to get an understanding of the above matters so that the subsequent adoption of children from the Ugandan setting might not be an onerous task to them."[109]

The above are some of the pieces of legislation enacted to combat oppressive cultural practices. Another law which, if it is passed, will prohibit some customary practices is the Marriage and Divorce Bill.[110] This Bill prohibits some cultural practices such as widow inheritance (clause 13), forced marriages (clause 16) and depriving widows of their property (clause 123).

5 COURTS WITH JURISDICTION OVER CUSTOMARY LAW ISSUES

Because customary law forms part of the Ugandan legal order, it is important for it to be enforceable and that there be a system to resolve disputes arising out of its enforcement or implementation. This is why some Constituent Assembly delegates believed that wherever there is a dispute between people regarding a question of customary law, they should refer it to courts for resolution.[111] Parliament has enacted legislation stipulating that courts have jurisdiction over customary law matters. In Uganda, different courts have different jurisdiction. Thus, Article 129 of the Constitution provides as follows:

> "(1) The judicial power of Uganda shall be exercised by the courts of judicature which shall consist of – (a) the Supreme Court of Uganda; (b) the Court of Appeal of Uganda; (c) the High Court of Uganda; and (d) such subordinate courts as Parliament may by law establish, including qadhis' courts for marriage, divorce, inheritance of property and guardianship, as may be prescribed by Parliament. (2) The Supreme Court, the Court of Appeal and the High Court of Uganda shall be superior courts of record and shall each have all the powers of such a court. (3) Subject to the provisions of this

Kween-defy-FGM-law/688334-4960544-5cc2pc/index.html; Monitor Correspondent "Police Arrest 19 for Aiding Female Circumcision" (23 January 2019) https://www.monitor.co.ug/News/National/Police-arrest-19-for-aiding-female-circumcision/688334-4946618-lmbi2l/index.html (accessed 2020-02-09).

107 Children Act Chapter 59.

108 *Re Nakawesa, Namanda & Katongole (infants)* (Adoption Cause No 164 of 2011) [2011] UGHC 107 (2 August 2011).

109 *Re Nakawesa, Namanda & Katongole (infants) supra* 2.

110 Marriage and Divorce Bill, 2009.

111 *Proceedings of the Constituent Assembly* 4009.

> Constitution, Parliament may make provision for the jurisdiction and procedure of the courts."

Because many customary law issues are at local level and each ethnic group has its own unique cultural practices, Parliament thought it wise to confer jurisdiction over customary law matters to local courts. This was done by enacting the local council courts on the basis of Article 129(1)(*d*) of the Constitution. Thus, section 10(1)(*b*) of the Local Council Courts Act, 2006 provides:

> "Subject to the provisions of this Act and of any other written law, every local council court shall have jurisdiction for the trial and determination of causes and matters of a civil nature governed only by customary law specified in the Third Schedule."[112]

According to the Third Schedule to the Act, local council courts have jurisdiction with regard to the following customary law matters: "(a) disputes in respect of land held under customary tenure; (b) disputes concerning marriage, marital status, separation, divorce or the parentage of children; (c) disputes relating to the identity of a customary heir; (d) customary bailment."[113] Section 32 of the Act provides for the right of appeal against the decisions of local council courts. Through the appeal process, customary law issues are also dealt with by magistrates' courts and the courts of record (the High Court, the Court of Appeal and the Supreme Court). However, as the above case law has illustrated, courts of record have also dealt with customary law questions when they are part of the issues that these courts have been called upon to resolve.

Local council courts are presided over by lay persons and are not courts of record although they are expected to keep a record of their decisions.[114] The jurisdiction of local council courts in customary law matters has been emphasised by the High Court.[115] Practice from Uganda shows that some local council courts have exercised that jurisdiction in cases such as determining ownership in customary land matters[116] and trespass on

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[112] Regulation 26(g) of the Local Council Courts Regulations, 2007 provides that "[e]very court shall have jurisdiction for the trial and determination of the following cases or matters 'civil disputes governed by customary law– disputes in respect of land held under customary tenure; disputes concerning marriage, marital status, separation, divorce or the parentage of children; disputes relating to the identity of a customary heir; customary bailment.'"

[113] These courts had similar jurisdiction even before 2006. See *Zaidi Ziwa v Gregory Kayita Senvuma* (Civil Suit No. 164 of 1993) [1999] UGHC 8 (31 May 1999); *Ntalo George v Babirye Edinansi* (Civil Revision No. 005 of 2006) [2009] UGHC 209 (25 June 2009); *Munobwa Muhamed v Uganda Muslim Supreme Council* (Civil Revision No. 1 of 2006) [2010] UGHC 121 (26 August 2010). Before 2006, local council officials had immunity from prosecution for anything done in the course of their duties (they enjoyed judicial privilege), see *Angulu George v Republic of Uganda* (Civil App. No. 8 of 2007) [2008] UGHC 94 (29 August 2008).

[114] *Barara v Nyakamaga* (High Court Civil Revision 003/2008) [2012] UGHC 46 (13 March 2012).

[115] *Mutonyi Margaret Wakyala v Tito Wakyala* (HCT-04-CV-CR-0007-2011) [2011] UGHC 117 (15 August 2011); *Busingye Jamiya v Mwebaze Abdu* (HCT-05-CV-CR-0033-2011) [2012] UGHC 68 (18 April 2012).

[116] *Dudu v Mwalimu Juma* (Civil Revision No. 0003 OF 2015) [2016] UGHCLD 7 (14 July 2016); *Kemish v Dima* (Miscellaneous Civil Application No. 0016 of 2015) [2017] UGHCLD

customary land.[117] Local court officials enjoy immunity from prosecution for anything they have done in the course of their duties.[118] The High Court held that the jurisdiction of local council courts does not extend to land that is not customary land.[119] In some cases, while dealing with customary land matters, local council courts have conducted their proceedings irregularly and their decisions have had to be set aside by the High Court.[120] Because of illiteracy, some people are not aware that local council courts have jurisdiction over customary land matters and they refer disputes over customary land to politicians.[121] This means that there is a need for the local council officials to be trained in these matters and for people to be informed about the jurisdiction of local council courts. In some cases, people have disobeyed the orders of local council courts to vacate customary land on which the courts found them to have trespassed and they have had to ask politicians to intervene on their behalf.[122]

Even before the adoption of the 1995 Constitution, the jurisdiction of the local council courts included customary law matters.[123] However, apart from local council courts and magistrates' courts, customary law is also enforced by informal courts. The problem is that these informal courts are not recognised by the Constitution because, during the making of the Constitution, submissions for such courts to be recognised in the Constitution were unsuccessful. The Constitutional Commission observed:

> "[a]lthough the magistrates and RC courts[124] dispose of many disputes which may arise out of customary law in Uganda, many such disputes are solved by informal courts, usually clan and family courts that deal with disputes between individuals. Some views have suggested that such courts should be recognised by law so that their decisions can be enforced. We are of the view that this should not normally be necessary because anyone dissatisfied with

56 (27 April 2017); *Uganda Telecom Limited v Adratere Oreste* (Miscellaneous Civil Application No. 0021 of 2015) [2017] UGHCLD 9 (20 July 2017); *Wambewo v Mazelele* (HCT-04-CV-MA-0171-2011) [2012] UGHC 173 (16 August 2012); *Onzia v Shaban Fadul* (Civil Appeal No. 0019 of 2013) [2017] UGHCLD 82 (15 June 2017); *Dubo v Minduni* (Civil Revision No. 0001 of 2017) [2017] UGHCLD 54 (27 April 2017); *Odyeki v Yokonani* (Civil Appeal No. 0009 of 2017) [2018] UGHCCD 50 (11 October 2018).

117 *Lubwama v Muganzilwazza Growers Co-operative Society* (Civil Appeal No.018 of 2016) [2017] UGHCLD 52 (2 May 2017); *Kisame Samson alias Sseruwagi v Ali Kiyinikibi* (Civil Revision No. 4 of 2008) [2010] UGHC 21 (21 February 2010); *Kurusumu v Masereka* (HCT-01-LD-CA 29 of 2014) [2016] UGHCLD 52 (20 December 2016).

118 *Muwisa v Biguyi* (HCT-01-LD-CA-0041 of 2013) [2016] UGHCLD 50 (20 December 2016).

119 *Alanyo v Angut* (Civil Appeal No HCT-02 CV CA 0025/2009) [2014] UGHCLD 60 (22 August 2014); *Administrator General suing Through Grace Nataya v Sunday Edward Mukol* (High Court Civil Suit No. 211 of 2002) (High Court Civil Suit No. 211 of 2002) [2008] UGHC 32 (22 March 2008).

120 *Kirangi v Karimunda* (HCT Civil Revision No. 06 of 2011) [2012] UGHC 191 (21 September 2012).

121 *Sinnabulya v Sekibaala* (Civil Appeal No. 6 of 2005) [2013] UGHCLD 23 (12 March 2013).

122 *Okello v Uganda* (Criminal Appeal No. 0035/2013) [2014] UGHCCRD 37 (22 August 2014).

123 Resistance Committee Courts had jurisdiction over, *inter alia*, "[c]ustomary law matters such as disputes on land, marital status of women, paternity of children, identity of customary heirs, impregnating of girls under eighteen years of age, elopement with girls under eighteen years and customary bailment". See *Report of the Constitutional Commission* par 17.18(b).

124 Resistance Committee Courts which would later become local council courts.

> the decision of such courts can commence proceedings in the RC courts which have power to deal with a wide range of customary law matters."[125]

The refusal to acknowledge informal courts means that many customary law disputes are being resolved informally. Practice from Uganda shows that clan courts have dealt with some customary matters such as land,[126] bride price,[127] and marriage disputes.[128] However, they also settle matters that have nothing do to with customary law such as defilement cases.[129] In determining a sentence to impose on a person convicted of an offence, courts will also consider, *inter alia*, his or her cultural beliefs and background.[130]

6 CONCLUSION

In this article, the author has demonstrated the measures being taken in Uganda to abolish oppressive and discriminatory cultural practices. Two general approaches have been followed in this regard – namely, a general prohibition of such practices by the Constitution, and also specific prohibitions. With regards to the general prohibition, the Constitution prohibits oppressive customary practices; and courts, relying on the Constitution, have found such practices to be unconstitutional. With regard to specific prohibition, legislation has been enacted to criminalise some cultural practices such as female genital mutilation. Nevertheless, some prohibited practices continue to be practised in Uganda.

It is submitted that the government should intensify educational campaigns to ensure that those who engage in such practices are sensitised about the law and also the disadvantages of these practices. Alternative ways in which some cultural practices could be practised without violating the Constitution must also be considered. In cases where practices are criminalised – for example, female genital mutilation – effective policing and prosecution could deter some from engaging in these.

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125 *Report of the Constitutional Commission* par 17.157. See also par 18.35.

126 Emuron "Former Soldier Throws Grenade in Land Meeting, Gets Killed" (22 January 2019) https://www.monitor.co.ug/News/National/Former-soldier-throws-grenade-land-meeting-gets-killed/688334-4945264-11dqhqy/index.html (accessed 2020-02-09).

127 Ocungi "Acholi to Draft a Bylaw on Bride Price, Says Chief" (1 January 2019) https://www.monitor.co.ug/News/National/Acholi-to-draft-a-bylaw-on-bride-price/688334-4916522-141ppat/index.html; Otwii "Lango Men Forced to 'Marry' the Dead" (12 December 2018) https://www.monitor.co.ug/News/National/Lango-men-forced--marry--dead/688334-4891394-ha83rt/index.html (accessed 2020-02-09).

128 Owich and Ocungi "Traditional Leaders on the Spot Over Increasing Torture" (3 October 2018) https://www.monitor.co.ug/News/National/Traditional-leaders-spot-over-increasing-torture/688334-4788378-wfalk6z/index.html (accessed 2020-02-09).

129 Mukooli "In Bududa, Parents Prefer Clan Heads to Resolve Defilement Cases" (28 August 2018) https://www.monitor.co.ug/News/National/In-Bududa-parents-prefer-clan-heads-resolve-defilement-cases/688334-4731612-vdev20z/index.html (accessed 2020-02-09).

130 *Uganda v Dimba* (Criminal Case No. 0089 of 2014) [2017] UGHCCRD 5 (16 January 2017); *Gwolo Jackson v Uganda* (Criminal Appeal No. 0014 of 2017) [2017] UGHCCRD 118 (14 September 2017).

A CRITICAL ANALYSIS OF SOUTH AFRICA'S SYSTEM OF GOVERNMENT: FROM A DISJUNCTIVE SYSTEM TO A SYNERGISTIC SYSTEM OF GOVERNMENT

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SUMMARY

The right to vote in South Africa is one of the fundamental rights recognised by the Constitution. South Africa ran its sixth election on 8 May 2019. Since the birth of democracy in 1994, it has had four presidents, two of whom did not serve their full term in office. Former President Thabo Mbeki resigned after he was recalled for using the country's law enforcement system to undermine Jacob Zuma's chances of succeeding him. He resigned with nine months to go in his second term in office. Mbeki's successor, former President Jacob Zuma, also resigned from office during his second term with 14 months to go. Several stinging criticisms were levelled against him. For example, he was accused of tribalism and being a "ruralitarian" who lacked urban sophistication to understand and lead a large economy such as South Africa. He was also accused of benefiting his family through creating business opportunities for them and directing development projects to his home village. Furthermore, his government was accused of being weak on corruption, and being easily influenced by the communists.

In light of the above, the question that begs for an answer is: does the current South African system of government and electoral system provide for high-level political accountability? In answering this question, further ancillary questions are posed throughout the article. What informed the drafters of the Electoral Amendment Act 73 of 1998 to choose the current electoral system? Is it time for South Africa to review its electoral system? How can South Africa increase the level of political accountability of the President?

1 INTRODUCTION

Democracy is a form of government that allows citizens to participate in the affairs of their country. South Africa attained democracy in 1994, and has since undergone many political changes. Most of these changes were ushered in by the Interim Constitution, which introduced a new system of

government and new institutions.[1] The overall functioning of a country's systems and institutional qualities depend on cooperation and consensus between government and citizenry.[2] Therefore, both government and citizenry play an important role in ensuring the smooth running of the country, and must work in harmony for the benefit of the country as a whole. The President of South Africa is the head of state and the head of the national executive.[3]

The electoral system of any country determines how leaders are brought into power, and the choice of the preferred legal system should be based on what the nation at large wants to achieve.[4] The election of a president is one of the most important procedures of a democratic state since the president is required to display the highest degree of integrity when performing his or her duties.[5] With democracy for South Africa came, *inter alia,* a new electoral system managed by the Independent Electoral Commission (IEC).[6]

In light of the above, the question is: does the current process for electing the president in South Africa safeguard political accountability? This article interrogates the shortcomings of the current system of government and the electoral system. First, it contextualises the right to vote as well as its scope and application. This is done by giving the historical background to this right, which in turn shows that the right to vote has undergone much change and development in general. The article then gives an overview of the South African 7 of government, before providing a comparative overview of the presidential system in Botswana.[7] The article moves on to deal with the South African electoral system and the parliamentary system of government along with the current procedure for electing the president. Finally, the article proposes a new process for electing the president.

2 THE RIGHT TO VOTE UNDER THE FINAL CONSTITUTION

During the pre-1994 era, the majority of South Africans were prohibited from voting in general elections based on their race.[8] The oppressive and undemocratic apartheid regime curtailed much extra-parliamentary political activity and, as such, the majority of South Africans were excluded from

1 SAHO "South Africa: First 20 Years of Democracy 1994–2014" (14 January 2014) https://www.sahistory.org.za/article/south-africa-first-20-years-democracy-1994-2014 (accessed 2018-06-14).

2 United Nations Development Programme "Governance Principles, Institutional Capacity and Quality" in *Towards Human Resilience: Sustaining MDG Progress in an Age of Economic Uncertainty* (2015) http://www.undp.org/content/dam/undp/library/Poverty%20Reduction/Inclusive%20development/Towards%20Human%20Resilience/Towards_SustainingMDGProgress_Ch8.pdf (accessed 2018-04-19).

3 S 83 of the Constitution of South Africa, 1996 (the Constitution).

4 Phirinyane *Election and the Management of Diversity in Botswana* (2013) 49.

5 *United Democratic Movement v Speaker of the National Assembly* 2017 (8) BCLR 1061 (CC); 2017 (5) SA 300 (CC) par 9. If the president is found to be guilty of gross misconduct or to have violated the Constitution, such president may be removed from office in terms of s 89 of the Constitution. See also s 1(*d*) and 57 of the Constitution.

6 The IEC was established in 1996 by the Electoral Commission Amendment Act 14 of 2004.

7 The reasons for choosing Botswana for the study are dealt with in detail in heading 7 below.

8 Currie and De Waal *The Bill of Rights Handbook* 6ed (2013) 421.

voting. The apartheid government had laws that applied to white people and laws that applied to black people. One change that came with the advent of democracy was the adoption of a new electoral system, one of the fundamental components of the process of democratic consolidation. Justice Langa in a lecture delivered at Stellenbosch University opined that the Constitution is a transformative document, one that seeks to move the country from a discriminatory past to a future based on the triplet of human dignity, equality and freedom.[9]

The Constitution came with an array of human rights. Section 19(1)(*b*) of the Constitution states that every citizen is free to make political choices, which includes, *inter alia*, a right to participate in the activities of a political party. In terms of this provision, every citizen has a right to participate in the activities of political parties, and one of those activities is appointing the leader of such political party. Section 19(3)(*a*) of the Constitution grants every citizen a right to vote. In terms of section 6 of the Electoral Act,[10] any South African citizen who is at least 18 years of age may vote. The Constitution does not expressly require membership of a political party to participate in the election of leaders of political parties.

The right to vote is directly linked to the right to freedom of expression that is afforded to everyone in terms of section 16 of the Constitution. When citizens vote, they directly present their personal views and/or expression with regard to whom they want as a leader of the country. Section 19, therefore, indirectly guarantees every citizen the freedom to express their political aspirations.

In *Ramakatsa v Magashule*,[11] the court affirmed that political rights are important because they aim to give effect to a system of representative democracy.[12] Furthermore, the court in *August v Electoral Commission*[13] addressed political rights of prisoners. In this regard, the court highlighted the right to vote and its nexus with the value of human dignity.[14] It held:

> "[T]he right to vote of each and every citizen is a badge of dignity and of personhood".[15]

In *Richer v Minister of Home Affairs*,[16] the court recognised the importance of citizens exercising the right to vote as an essential working component of

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9 Langa "Transformative Constitutionalism" 2006 3 *Stellenbosch Law Review* 352.

10 73 of 1998.

11 [2012] ZACC 31.

12 In this case, the court held that "in the apartheid era the majority of the people in the country were denied political rights that were enjoyed by the minority. The majority of black people could not form or join political parties of their choices. Nor could they vote for those who were eligible to be members of parliament. They were not only disenfranchised but were also excluded from all decision-making processes undertaken by the government, including those affecting them".

13 [1999] ZACC 3.

14 *August v Minister of Home Affairs* [2018] ZAECMHC 12. See also *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* [2004] ZACC 10.

15 *Ibid.*

16 2009 (3) SA 615 (CC).

democracy.[17] The court further held that, when a citizen marks their ballot [paper], they remind those who are or will be elected that their position is based on the will of the people and will remain subject to that will. In *New National Party of South Africa v Government of South Africa*,[18] the court held that the right to vote is fundamental to a democracy and there can never be democracy without the right to vote.[19] Furthermore, the court held that a citizen's right to vote clearly places a duty on the legislature and the executive to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised.[20]

3 SOUTH AFRICA'S INTERNATIONAL OBLIGATIONS IN RELATION TO POLITICAL RIGHTS

The obligation of states to provide citizens with the right to vote is also contained in international agreements and declarations adopted by international organisations such as the United Nations and the African Union and Southern African Development Community (SADC). For example, Article 21 of the Universal Declaration of Human Rights[21] recognises the right of citizens to participate in the activities of government.[22] Article 25 of the International Covenant on Civil and Political Rights (ICCPR)[23] provides for a right to participate in the public affairs of states, which also includes a right to vote.[24] Article 2.1 of the SADC Principles of Guidelines Governing Democratic Elections[25] requires member states to hold regular free and fair, transparent, credible and peaceful democratic elections to institutionalise legitimate authority of representative government. Article 2 of the African Charter on Democracy, Elections and Governance[26] provides that all member states must "[p]romote the holding of regular free and fair elections to institutionalise legitimate authority of representative government as well as democratic change of governments".

17 *Richer v Minister of Home Affairs supra* 36.

18 1999 (3) SA 191 (CC).

19 *New National Party of South Africa v Government of South Africa supra* 11.

20 *Ibid.*

21 Universal Declaration of Human Rights, 1948.

22 This provision states: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

23 International Covenant on Civil and Political Rights, 1966.

24 This provision states: "Every citizen shall have a right and opportunity to … (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors".

25 SADC Principles of Guidelines Governing Democratic Elections, 2015.

26 African Charter on Democracy, Elections and Governance, 2007.

4 AN OVERVIEW OF SOUTH AFRICA'S ELECTORAL SYSTEM

Constitutions are skeletal in nature. Quite often further legislation is required to bring constitutional provisions into practice. South Africa similarly needed to introduce an electoral system through the enactment of legislation.[27] To achieve this, the government assigned the Electoral Task Team (ETT) with the task of drafting an Electoral System Act that would regulate elections in South Africa in terms of the Constitution. The ETT was, therefore, guided by the Constitution in drafting the proposed electoral system. The ETT was chaired by Dr F Van Zyl Slabbert and comprised 13 members.[28]

The ETT was required to draft fair, inclusive, and simple legislation, which would also ensure greater accountability in South African politics.[29] When the ETT commenced its investigation, South Africa had already had two democratic elections in 1994 and 1999.[30] Therefore, the main aim of the ETT was to investigate whether the 1994 electoral system (used in the 1994 and 1999 elections) was suitable for the envisaged democratic South Africa. The ETT used the 1994 electoral system as the basis on which to establish the extent to which the electorate identified and understood the 1994 electoral system.

The question for the ETT was how it could determine the "appropriate" electoral system for South Africa? The ETT had to answer the following two questions: first, would the advantages of adjusting the 1994 electoral system outweigh the concomitant disadvantages?[31] Secondly, would the advantages of preserving the 1994 electoral system outweigh the concomitant disadvantages?[32] However, the ETT members agreed that its purpose was not to amend the Constitution, but to enact a piece of legislation that would be in line with the Constitution.[33] When drafting amendments to the electoral system, the ETT considered *inter alia* sections 1(*d*), 19, 46(1), 60, 61, 62 and 105 of the Constitution. Furthermore, the ETT agreed that the advantages and disadvantages of the electoral system applicable in the 1994 and 1999 elections had to be thoroughly investigated before it could decide to change or do away with it.[34] The challenge was to

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27 The 1994 electoral system was designed to apply only to the 1994 and 1999 elections. Therefore, the Electoral Task Team (ETT) had to draft legislation that would regulate elections in South Africa moving forward. For the sake of clarity, the Electoral Act that applied during the 1994 and 1999 elections is referred to as the proposed Electoral Act and the electoral system that applied in 1994 and 1999 election is referred to as the proposed electoral system.

28 The Electoral Task Team Report, 2003 (ETTR).

29 ETTR 16–19. The ETT regarded these as the "[c]ore values/principles for judging an electoral system".

30 The 1994 electoral system was carried over to the 1999 national and provincial elections by means of items 6(3)(a) and 11(1)(a) of Schedule 6 of the Constitution.

31 ETTR 12.

32 *Ibid.*

33 ETTR 13.

34 ETTR 1.

draft a suitable electoral system for a highly divided and unequal society in the process of delicate transition.[35]

This was a difficult task indeed for the ETT members. The ETT had to consider the "most appropriate" electoral system against a background of "the salient and relevant aspects of the South African context".[36] After vigorous debate, the ETT agreed that the electoral system should be judged on the basis of fairness, inclusiveness, simplicity and accountability, being the core values and principles of a democratic electoral system.[37] The ETT agreed on a number of aspects with regard to these principles.

Firstly, fairness means that every eligible member of the electorate should be afforded an opportunity to vote, and all votes should carry equal weight.[38] This is in line with the proportionality principle as required by the Constitution. In terms of this principle, political parties gain seats in Parliament in proportion to the number of votes they received.

Secondly, inclusiveness entails taking into account the given demographic, ethnic, racial and religious diversity of the South African voting population, and making an effort to allow the widest possible degree of participation.[39]

Thirdly, simplicity means that the electoral system should be practically accessible and easily understandable.[40]

Lastly, the ETT identified a lack of political accountability in the 1994 electoral system. Collective accountability was insufficient and the proposed electoral system should have some form of individual accountability.[41]

The ETT had to reconcile two schools of thought that emerged out of its deliberations: one school thought that the current system should remain unchanged; and the other, that a larger constituency representation should be built into the system.[42] The ETT failed to reach a consensus on these two points of view. As a result, the two contrasting groups each drafted and signed their own set of recommendations, with the current system winning the majority vote.[43]

The results of the research were as follows: 74 per cent of respondents were satisfied with the 1994 electoral system;[44] 72 per cent felt that the 1994 electoral system was fair to all parties; 81 per cent felt that it allowed for different voices in Parliament;[45] 78 per cent felt that it allowed them to

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35 Louw "The South African Electoral System" (20 March 2014) https://hsf.org.za/publications/hsf-briefs/the-south-african-electoral-system (accessed 2018-11-11).

36 ETTR 19.

37 ETTR 16–20.

38 ETTR 16.

39 *Ibid*.

40 ETTR 17.

41 ETTR 18–19.

42 ETTR 12.

43 The ETTR contains both majority recommendations (in chapter four) and minority recommendations in chapter five.

44 ETTR 8.

45 *Ibid.*

change the political party in power;[46] and 68 per cent felt that it ensured political parties could be held accountable for their actions.[47]

The ETT should be commended for attempting to create an electoral system that would be fair, inclusive and simple. The current electoral system can be easily understood by both literate and illiterate people in South Africa. Although not a principle that formed the basis of the ETT investigation, the current system also makes provisions for openness, in that the results are broadcasted live as and when they become available.

The 1994 electoral system had an advantage, however, in that it was the first electoral system to be used post-apartheid. South Africans had nothing with which to compare the 1994 electoral system, since the apartheid electoral system was discriminatory in nature. It is submitted that South Africans were looking for the bare minimum from the 1994 and 1999 elections; for a nation that had been oppressed for so long, a bare minimum offered by democracy was better than what the apartheid regime had offered.

The current electoral system has been tried and tested in the last six democratic elections since 1994.[48] The question is whether it is time to increase the level of accountability of South Africa's president, given the experience of fraud and maladministration in the past 25 years? The current system has not been without flaws and is capable of improvement.

First, the political accountability[49] of the President is unclear under the prevailing regime. The leader of a political party is individually accountable to his or her political party but this does not amount to public accountability. With regard to collective accountability, a political party as an organisation is accountable to the public and to Parliament. Chapter 4, part 6 of the Electoral Act 73 of 1998 was amended in 2003 to include the current electoral system.

Secondly, once a person ascends to the office of president, it is difficult to remove such person from office. This was evident from the *Economic Freedom Fighters v Speaker of the National Assembly*[50] case. Although the court found that former President Zuma had failed as the President of South Africa to "uphold, defend and respect the Constitution as the supreme law of the land", it also did not order the removal of Zuma from office.[51] This is because the powers to remove a president vest in the National Assembly (NA) in terms of section 89(1) of the Constitution, and such an order would thus have been *ultra vires*. If the President is among the majority of members of the NA, who are also from one party, those members are likely to vote against the removal of such president.

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46 *Ibid.*

47 *Ibid.*

48 The ETT did not introduce a new electoral system; it only worked on improving the system that was used in 1994.

49 Hoque and Pearson *Accountability Reform, Parliamentary Oversight and the Role of Performance Audit in Australia* (2018) 176.

50 (CCT76/17) [2017] ZACC 42.

51 *Economic Freedom Fighters v Speaker of the National Assembly supra* 5.

Lastly, certain political rights are afforded only to members of political parties[52] even though section 19 of the Constitution includes "every citizen".[53] Therefore, even though the right to vote is enshrined by the Constitution, and is afforded to every citizen, in practical terms, only members of a political party can actively and directly take part in electing the President. All other voters have an indirect say in the election of the President through their support of the party of their choice in national elections.

5 THE PROCESS FOR ELECTING THE PRESIDENT OF SOUTH AFRICA

South Africa has a bicameral parliament and, as such, comprises two houses of parliament – namely, the NA and the National Council of Provinces (NCoP).[54] These two houses represent the public at the national and provincial level. South Africa follows the proportional representation system of government[55] in terms of which every vote counts; and the total number of votes for a party determines the number of seats it gets in Parliament.[56] This is called party-list proportional representation because parties are represented in proportion to their electoral support. The NA operates at the national level and has 400 seats comprising members of political parties; one of its functions is to elect the President.[57] The NA is required to elect the President at its first sitting after national elections or whenever necessary.[58]

Before a candidate can be president in South Africa, the various political parties must contest a national general election. The Electoral Act details the process for such contestation. Section 26 of the Electoral Act provides that a political party may contest an election if such party is registered and has submitted a list of candidates. Section 27 of the Electoral Act provides that a registered political party that intends to contest an election must nominate candidates and submit a list of those candidates for election to the chief electoral officer. Regulation 2(a) of the same Act requires the lists of nominated candidates to be signed by the authorised representative of the political party.[59] This emphasises the rule that only members of the political party can be nominated and consequently elected as president of the country. Practically speaking, when a person is still running or campaigning

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52 Achury and Scarrow "The Consequences of Membership Incentives: Do Greater Political Benefits Attract Different Kinds of Members?" 2020 26 *Party Politics* 58.

53 S 19 of the Constitution.

54 De Vos *South African Constitutional Law in Context* 2ed (2015) 108.

55 Parliament of the Republic of South Africa "How Parliament Is Structured" https://www.parliament.gov.za/how-parliament-is-structured (accessed 2018-06-18).

56 IEC "Electoral Commission South Africa 2016" *in Municipal Elections Handbook* (2016) 13.

57 Parliament of the Republic of South Africa https://www.parliament.gov.za/how-parliament-is-structured.

58 Once elected, the President becomes Head of State and head of the national executive.

59 *Electoral Commission v Inkatha Freedom Party* [2011] ZACC 7; see generally Dube and Machaya "The Application of the Doctrine of *Res Judicata* in Political Rights Cases: *National Freedom Party v Electoral Commission and Others*" 2016 20 *Law Democracy and Development* 192–199.

to be leader of a political party, such person represents a political party, but once elected as a leader of a political party, he or she represents the public.

Section 38 of the Electoral Act contains the procedure for voting during elections. The procedure to vote is as follows: the voter is handed a ballot paper; enters the voting compartment; chooses a political party or candidate by marking the ballot paper accordingly and places the ballot paper in the ballot box.

The process of electing a president in South Africa is contained in section 86 and Part A of Schedule 3 of the Constitution. The Chief Justice or a designated judge calls for the nominations, makes rules for the proceedings, and presides over such proceedings.[60] There are a number of steps in the procedure for electing a president in terms of Schedule 3.

Firstly, the Chief Justice makes a call for the nomination through a nomination form. The nomination form must be signed by two members of the NA.[61] A candidate has to be nominated by a province to make it onto the ballot, but may also be nominated from the floor by 25 per cent of voting delegates at the national conference.[62]

Secondly, a person who is nominated must accept the nomination by signing either the nomination form or any other form of written confirmation.[63]

Thirdly, the Chief Justice or his/her delegate presiding over the meeting must announce the names of the persons who have been nominated as candidates. Debates are not permitted at this stage.[64] If only one candidate is nominated, the person presiding over the proceedings must declare that candidate elected as the President.[65]

Fourthly, if more than one candidate is nominated, a vote must be taken at the meeting by secret ballot, and each member is entitled to one vote.[66] Lastly, the Chief Justice or his/her delegate presiding over the proceedings must declare the candidate who receives the majority votes as the President.[67]

6 CRITICAL ANALYSIS OF SOUTH AFRICA'S SYSTEM OF GOVERNMENT

South Africa has a hybrid system of government with two formal legal systems.[68] In other words, South Africa follows both a presidential and a parliamentary system of government. Under this hybrid system, political

60 Schedule 3, Part A, s 2 of the Constitution.
61 Schedule 3, Part A, s 3(2)(*a*) of the Constitution.
62 *Ibid*.
63 Schedule 3, Part A, s 3(3) of the Constitution.
64 Schedule 3, Part A, s 4 of the Constitution.
65 Schedule 3, Part A, s 5 of the Constitution.
66 Schedule 3, Part A, s 6 of the Constitution.
67 Schedule 3, Part A, s 7 of the Constitution.
68 Schwella "Federalism in South Africa: A Complex Context and Continued Challenges" 2016 *Aufsatz/Enthaltenes Werk* 85–86.

parties have a decisive influence on the way in which government is composed and the executive power rests in the President and the Cabinet.[69] A number of characteristics are typical of a parliamentary system of government.

First, there is a strict demarcation between the powers of the executive and those of the legislature known as separation of powers. In this system, the Speaker of Parliament plays a vital role.[70] This provides checks and balances between all spheres of government. This way they can raise their voice against any kind of partiality and the misuse of powers by the governing body.

Secondly, Parliament must approve executive decisions before they are taken. This allows for members of parliament to challenge the rules and decisions tabled in Parliament by the government.

Thirdly, Parliament is elected for a certain period of time.[71] Since the parliamentary system is democratic in nature, elections can be called and held at any time, if the need arises.[72]

Lastly, the President may be removed via the approval of a vote of no confidence.[73] When such votes are passed, either a new government is formed or, in case this is not possible, new elections are held.[74]

In South Africa, legislative powers rest in both houses of parliament. The NA is generally a constitutionally and politically dominant house.[75] In the NA, political parties are the democratic link between the electorate and the legislature. Generally, a person cannot become a member of parliament unless also a member of a political party.[76] Therefore, the Constitution established is not only a parliamentary system of government in which the majority party in the NA forms a government, but also a system of party government.[77]

However, the parliamentary system is not without its disadvantages. First, the majority party in the NA has decisive power on matters tabled before Parliament.[78] More power may be distributed and/or misused. As a result, corruption can easily spread throughout all spheres of government. The problem that this presents is that if one party is in the majority, it can implement and approve bills and decisions, and the views and opinions of the opposition will not have an effect.[79] This represents a challenge since the

69 S 83 of the Constitution.

70 Parliament of the Republic of South Africa "The Speaker" https://www.parliament.gov.za/na-presiding-officers (accessed 2018-06-18).

71 S 49(1) of the Constitution.

72 S 50(1) of the Constitution.

73 S 89 of the Constitution.

74 S 50(2) of the Constitution.

75 Parliament of the Republic of South Africa https://www.parliament.gov.za/how-parliament-is-structured.

76 De Vos *South Africa Constitutional Law* 109.

77 *Ibid.*

78 Constitutionally Speaking "How Can We Solve the Problem With Our Electoral System" (12 March 2012) https://constitutionallyspeaking.co.za/how-can-we-solve-problems-with-our-electoral-system/ (accessed 2018-06-18).

79 *Ibid*.

decision of a party with most votes may not necessarily reflect the views of the public. This was evident when the former President Jacob Zuma's competence to lead the country was challenged throughout his term in office. Molomo argues that since the President enjoys extensive executive powers, the votes must come directly from the people.[80]

Secondly, the parliamentary system is ineffective when it comes to ensuring individual political accountability that is directly linked to the populace.[81] This is because, in the parliamentary system of government, the President is only indirectly accountable to the voters.[82] For example, the parliamentary system of government in South Africa came under attack when two African National Congress (ANC) members of parliament, Ben Turok and Gloria Borman, abstained from voting for the Protection of State Information Bill in 2012.[83] Turok and Borman were summoned to appear before the ANC's national disciplinary committee, but the proceedings were postponed indefinitely.[84] The problem here is that members of parliament are answerable not to the populace, but to the leader of their political parties. After all, a member of parliament is not removed from his or her seat by the electorate, but by the political parties.

The importance of political accountability has been highlighted in *McBride v Minister of Police*, where the court held that accountability is one of the important values enshrined in the Constitution and it is a basic tenet for good governance.[85]

Thirdly, South Africa uses a closed-list proportional representation system.[86] In this system, political parties submit a list of individuals to be elected as members of national and provincial legislatures.[87] The electorate does not have the power or right to determine party lists, but instead votes for political parties, regardless of any disinclination towards certain individuals on the party lists.[88]

Lastly, even though political parties lie at the heart of South Africa's constitutional democracy, the Constitution does not regulate the internal affairs of political parties, nor does it contain extensive provisions on the appropriate constitutional relationship between political parties and the constitutional structures such as the legislature and the executive.[89] For example, the Constitution does not regulate how the leaders of political parties should be elected or the manner in which their members should be

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80 Molomo "Democracy Under Siege: The Presidency and Executive Power in Botswana" 2000 14 *Botswana Journal of African Studies* 106.

81 Strom "Delegation and Accountability in Parliamentary Democracies" 2000 *European Journal of Political Research* 1. See also Persson, Roland and Tabellini "Separation of Powers and Political Accountability" 1997 122 *The Quarterly Journal of Economics* 1197.

82 *Ibid.*

83 Sibalukhulu "SA's Electoral System Fails the People" (20 April 2012) https://mg.co.za/article/2012-04-20-sas-electoral-system-fails-the-people (accessed 2018-07-23).

84 *Ibid.*

85 *McBride v Minister of Police* (CCT255/15) [2016] ZACC 30.

86 S 27 of the Electoral Act.

87 S 86 of the Constitution.

88 Sibalukhulu https://mg.co.za/article/2012-04-20-sas-electoral-system-fails-the-people.

89 De Vos *South African Constitutional Law* 562.

disciplined for misconduct. The required standard of conduct of members of political parties is based on agreement among themselves. The Constitution thus does not spell out how members of political parties should exercise their right to participate in the activities of such political parties. However, the Constitution does require political parties to act in accordance with its prescripts. So far, the only political party that has been forthcoming about the procedure for the election of a leader within its ranks is the ANC.[90] It is currently not clear how the other political parties elect or appoint their leaders.

7 THE PARLIAMENTARY SYSTEM OF GOVERNMENT AND THE RIGHT TO VOTE IN BOTSWANA – A COMPARATIVE OVERVIEW

Botswana is a front-runner in politics in the African region.[91] It gained independence from Great Britain in 1966.[92] The reason Botswana was chosen for comparison in this article is that first, like South Africa, Botswana has a diverse social composition[93] and has more than 15 different ethnic groups.[94] Secondly, Botswana is a modern constitutional democracy, with the Constitution having been mandated by Great Britain when it gained its independence in 1966.[95] Thirdly, although the Constitution of Botswana does not assert its own supremacy, it is regarded by all citizens as the supreme law of the land. Fourthly, it provides for a separation of powers between the legislature, judiciary and executive.[96] However, because the ruling party dominates both the executive and the legislature, the separation of powers only exists in theory. Botswana follows the Westminster parliamentary system where 40 members are elected, and become representatives of the government.[97] Lastly, Botswana is a multi-party democracy and the President is the head of state[98] and head of the executive.[99]

With its independence, Botswana adopted the direct electoral system also known as the first-past-the-post (FPTP) system or the winner-takes-all.[100] The system contains a single party cabinet, which runs the government. Under this system of government, the presidential candidate who wins the

90 ANC *ANC 54th National Conference Nomination Process* (2017) 1.

91 Molomo 2000 *Botswana Journal of African Studies* 95.

92 Phirinyane *Election and the Management of Diversity in Botswana* 2.

93 Botswana divides tribes and language grouping into majority (being the eight Setswana speaking tribes) and the minority (being the seven Setswana-non speaking tribes). Some of the ethnic groups in Botswana are Tswana, Koena, Balete, Kalanga, Mangwato, Yeyi, Lozi and Herero. Consequently, the linguistic and political marginalisation of minority groups may affect their legal standing.

94 Taylor and Good "Botswana: A Minimalist Democracy" 2008 15 *Taylor and Francis Online* 1.

95 Phirinyane *Election and the Management of Diversity in Botswana 2.*

96 *Ibid.*

97 Botlhale and Lotshwao "The Uneasy Relationship Between Parliament and the Executive in Botswana" 2013 45 *The Botswana Society* 46.

98 S 30 of the Constitution of Botswana.

99 S 47(1) of the Constitution of Botswana.

100 Somolekae *Political Parties in Botswana* 2ed (2006) 24.

majority of votes in the NA automatically becomes president.[101] The procedure for electing a president is contained in section 32 of the Constitution of Botswana.

The right to vote for members of parliament in Botswana is afforded to all citizens who are above the age of 18. However, citizens do not have a right to vote for the President since presidential elections are conducted by Parliament.[102] Part VI of the Electoral Act[103] (Electoral Act of Botswana) deals with the election. Section 31 of this Act affords citizens who are registered as voters a right to vote. Section 35 of the same Act gives guidance on nominations for parliamentary and local government candidates and makes provision for individuals to stand for election as independent candidates. Before national general elections, the President must sign a writ of election.[104]

First, the presidential nominations must be delivered to the returning officer, and an aspiring presidential candidate must be supported by 1 000 votes.[105]

Secondly, a person nominated as a parliamentary candidate must declare which of the presidential candidates he or she supports.[106] Where the parliamentary election is contested in any constituency, a poll is taken at which the votes are governed by ballot.[107] The Constitution requires that any parliamentary candidate who declared support for a particular presidential candidate is required to use the same voting colour and symbol, if any, allocated to that presidential candidate for the purposes of the presidential election.[108]

Lastly, the winning presidential candidate is declared by the returning officer if supported by more than half of the total seats in the NA.

This election process has characteristics of both direct and indirect election of a president – direct, in that the initial nominations must be supported by at least 1 000 votes from the public, and thereafter, indirect, in the process where the parliamentary nominees in the NA accept the nominations, and at the same time nominate a presidential candidate they wish to support. The parliamentary and presidential elections are done simultaneously, where a nominated parliamentary candidate in his or her nomination is also required to nominate the presidential candidate he or she supports. In Botswana, as in South Africa, there is no vote of investiture and

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101 *Ibid*.

102 Polity "The Right to Vote: Where Do Citizens in the Diaspora Stand? Part 2" (8 April 2013) http://www.polity.org.za/article/the-right-to-vote-where-do-citizens-in-the-diaspora-stand---part-2-2013-04-08 (accessed 2018-08-20).

103 38 of 1968 of Botswana.

104 S 34 of the Electoral Act of Botswana.

105 S 32(2) of the Constitution of Botswana.

106 S 32(3)(*a*) of the Constitution of Botswana.

107 S 32(3)(*c*) of the Constitution of Botswana.

108 *Ibid.*

the designation of a president is based on the partisan distribution of elected seats rather than an actual vote of the elected MPs.[109]

However, it is not clear whether the electorate in Botswana votes for individuals or for political parties. Somolekae argues that Botswana has a free mandate system, which means that the electorate votes for individuals and not political parties.[110] As such, elected candidates can defect to other parties and still retain their seats.[111] Contrary to this view, Molomo opines that the electorate in Botswana votes for the party and not an individual.[112]

The FPTP electoral system in Botswana has been criticised for its tendency to distort a party's popular support in relation to seats won, and thus promotes a dominant party system. Furthermore, this electoral system is also criticised for being incapable of presenting a true reflection of the interest of the electorate and for being unable to provide for minority groups in the NA.[113] It is also criticised for being unresponsive to changes in public opinion and being open to manipulation of electoral boundaries.[114]

8 A PROPOSED SYNERGISTIC SYSTEM OF GOVERNMENT

The structure of an electoral system is central to the nature of a country's politics. It secures a link between the preferences of citizens, the preferences of elected officials and the government's policy direction.[115] Presidential elections form an important part of the liberal democratic framework.[116] There is no "perfect" system of government and thus both the parliamentary and presidential systems of government are flawed, as seen in South Africa and Botswana. The method of electing a president is directly linked to how a government responds and accounts to the people that it represents. The current electoral system in South Africa is set up in such a way that citizens are forced to vote for a political party, and indirectly vote for a candidate who has already been chosen to be the leader of a political party without citizens' participation. This tampers with the principle of good governance as required by the Constitution, which mandates that citizens should have a voice at the national level.

A key question is whether South Africa should do away with the parliamentary system and adopt a presidential system in which the President is directly elected by the public? Although this option appears attractive at first glance, it is not clear that such a change would necessarily have a positive effect in a country like South Africa. Some critics of the parliamentary system argue that we should do away with the closed-list proportional representation system in favour of a FPTP system in which we

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109 Poteete "Electoral Competition, Factionalism, and Persistent Party Dominance in Botswana" 2012 1 *Cambridge Journal* 81.

110 Somolekae *Political Parties in Botswana* 6.

111 *Ibid*.

112 Molomo 2000 *Botswana Journal of African Studies* 106.

113 *Ibid.*

114 Phirinyane *Election and the Management of Diversity in Botswana* 44.

115 Louw https://hsf.org.za/publications/hsf-briefs/the-south-african-electoral-system.

116 Molomo 2000 *Botswana Journal of African Studies* 95.

elect the representative who obtains the most votes in each constituency.[117] They further argue that the direct election of a president provides the highest degree of accountability.[118] If members of parliament were to be elected directly by the electorate in constituencies, those members would be far more responsive to the needs of the electorate in the constituencies, and would be far more willing to ensure that the hopes and dreams of their constituents find expression in our legislature.[119]

In both presidential and parliamentary systems of government, the public may vote for a particular political party based on the popularity of that political party rather than the individual leader. As such, voters who vote for the ANC may vote for the ANC regardless of the face on the ballot paper. For example, in Botswana, the political behaviour of people in the Central District is influenced by the fact that one of the founding members, Seretse Khama, comes from there.[120] Therefore, whether the President is elected by Parliament or directly by the electorate, there is no guarantee that the electorate will change its electoral behaviour based on how much voters like or respect the person who is the face of a political party. Other factors that may influence the political behaviour of people are religious, ethnic and linguistic identity. Voters may be inclined to support a political leader who is from the same religious, ethnic and linguistic group as them.[121]

De Vos argues that, on paper, the NA is more powerful than the President because the NA has the power not only to elect the President, but also to remove him or her from office. However, in practice, the President has more power until he or she loses the support of the majority party in the NA.[122]

The system of government should, mainly, provide for the highest degree of both individual and collective political accountability because this has the potential to curb corruption within government.[123] Free and fair elections tend to advance competition among political leaders, which in turn provides for a "built-in" form of accountability. As such, it may limit party domination over a long period.[124] Although the Constitution promotes a high level of accountability, one cannot ignore the fact that a culture of unaccountability prevails in the South African government. Section 1(*d*) of the Constitution recognises South Africa as a democratic state that embraces "universal adult suffrage, a national common voters roll, regular elections and a multi-

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117 Constitutionally Speaking https://constitutionallyspeaking.co.za/how-can-we-solve-problems-with-our-electoral-system/.

118 *Ibid.*

119 Constitutionally Speaking "Is It Time to Elect South Africa's President Directly?" (17 January 2017) https://constitutionallyspeaking.co.za/is-it-time-to-elect-south-africas-president-directly/ (accessed 2018-07-20).

120 Phirinyane *Election and the Management of Diversity in Botswana* 8.

121 Phirinyane *Election and the Management of Diversity in Botswana* 8. See also Beyers "Religion as Political Instrument: The Case of Japan and South Africa" 2015 28 *Journal of the Study of Religion* 154–155. For example, the values of the ANC when it was first founded were based on Christian and religious principles. The ANC anthem, *Nkosi Sikelel' iAfrica*, was originally intended as a hymn written by a lay preacher, Enoch Sontonga.

122 De Vos *South Africa Constitutional Law* 174.

123 Chun and Luna-Reyes "Social Media in Government - Selections from the 12th Annual International Conference on Digital Government Research" 2012 29 *Government Information Quarterly* 337.

124 *Ibid*.

party system of democratic government, to ensure accountability, responsiveness and openness".[125] The ultimate form of political accountability is at the ballot box.[126]

South Africa needs a system of government that will ensure that the President is not only directly accountable to Parliament, but also to the public. Therefore, the President needs to be horizontally and vertically accountable to both citizens and Parliament. Vertical accountability provides a nexus between government and citizens through elections. When citizens vote, they demonstrate their political will and choices, which in turn holds the government indirectly accountable. Horizontal accountability ensures that the President is accountable to Parliament. As a result, it ensures that there is a close connection between voters and their representatives based on geographical accountability.[127]

Moving forward, it may be best for South Africa to consider both a direct and indirect election of president by the public. To achieve this, the author proposes a "synergistic system of government" encompassing three steps for presidential election.

Step 1 would be the nomination stage and would entail participation by the electorate in the nomination of presidential candidates. The procedure for nominations would be similar to the procedure for voting at elections and should be as follows: the voter is handed a nomination form; enters the nomination compartment; chooses a presidential candidate by writing the nominee's name on the nomination form and places it in the nomination box. For easier access, there should be nomination boxes at all nomination stations throughout the country. The electorate would be afforded an opportunity to nominate directly any members of a particular political party with the minimum requirements to hold the office of president.

Step 2 would be the acceptance-of-nomination stage. In this stage, a person who is nominated must accept the nomination either by signing the nomination form or by any other form of written confirmation.[128] At least 1 000 votes of the electorate must support the nominee.[129]

Step 3 would be the pre-voting stage. In this stage, all nominees in their respective political parties should be selected. This stage will commence with the political party's internal election for their respective leaders in terms of the party's constitution. At this stage, the current processes for the election of political parties' leaders would be retained so as to safeguard parties' prerogative to determine their own internal processes, except that this prerogative would be limited in that nominations would be made directly by the electorate. The nominees would then compete to be leader of their

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125 S 1 of the Constitution.

126 Constitutionally Speaking "What We Talk About When We Talk About Accountability" (24 March 2010) https://constitutionallyspeaking.co.za/what-we-talk-about-when-we-talk-about-accountability/ (accessed 2018-07-20).

127 Phirinyane *Election and the Management of Diversity in Botswana* 8.

128 These first two steps would require the amendment of Ch 3, Part 3 of the Electoral Act. However, the amendment of legislation is beyond the scope of this article.

129 This threshold is similar to the one followed in Botswana. See s 32(2) of the Constitution of Botswana.

respective political parties.[130] The candidate with more than 51 per cent percent of support would then be leader of his or her political party. Such candidate's name should be submitted to the chief electoral officer in terms of Regulation 2(a) of the Electoral Act.

Step 4 would be the election process and would require the procedure as contained in Chapter 4, Part 1 of the Electoral Act to continue. The current election process in terms of section 26 of the Electoral Act (the procedure for contesting an election by political parties) would be retained, as would the procedure in section 38 of the same Act (the procedure for voting at voting stations).[131] At this stage, the public would confirm the nominations by voting for a political party of their choice. The public would be given an opportunity to vote for a candidate who is going to be president by indirectly voting for a political party of their choice. At the end of the process, the political party with the majority of votes would win the election.[132]

Step 5 would retain the process for the election of the President in terms of section 86 of the Constitution.[133]

Direct elections would ensure that the electorate is afforded an opportunity to nominate a presidential candidate in the first two steps of the proposed process. Indirect elections would continue from step 3 after the nominations. In step 4, the electorate would confirm their political choices by voting for the party with the preferred leader. This would ensure that South African citizens were part of the election process right from the beginning. As a result, political power would flow democratically from the populace as a political unit. According to Peonidis, the confluence of democracy and popular sovereignty gives priority to decision-making procedures that engage the totality of citizens.[134] The participants at the International Conference on Popular Participation in the Recovery and Development Process in Africa supported the participation of citizens in political decisions at all levels. They asserted:

> "We believe strongly that popular participation is, in essence, the empowerment of the people to effectively involve themselves in creating the structures and in designing policies and programs that serve the interest of all as well as to effectively contribute to the development process and share equitably in its benefits. Therefore, there must be an opening up of political process to accommodate freedom of opinions, tolerate differences, accept consensus on issues as well as ensure the effective participation of the people and their organizations and associations."[135]

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130 The process for counting the votes in Ch 4, Part 2 and 3 of the Electoral Act should be followed.

131 These procedures are discussed under heading 3 above and will not be repeated in this section.

132 These processes may require an amendment of the Constitution and the Electoral Act. However, these amendments are beyond the scope of this article.

133 This process has already been dealt with under heading 3 and will not be repeated in this section.

134 Peonidis *Democracy as Popular Sovereignty* (2013) 23.

135 United Nations. Economic Commission for Africa (Governance and Public Administration Division) *The Role of Parliament in Promoting Good Governance* (2013) 19.

9 CONCLUSION

South Africa has come a long way since the advent of democracy. The current South African electoral system espouses and supports democratic values of fairness and inclusivity as envisaged by the Constitution. However, it may be time to revisit some aspects of the electoral system to assess whether they promote democracy as envisaged by the Constitution. However, a change in the electoral system and system of government alone may not be sufficient. Changing the behaviour of the electorate requires more than a change in these systems. Furthermore, both forms of government have advantages and disadvantages. The nature of South Africa with nine provinces, different religions, different cultures and eleven official languages (and several undocumented non-official languages, like *lobedu*) requires a diverse approach. However, the process above may increase the level of vertical accountability of the President. If presidential and parliamentary systems of government are intertwined, such accountability will increase.

THE CHALLENGES OF PROTECTING REFUGEES IN MIXED MIGRATION *VIS-À-VIS* THE APPLICATION OF ARTICLES 1F AND 31 OF THE REFUGEE CONVENTION*

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SUMMARY

This article embarks on a critical analysis of the application of articles 1F and 31 of the Refugee Convention in a mixed migration setting in Africa. It exposes the problem of mixed migration and how it affects refugees and offers a brief history and scope and purpose of these articles. This study argues that article 1F(b) is ambiguous and inadequate, and that it provides room for adjudicators to exclude certain migrants from refugee status. On the other hand, owing to vagueness in these articles, refugees can be penalised, criminalised and detained for possible extradition and repatriation. Additionally, refugees who enter countries of refuge amidst other migrants may find it difficult to report to an appropriate centre to apply for refugee status. Thus, they are not able to comply with article 31 of the Refugee Convention. Therefore, the author recommends the amendment of both articles 1F and 31 of the Refugee Convention to eliminate problematic ambiguities.

1 INTRODUCTION

Refugees who enter countries of refuge seeking asylum are sometimes excluded from protection under article 1F of the Convention Relating to the Status of Refugees (the Refugee Convention).[1] Once excluded, they are frequently either detained contrary to article 31 of the Refugee Convention,

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1 UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, 137.

given a limited time to leave the country, or are extradited to countries where their lives would be in danger of persecution.[2] Like refugees who are victims of sexual violence, their cases may never reach a court.[3] Other refugees who come undocumented into countries of refuge, and who in the midst of other migrants cannot present themselves to the required authority of a host country in compliance with the provision of article 31(1) of the Refugee Convention, may also be denied refugee status. Moreover, they may be labelled as criminals and detained contrary to the provision of article 31 of the Refugee Convention.

Mixed migration is a most problematic phenomenon of our time, especially in Africa, because it creates difficulties in identifying persons needing the protection of the Refugee Convention.[4] In these cases, all migrants are considered defenceless at all stages of migration. However, not all migrants can benefit from the protection of the Refugee Convention. Thus, because of problems in identifying the groups of migrants needing protection as well as states' intolerance of illegal entry of foreigners into their countries and towards international crimes, some migrants who are genuinely in need of the protection of United Nations High Commissioner for Refugees (UNHCR) may be either excluded or penalised as illegal or undocumented migrants; and their applications for refugee status are therefore denied from time to time. Other challenges of protection identified in Africa include, among others, access to migrants (depending on the type of journey they undertake) and accessibility to information about the rights of refugees in certain countries.

The concept of mixed migration can be understood from two perspectives. First, it could arise from the various inspirations for migration and the various types of migrant who immigrate together using the same route, modes or means. Mixed migration has been defined as a "complex migratory population movement including refugees, asylum-seekers, economic migrants and other types of migrants as opposed to migratory population movements that consist entirely of one category of migrants".[5] According to

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2 *The Refugee Appeal Board of South Africa v Mukungubila* (185/2018) [2018] ZASCA 191 (19 December 2018).

3 Stevens and Eberechi "A Critical Analysis of Article 16 of the UN Refugee Convention in Relation to Victims of Sexual Violence in Refugee Camps in Africa" 2019 52(1) *De Jure* 166.

4 Long and Crisp "In Harm's Way: The Irregular Movement of Migrants to Southern Africa from the Horn and Great Lakes Regions" (2011) *New Issues in Refugee Research* Research paper no. 200; United Nations High Commissioner for Refugees, Geneva, Switzerland http://eprints.lse.ac.uk/38311/ (accessed 2019-07-22).

5 European Commission "Asylum and Migration Glossary 6.0: A Tool For Better Comparability Produced by the European Migration Network" (May 2018) http://www.emncz.eu/emn-glossary-en-version.pdf (accessed 2018-01-10) 259; International Migration Law "Glossary on Migration" (2011) N°25 2ed IOM International Organisation for Migration http://www.corteidh.or.cr/sitios/Observaciones/11/Anexo5.pdf (accessed 2018-06-10) 63; International Migration Law "Glossary on Migration" (2004) IOM International Organisation for Migration http://www.iomvienna.at/sites/default/files/IML_1_EN.pdf (accessed 2018-06-10) 42; European Commission "Asylum and Migration Glossary 3.0: A Tool For Better Comparability Produced by the European Migration Network" (2014) http://extranjeros.empleo.gob.es/es/redeuropemigracion/glosario/emn-glossary-en-version v30.pdf (accessed 2018-06-10) 197.

available statistics, these migrants move from one country to another in Africa or from North Africa to Europe, although statistics are inaccurate.[6]

Mixed migrants may either decide to move deliberately or they may be forced to move; these migrants comprise individuals with diverse profiles and degrees of susceptibilities. They include "regular and irregular migrant workers, refugees, smuggled migrants, trafficked persons, unaccompanied minors, environmental migrants, stranded migrants and victims of exploitation and abuse".[7] Occasionally, some of them employ the use of illegitimate routes to escape from "political unrest, persecution, and conflict", while others flee from drought, crop failure, food insecurity, and severe poverty either in the host and transit states with little or no protection and consequently they are exposed to human rights abuse.[8]

For any migrant to enjoy international protection as a refugee, the individual must have suffered certain maltreatment as provided for in article 1 of the Refugee Convention. This implies that not all migrants in mixed migration can be protected as refugees. Alfaro-Velcamp and Shaw aver that some African immigrants who immigrate into certain countries in Africa do so without permits/documentation[9] and are therefore perceived as law breakers and are frequently tagged as "refugees"[10] contrary to the legal definition of refugee.[11] This perception is problematic for refugees because they are grouped together with other migrants.[12]

Persons who require the protection of the Refugee Convention are often regarded as criminals alongside other undocumented mixed migrants who are subjected to arrest and then automatically detained and apprehended as illegal immigrants, contrary to the provision of article 1F of the Refugee Convention. Furthermore, there are limited reception centres in some countries;[13] refugees entering a country may have difficulty accessing reception centres; this may take days or weeks. In the process, they are sometimes arrested, tagged as illegal migrants and detained for repatriation, contrary to article 31 of the Refugee Convention.

This study examines the application of articles 1F and 31 of the Refugee Convention in a mixed migration setting in Africa. It uncovers the problem of mixed migration and how it affects refugees. It offers a brief history, scope and purpose of the articles. "Africa is in the global south, comprising 54

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6 Mixed Migration Centre "Mixed Migration Review 2018 Highlights Interviews Essays Data" (2018) http://www.mixedmigration.org/ (accessed 2019-07-22).

7 Njuki and Abera "Forced Displacement and Mixed Migration Challenges in the IGAD Region" 2018 7(1) *Great Insights Magazine* 11; UN Office for the Coordination of Humanitarian Affairs (OCHA) "Mixed Migration in Southern Africa" https://reliefweb.int/sites/reliefweb.int/files/resources/OCHA_ROSA_Humanitarian_Bulletin_Jan_204.pdf (accessed 2019-07-15).

8 *Ibid*.

9 MHub *Conditions and Risks of Mixed Migration in North East Africa* Study 2 (2015).

10 Alfaro-Velcamp and Shaw "'Please GO HOME and BUILD Africa': Criminalising Immigrants in South Africa" 2016 42(5) *Journal of Southern African Studies* 983 985.

11 S 3 of the Refugees Act 130 of 1998; Art 1 of the Refugee Convention.

12 Alfaro-Velcamp and Shaw 2016 *Journal of Southern African Studies* 985.

13 *Ibid*.

countries[14] with a population of 1,321,384,450 as at 16 July 2019 and is equivalent to 16.64% of the total world population".[15] Africa is championed by its regional body, the African Union.

The continent is further divided into eight sub-regional bodies – namely, the Arab Maghreb Union (AMU/UMA) and the Community of Sahel-Saharan States (CENSAD) in the north; the Economic Community of West African States (ECOWAS) located in the west; the East African Community (EAC) and the Intergovernmental Authority on Development (IGAD) in the east; the Common Market for Eastern and Southern Africa (COMESA) in the south-east; the Economic Community of Central African States (ECCAS) in the centre; and the Southern African Development Community (SADC) in the south.[16] With regard to the status of the Refugee Convention and the 1967 Protocol, 49 countries in Africa have ratified either one or both of the Convention and the Protocol, as documented on April 2015; Madagascar has ratified only the 1951 Convention while Cape Verde has only ratified the 1967 Protocol.[17]

2 AN APPRAISAL OF THE APPLICATION OF ARTICLES 1F AND 31 OF THE REFUGEE CONVENTION

2 1 Article 1F

Article 1F of the Refugee Convention provides the grounds for exclusion from refugee status. It reads:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations".

Article 1F functions to protect contracting states' security and prohibits individuals with certain demeanour from benefitting from the protection of the Refugee Convention.[18] It is also meant to prevent criminal justice deserters

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14 Worldometer "How Many Countries in Africa?" (2019) https://www.worldometers.info/geography/how-many-countries-in-africa/ (accessed 2019-07-16).

15 Worldometer "Population of Africa (2019)" (July 2019) https://www.worldometers.info/world-population/africa-population/ (accessed 2019-07-16).

16 Office of the Special Adviser on Africa "The Regional Economic Communities (RECs) of the African Union" United Nations http://www.un.org/en/africa/osaa/peace/recs.shtml (accessed 2019-07-16).

17 UNHCR United Nations High Commissioner for Refugees "States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol" (April 2015) https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf (accessed 2019-07-16) 1.

18 Zimmermann and Wennholz *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (2011) 583.

from enjoying international refugee protection, thereby guarding the security of host countries.[19] Article 1F is also a prerequisite for the elimination of certain persons from international refugee protection. Other objects of article 1F, as enunciated in the *travaux préparatoires*,[20] are to protect the sanctity of the refugee status system against exploitation – by excluding offenders of crimes and by curbing the impunity of those who profit from refugee status and contribute to refugee production.[21] In addition, article 1F was created to hold accountable perpetrators of grievous crimes in the Second World War, as well as criminals of a non-political nature or persons convicted of acts contrary to the principles of the United Nations (UN). The scope of articles 1F(a) and (c) is clearly delineated.

However, article 1F(b) does not define the categories of crime that should be categorised as "serious non-political crime outside the country of refuge prior to his admission to that country as a refugee". Can article 1F(b) mean to imply all serious non-political crimes committed as defined by the criminal laws of the domestic judicial systems? The significance of article 1F(b) is that the mere commission of a crime will suffice, irrespective of whether conviction or punishment has been imposed or whether the criminal has served a jail term, although the commission of a crime can be inferred from prosecution of an applicant for refugee status. The threshold of the burden of proof here is not beyond a reasonable doubt but there should be a "reasonable belief" that an asylum applicant committed the crime.[22] The author submits that this provision gives contracting parties ample discretion to determine crimes that could fit into this category. This is because there will be variations in determining what constitutes a non-political crime by host states.

A serious non-political crime is described as an act that covers a broad spectrum of crimes committed by an individual with personal *mens rea* for

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19 *Ibid*.

20 UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the 24th Meeting, 27 Nov. 1951, UN doc. A/CONF.2/SR.24, Statements of Herment (Belgium) and Hoare (UK) http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=3ae68cde18 (accessed 2018-09-27); Goodwin-Gill *The Refugee in International Law* (1996) 95–114, 147–50; Shah "Taking the 'Political' out of Asylum: The Legal Containment of Refugees' Political Activism" in Nicholson and Twomey (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 119 130; Gilbert "Current Issues in the Application of the Exclusion Clauses" in Feller, Turk and Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) 427; Dogar *The Purpose of the Exclusion Clause and the Role of the UNHCR: Protection or Impunity?* (LLM thesis, McGill University, Montreal) 2015.

21 Zimmermann and Wennholz *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* 583; Larsaeus, "The Relationship Between Safeguarding Internal Security and Complying with International Obligations of Protection. The Unresolved Issue of Excluded Asylum Seekers" 2004 7369 *Nordic Journal of International Law* 69; UN High Commissioner for Refugees (UNHCR) "Guidelines on Protection: Application of the Exclusion Clauses: Article IF of the 1951 Convention relating to the Status of Refugees" (HCR/GIP/03/05, 4 Sept. 2003) 2; Gilbert in Feller, Turk and Nicholson *Refugee Protection in International Law* 425; Standing Committee of the Executive Committee of the High Commissioner's Programme, "Note on the Exclusion Clauses", 47th Session, UN doc. EC/47/SC/CRP.29, 30 May 1997 par 3.

22 *Gavrić v Refugee Status Determination Officer, Cape Town* [2018] ZACC 38 par 107, 110.

selfish benefits devoid of political incentives.[23] Where there is no nexus between a crime and a political purpose, that crime can be regarded as non-political. The African Union statute on refugee protection does not outline the species of crime that could be denoted as non-political, but provides for the exclusion from protection of persons who are offenders of such crimes.[24] However, states in Africa vary widely in their definition of a non-political crime, and some do not offer any clarification of such crimes in their refugee law.

For instance, the Ugandan refugee law declares a non-political crime to be a crime devoid of political disposition; it excludes hostility against a state regime relating to a question of political leadership or governance of a nation state or criminalities that are not interrelated to, or are a fragment of, a political disturbance that is executed as a political association agenda or an opposition group struggling for supremacy or political dominance of a nation.[25] Likewise, the South African Refugees Act describes a serious non-political crime as any crime that is "punishable by imprisonment" under its criminal regime.[26] A serious non-political crime has been designated in Namibia to include "any non-political offence which, if committed in Namibia, would be punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of five years or more".[27] This implies that crimes that are punishable with five years' imprisonment or house arrest could be used to deprive a person of refugee status in Namibia. In the same way, the Zambian Refugee Act declares a serious non-political crime to be an "offence" that is acknowledged by domestic law as a felony or, if not declared to be a misdemeanour, is punishable, without "proof of previous conviction, with death, or with imprisonment with hard labour for three years or more" under section 4 of the Penal Code.[28]

Conversely, the Ghanaian Refugee Act,[29] the Kenyan Refugee Act,[30] the Nigerian National Commission for Refugees Act,[31] the Ethiopian Refugee law[32] and the Tanzanian Refugee Act[33] do not categorise crimes that could be considered as serious non-political crimes. Interestingly, Morocco,

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23 UN High Commissioner for Refugees (UNHCR) Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees in Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (December 2011) HCR/1P/4/ENG/REV. 3 par 15 https://www.Refworld.org/docid/4f33c8d9 2.html (accessed 2019-06-17).

24 Art 4(F) and 5(B) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted on 10 September 1969 by the Assembly of Heads of State and Government. CAB/LEG/24.3. It entered into force on 20 June 1974.

25 S 2 of the Refugees Act 21 of 2006 (Uganda).

26 S 4(1)(*b*) of the Refugees Act 130 of 1998 (South Africa).

27 S 41(*b*)(ii) and 3 of the Namibia Refugees (Recognition and Control) Act 2 of 1999 (Namibia).

28 S 2 of the Refugees Act 1 of 2017 (Zambia); S 4 of the Penal Code Act Cap 87 of the Laws of Zambia.

29 S 1(2)(*b*) of the Refugee Law of 1992 (Ghana).

30 S 4(b)(*c*) of the Refugees Act 13 of 2006 (Kenya).

31 National Commission for Refugees Act (Nigeria), Cap N21 LFN 2004, 29 December 1989.

32 Ethiopia: Proclamation No.1110/2019, 27 February 2019.

33 The Refugee Act 9 of 1998 (Tanzania).

Tunisia and Egypt are yet to domesticate the 1951 UN Refugee Convention. However, the right to seek asylum is provided for in article 26 of the Tunisian Constitution,[34] and in article 57 of the Constitution of the Arab Republic of Egypt,[35] while the Moroccan Constitution does not provide for the protection of refugees.[36] Additionally, in Egypt, refugee status determination is adjudicated by the UNHCR.[37]

The issue of a non-political crime[38] was raised in *Gavrić v Refugee Status Determination Officer, Cape Town*.[39] Gavrić, a Serbian citizen, had been in the police service of that country before being detained, charged and later subjected to house arrest for the murders of Mr Zeljo Ražnatović (popularly termed as Arkan) and his two "bodyguard" in Belgrade, Serbia, before escaping to South Africa with a different identity in 2007.[40] In 2008, while residing in South Africa, he was convicted in his absence of the murders and sentenced to 30 years in prison (later increased to 35) by the Serbian Supreme Court;[41] an extradition order by the Serbian Ministry of Justice was served on South Africa in 2011.[42]

While in South Africa, Gavrić was also a victim and witness to unlawful gunfire and was later arrested and charged with illicit possession of drugs and the illegal acquisition of a driver's licence, passport and even firearms with a deceitful name.[43] After residing in South Africa for four years, he sought asylum here in order to avert the extradition order and his repatriation to Serbia under section 3 of the Refugee Act.[44] His application for refugee status was denied by the Refugee Status Determination Officer (RSDO) and he was excluded from protection as a refugee in accordance with section 4(1)(*b*) on the ground that he had been convicted of a serious non-political crime.[45] Dissatisfied, Gavrić appealed against the decision of the RSDO to the High Court and asked the court to affirm that section 4(1)(*b*) of the South African Refugees Act was constitutionally unenforceable; he requested the court to outlaw the expulsion order and prevent his repatriation to Serbia[46] since it violated his constitutional "right to life, dignity, equality and security of person".[47] This appeal was dismissed with costs and the appeal also failed at the High Court full bench.[48]

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34 Tunisia's Constitution of 2014.

35 The Constitution of The Arab Republic of Egypt 2014.

36 Morocco's Constitution of 2011.

37 Art 2(a) of the 1954 Memorandum of Understanding between the Egyptian Government and the UNHCR.

38 Art 1F(b) of the Refugee Convention; s 4(1)(*b*) of the Refugees Act 130 of 1998 (South Africa).

39 *Gavrić v Refugee Status Determination Officer, Cape Town supra*.

40 *Gavrić v Refugee Status Determination Officer, Cape Town supra* par 3, 5, 6, 7.

41 *Gavrić v Refugee Status Determination Officer, Cape Town supra* par 8.

42 *Gavrić v Refugee Status Determination Officer, Cape Town supra* par 9.

43 *Ibid.*

44 *Gavrić v Refugee Status Determination Officer, Cape Town supra* par 10.

45 *Gavrić v Refugee Status Determination Officer, Cape Town supra* par 10; Refugees Act 130 of 1998.

46 *Gavrić v Refugee Status Determination Officer, Cape Town supra* par 11.

47 *Gavrić v Refugee Status Determination Officer, Cape Town supra* par 20.

48 *Gavrić v Refugee Status Determination Officer, Cape Town supra* par 11–12.

His application to the Supreme Court of South Africa for leave to appeal against the decision of the RSDO and that of the High Court was also denied.[49] However, at the Constitutional Court, at issue was the constitutionality of section 4(1)(*b*) of the South African Refugees Act. The court held it was not unconstitutional because section 2, which provides for non-expulsion, improvises for whatever constitutional gap might have existed.[50] In deciding the constitutionality of section 4 of the Refugees Act, the court cited the Supreme Court of Appeal case, *Minister of Home Affairs v Watchenuka*:

> "Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this country – for whatever reason – it must be respected, and is protected, by s 10 of the Bill of Rights."[51]

This implies that, once individuals are in the territory, their right to human dignity is protected. In addition, it entails that a person who is excluded from protection under the Refugees Act has the right to remain in South Africa if extradition would lead to the loss of his or her right to life.[52] It was further established by the court that there are no exceptions in South Africa to a person's right to life, human dignity and not to be treated or punished in a cruel, inhumane or humiliating manner.[53]

In determining the applicant's refugee status, the court pointed to a procedural defect in which the RSDO only provided the conclusion of the adjudication to the applicant but failed to disclose the logical reasoning behind the denial of the status.[54] Moreover, the RSDO did not ascertain whether the crime was political.[55] The Constitutional Court accordingly set aside the decision of the RSDO. However, it is well known that most cases involving refugees do not reach court.[56] Therefore, many asylum seekers whose applications are rejected by the RSDO may not be as lucky as Gavrić as to have their cases determined in court.

The Constitutional Court of South Africa also investigated whether the applicant should be excluded, in accordance with section 4(1)(*b*) of the

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49 *Gavrić v Refugee Status Determination Officer, Cape Town supra* par 12.

50 *Gavrić v Refugee Status Determination Officer, Cape Town supra* par 22, 31; Refugees Act 130 of 1998.

51 *Minister of Home Affairs v Watchenuka* [2003] ZASCA 142; 2004 (4) SA 326 (SCA) 330B par 25.

52 *Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC) par 37–39; *Minister of Home Affairs v Tsebe* [2012] ZACC 16; 2012 (5) SA 467 (CC); 2012 (10) BCLR 1017 (CC) (Tsebe) par 43.

53 *Minister of Home Affairs v Tsebe supra* par 50.

54 *Gavrić v Refugee Status Determination Officer, Cape Town supra* par 69.

55 *Ibid*.

56 People Opposing Women Abuse (POWA) with the AIDS Legal Network (ALN) on behalf of the One in Nine Campaign and the Coalition for African Lesbians (CAL) 2010 "Criminal Injustice: Violence against Women in South Africa", Shadow Report on Beijing + 15 March 2010 https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ZAF/INT_CEDAW_NGO_ZAF_48_10364_E.pdf 12 (accessed 2020-07-27); Eberechi "Access to Justice for Victims of Sexual Violence in Refugee Camps" (Unpublished LLD Thesis 2018 University of Pretoria) https://repository.up.ac.za/handle/2263/6 6657/statistics 226 (accessed 2020-07-27).

Refugees Act, from the Act's protection based on his commission of a serious non-political crime. The court began by isolating the principles and criteria for the identification of a political crime. The court said that for a crime to be considered political there must be an obvious connection between the criminal act and its political intention. The said act must be proportional to its political purpose.[57] The crime must have been committed with an obvious and sincere political motivation for a specific purpose and not for private benefit.[58] In addition, the political interest must be palpable to any rational human being.[59] Political crimes were also identified by virtue of their association with "specific events and time".[60] For instance, offences considered as political in Senegal consist of crimes committed (in Senegal or a foreign country) between 1 January 1983 and 31 December 2004 in connection with "the general or local elections" or committed with political incentives, whether the offenders have been found guilty or not.[61]

The Constitutional Court added that the political objective must be for the defence and advancement of "fundamental human rights" – namely, the "right to life, equality, human dignity, political" involvement, with no discrimination because of sex or race.[62] The political purpose must protect and promote "the rule of law", liberty of individuals, faith, "beliefs", views, expression, principles, and the establishment of an open and autonomous social order.[63] In the instant case, in deciding whether the felony committed by the applicant was non-political, the court considered foreign judgments that were against the applicant, but did not rely on them. Tactically, Gavrić could not convince the court that the crime was political, and he was therefore excluded from refugee status under section 4(1)(*b*).[64]

Article 1F(b) was similarly challenged in *Febles v Canada (Citizenship and Immigration)*.[65] Febles was a Cuban whose refugee status had been revoked; he had been served with an expulsion order by the United States (US) after serving two jail terms for the crime of assault with the use of deadly weapons – in the first instance by striking his roommate's head with a hammer, and secondly for threatening the life of the roommate's girlfriend at knifepoint.[66] Febles escaped to Canada to apply for refugee status but was denied such protection, in accordance with article 1F(b) of the Refugee

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57 *Tribunal Administratif Fédéral*, Case E–7772, 22 June 2007 par 4.4; *Gavrić v Refugee Status Determination Officer, Cape Town supra* par 98.

58 *Tribunal Fédéral*, case ATF 106 Ib 307.

59 *Tribunal Fédéral,* case ATF *supra.*

60 S 20(2)(3) of the Promotion of National Unity and Reconciliation Act 34 of 1995 (Reconciliation Act): Art 44–45 of Ordonnance n° 06–01 du 28 Moharram 1427 correspondant au 27 février 2006 portant mise en oeuvre de la Charte pour la paix et la réconciliation nationale (English translation; Ordinance No. 06–01 of 28 Moharram 1427 corresponding to 27 February 2006 implementing implementation of the Charter for Peace and National Reconciliation).

61 *FIDH v Senegal* par 2, Comm. 304/2005, 21st ACHPR AAR Annex II (2006–2007).

62 *Gavrić v Refugee Status Determination Officer, Cape Town supra* par 106.

63 *Ibid*.

64 Refugees Act 130 of 1998; *Febles v Canada (Citizenship and Immigration)* 2014 SCC 68, [2014] 3 S.C.R. 431.

65 *Febles v Canada* 432, 467 (73).

66 *Febles v Canada supra* 432, 468 (77-78).

Convention[67] and sections 98 of the Immigration and Refugee Protection Act (IRPA) of Canada, based on the crime committed prior to his flight from the US.[68] The overarching issue the court had to address was the interpretation of article 1F(b) of the Refugee Convention and whether it included "matters or events after commission of crime" – for instance whether the applicant is a "fugitive from justice or unmeritorious or dangerous at the time of the application for refugee protection",[69] or if an applicant who has served a jail term for the conviction of a serious crime or "because of redeeming his conduct in the interim" is qualified for refugee protection.[70]

The Federal Court and Federal Court of Appeal, dismissed Febles's appeal against the refugee board's decision that the crime fell within the ambit of article 1F(b) of 1951 UN Refugee Convention and section 98 of IRPA and, therefore, did not qualify for international protection as a refugee.[71] Although the Supreme Court of Canada, allowed the appeal Feble's appeal and referred the case back to the Immigration and Refugee Board for redetermination.[72] However, the *Febles* case is a classic example of the ambiguous nature of article 1F(b); the court had to determine the outcome of an issue that was outside the conception of article 1F(b) as introduced by the parties to the suit. During the proceedings, issues like remorse, redemption of conduct, and the serving of jail terms were raised.[73] Febles also argued that article 1F(b) only applies to absconders of crimes and not to persons who have already been punished for the crimes committed. These were extraneous issues argued in the proceedings. The author therefore contends that there is a need to amend article 1F(b) to reflect the arguments raised in the case of *Febles*.

The joint cases of *Bundesrepublik Deutschland v B and D*[74] are further classic examples of the abstruse nature of the provisions of article 1F(b) of the Refugee Convention. Here, the German courts were uncertain whether membership or support of terrorist groups could constitute an apolitical crime. B (in Case C-57/09) was a Turkish citizen of Kurdish descent, who was arrested, tortured and sentenced to life imprisonment for his support of guerrilla armed conflict.[75] While in prison, he murdered a fellow suspected inmate for snitching, which earned him another life sentence. He later escaped to Germany, capitalising on his conditional release for six months on health grounds. There he applied for refugee protection and the prohibition of extradition to Turkey.[76] However, both applications fell through because the *Bundesamt* felt that he had committed a non-political crime in

67 *Febles v Canada supra* 432; 468 (80).
68 Immigration and Refugee Protection Act (IRPA) [Canada], SC 2001, c. 27, 1 November 2001.
69 *Febles v Canada supra* 433.
70 *Febles v Canada supra* 442 (3).
71 *Febles v Canada supra* 469 (85).
72 *Febles v Canada supra* 488 (136).
73 *Ibid*.
74 *Bundesrepublik Deutschland v B and D* (Joined Cases C–57/109 and C–101/09, CJEU).
75 *Bundesrepublik Deutschland v B and D supra* par 44–46.
76 *Bundesrepublik Deutschland v B and D supra* par 47–48.

violation of Paragraph 3(2)(2) of the Germany: Asylum Procedure Act (*AsylVfG*)[77] and that he was therefore not immune to extradition to Turkey.[78]

On appeal to the Administrative Court, *Gelsenkirchen* (*Verwaltungsgericht Gelsenkirchen*), this decision was invalidated and the Administrative Court outlawed the extradition of B to Germany and ordered that B should be granted refugee status.[79] The Bundesamt appeal to the Higher Administrative Court of North Rhine-Westphalia (the *Oberverwaltungsgericht für das Land Nordrhein-Westfalen*) against the decision of the lower court was terminated because the Oberverwaltungsgericht reasoned that the aim of the exclusion clause was not just to punish perpetrators of serious non-political crime but was also intended to prevent an applicant from extradition to a country where they would be at risk of persecution; thus a holistic approach to such a decision must be adopted with the doctrine of "proportionality" in mind.[80] The Higher Administrative Court also reasoned that exclusion should be considered when the applicant constitutes a threat to the security of the country.[81]

Dissatisfied, the Bundesamt appealed against the judgment of the Higher Administrative Court to the Federal Administrative Court (the Bundesverwaltungsgericht) where they contended that exclusion from protection under Paragraph 60(8) of the *Aufenthaltsgesetz*[82] and paragraph 3(2) of the Asylum Procedure Act[83] (for the purpose of this article) does not require a refugee not to be a threat to the peace and security of Germany and that the issue of proportionality does not arise in this case.[84] The Bundesamt also maintained that article 12(2) of Directive 2004/83 cannot be suspended by members of the European Union.[85]

Equally, D (in Case C-101/09), who is of the same nationality and ethnicity as B, confessed that he was a guerrilla fighter and a senior officer of PKK; he had been sent to the northern part of Iran but only resided there for about a year. He left the PKK due to political ideological differences and leadership and subsequently escaped to Germany as a result of a threat to his life.[86] He was granted asylum status under the existing law of 2001. However, with the advent of the *Terrorismusbekämpfungsgesetz* (Anti-Terrorism File Act),[87] the

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77 Germany: Asylum Procedure Act (AsylVfG) [Germany] 27 July 1993.

78 *Bundesrepublik Deutschland v B and D supra* par 49–50.

79 *Bundesrepublik Deutschland v B and D supra* par 51.

80 *Bundesrepublik Deutschland v B and D supra* par 52–53.

81 *Ibid.*

82 *Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im undesgebiet* (Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory in the version of 30 October 2017 (Federal Law Gazette I, p. 1106 ff. Valid as from 1 August 2017).

83 Germany: Asylum Procedure Act (AsylVfG) [Germany] 27 July 1993.

84 *Bundesrepublik Deutschland v B and D supra* par 54.

85 *Bundesrepublik Deutschland v B and D supra* par 54; European Union: Council of the European Union, Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 30 September 2004.

86 *Bundesrepublik Deutschland v B and D supra* par 57–59.

87 Anti-Terrorism File Act of December 22, 2006 (Federal Law Gazette I p. 3409), which was last amended by Article 10 of the Law of August 14, 2017 (Federal Law Gazette I p. 3202).

Bundesamt reviewed the grant of asylum and withdrew his protection as a refugee in accordance with paragraph 73(1) of the *AsylVfG*,[88] on the basis that he had committed a serious non-political crime outside of Germany before the status was granted.[89] On appeal to the Administrative Court, Gelsenkirchen, the decision of the *Bundesamt* was likewise overturned. In the same vein, the *Bundesamt* appealed to the Higher Administrative Court of North Rhine-Westphalia where the matter was dismissed on the same grounds as in the case of B in 2007, and the court reasoned that the exclusion clause under the German law did not apply.[90]

The *Bundesam*t, being unhappy with the decision of the Higher Administrative Court, sought the Federal Administrative Court to review the appeal court decision.[91] The Federal Administrative Court found that B and D qualified for refugee protection because they would be at risk of persecution if they were repatriated to Turkey. However, neither applicant could enjoy refugee protection since they met the requirement for exclusion as provided for under article 12(2) of Directive 2004/83.[92] The Federal Administrative Court reiterated that whether the exclusion clauses are applicable in the instant cases under article 16(a) of the *Grundgesetz* (Germany: Basic Law for the Federal Republic of Germany).[93] B and D cannot be excluded, this implied that there is a conflict between the provision of *Grundgesetz* and article12(2) of Directive 2004/83. Therefore, the cases were referred to the European Court of Justice for their interpretation.

Several questions were submitted by the German court to the European court. First, does former membership, and participation as fighter and officer of a prohibited terrorist group create a non-political crime?[94] Secondly, if this is a non-political crime, then does the exclusion clause in article 12(2)(b) and (c) require that the asylum seeker must constitute an incessant threat to the peace of the country?[95] Thirdly, is the proportionality test required in determining application of the exclusion clause? Fourthly, if proportionality is considered in the third question, should it be considered in extradition proceedings under article 3 of European Convention on Human Rights (ECHR)[96] or under state laws and is exclusion disproportionate only in exceptional cases having particular characteristics?[97] Lastly, is there a conflict between the provision of "Directive 2004/83, for the purposes of Article 3 [of Directive 2004/83] and National law" even if an asylum seeker qualifies to be excluded in accordance with article 12(2) of the Directive while possessing "a right to asylum under national constitutional law" as in

88 Germany: Asylum Procedure Act; *Bundesrepublik Deutschland v B and D supra* par 60.
89 *Bundesrepublik Deutschland v B and D supra* par 60.
90 *Bundesrepublik Deutschland v B and D supra* par 61–62.
91 *Bundesrepublik Deutschland v B and D supra* par 63.
92 *Bundesrepublik Deutschland v B and D supra* par 64.
93 Germany: Basic Law for the Federal Republic of Germany [Germany], 23 May 1949.
94 *Bundesrepublik Deutschland v B and D supra* par 67.
95 *Ibid.*
96 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.
97 *Bundesrepublik Deutschland v B and D supra* par 67.

the case of B?[98] In addition, is there a conflict if the asylum seeker is still recognised as a holder of a right to asylum under domestic "constitutional law", despite the fact that he satisfies "one of the exclusion criteria laid down in Article 12(2) of the directive" and refugee status under article 14(3) of the directive is accordingly revoked, as in the case of D?[99]

It was held that membership of and participation in a terrorist group that is listed in the Annex to Common Position 2001/931[100] does not necessarily constitute a non-political crime on the part of an asylum seeker, and that individual responsibility for the crime must be established in order to prove the provision of article 12(2) of Directive 2004/83.[101] On the second question, the court concluded that posing a threat to the peace and security of a receiving state is not a criterion for excluding an asylum seeker under article 12(2) of the Directive.[102] In addition, there is no need for the proportionality test in determining exclusion in this case.[103] Finally, the European Court declared that states have the right to grant asylum under their domestic law, but the grant must be distinct from providing refugee status under the directives.[104]

The problem with this clause is that states are given a wide discretion to determine the scope and types of crime that are deemed to be non-political, which can cause hardships for seekers of refugee status. As seen above, contracting states vary as to what they deem to be non-political crimes. However, the court in *Gavrić* did not outline offences that can be regarded as non-political but gave the conditions and principles that the RSDO and courts should look out for, since what constitutes a non-political crime in one country will not be so in another country. Also, in the *Gavrić case*, the RSDO relied on the Serbian judgment in arriving at her decision, even though the burden of proof was reasonable acceptance that the applicant committed the crime. In the *Febles* case, as stated above, issues fell outside the purview of reasonable belief. However, in *Bundesrepublik Deutschland v B and D,* it was held that lending support or belonging to a terrorist group does not necessarily constitute a non-political crime, unless individual culpability of the asylum seeker can be established.[105] Once an applicant in some jurisdictions is excluded from refugee status by a court, the applicant can be

98 *Ibid.*

99 *Ibid*.

100 The Council of the European Union "Council Common Position of 27 December 2001 on the Application of Specific Measures to Combat Terrorism" (2001/931/CFSP) Official Journal of the European Communities L 344/94, 28.12.2001.

101 *Bundesrepublik Deutschland v B and D supra* par 99; UN High Commissioner for Refugees (UNHCR), UNHCR public statement in relation to cases *Bundesrepublik Deutschland v B and D* pending before the Court of Justice of the European Union (July 2009) https://www.refworld.org/docid/4a5de2992.html (accessed 2019-12-20) 7.

102 *Bundesrepublik Deutschland v B and D supra* par 105; UN High Commissioner for Refugees (UNHCR) UNHCR public statement in relation to cases *Bundesrepublik Deutschland v B and D* pending before the Court of Justice of the European Union 32–33.

103 *Bundesrepublik Deutschland v B and D supra* par 111.

104 *Bundesrepublik Deutschland v B and D supra* par 121.

105 UN High Commissioner for Refugees (UNHCR) UNHCR public statement in relation to cases *Bundesrepublik Deutschland v B and D* pending before the Court of Justice of the European Union 30.

declared an illegal immigrant and thus article 31[106] can be invoked. However, there may be provisions in the national laws such as article 16(a) of the Grundgesetz (Germany: Basic Law for the Federal Republic of Germany)[107] that offer protection other than refugee status.

2 2 Article 31

Article 31 of the Refugee Convention provides:

> "1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
> 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

The purpose of this article as expressed in the *travaux préparatoires* is to prevent refugees from being criminalised as illegal immigrants or residents of a country, since most refugees who escape from persecution are likely to enter countries of refuge without documentation.[108] State practice is typically that any immigrant who enters and settles into a country without identity documents and visas is arrested, criminalised, prosecuted, sentenced and repatriated. However, the scope of article 31 of the Refugee Convention covers refugees who have entered a country unlawfully. The word "penalties" in article 31 connotes "administrative and judicial convictions" for unlawful entrance or stay in the country of refuge.[109] While the phrase "coming directly" denotes refugees who arrived either from their state of origin or a nation where their existence or liberty was in danger or a third transit country where they could not obtain refugee status.[110] According to Weis, the phrase "coming directly" is frequently invoked by states as a condition for the purpose of conferring asylum status and the expression "good cause" was also not elucidated.[111] Weis further reiterates that article 31(1) does not compel contracting parties to legalise the status of refugees, and it neither prohibits states from evicting them nor offers any alternatives to a refugee who has been denied asylum status and who also cannot comply with the rejection order.[112]

The author therefore argues that this gap in article 31 leaves a wide discretion that contracting states can depend on to reject an application for refugee status. Thus, the author argues that article 31(1) of the Refugee

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106 The Refugee Convention.
107 Germany: Basic Law for the Federal Republic of Germany [Germany], 23 May 1949.
108 Weis *The Refugee Convention* (1951) 302.
109 Weis *The Refugee Convention* 303.
110 *Ibid*.
111 *Ibid*.
112 *Ibid*.

Convention should be amended to fill the lacuna. Article 31(1) also implies that refugees should not be excluded if they will be rejected by other countries and "he may not be put over the 'green border'".[113] Article 31 also permits a refugee to remain in a country of transit for a short time, as may an asylum seeker whose application for legalisation is under review awaiting the determination of the application.[114]

However, article 31(2) provides for limitations on the movement of a refugee who has unlawfully entered or is present in a territory. Without prescribing the measure of restriction to be applied by contracting states, it states that restriction must limit their movement for national security reasons.[115] With regard to the issue of custody of a refugee, the President of the Conference of Plenipotentiaries raised the issue with no response from the participants at the meeting.[116] Weis submitted that refugees should not be imprisoned, but could be held for a short time in custody in refugee camps during mass arrival for the purposes of the investigation.[117]

Weis further stated that the limitation on the movement of refugees should be until their status has been legalised or they have been granted asylum in a third country.[118] This is tricky because these procedures can last from days to months and implies that refugees could be detained indefinitely. Thus, it implies vitiating the non-penalisation provided for under article 31 of the Refugee Convention and violating refugees' right to freedom of movement. Simply put, article 31(1) reveals that on no account should a refugee be punished or criminalised for unlawful entrance into a contracting state from a country where their human rights will be violated as understood by the provision of article 1A(2) of the Refugee Convention. The proviso here is that the refugee will only be free from being criminalised if he or she reports to the appropriate authority of the countries without delay and adduces evidence that he or she has good reason for the unlawful entry.

In the *Republic v Ilola Shabani*,[119] two new refugees had arrived in Kaseke village in Kigoma rural district of Tanzania. They reported to the village authorities in accordance with section 9(1),[120] and the leadership of

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113 UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Sixteenth Meeting, 23 November 1951, A/CONF.2/SR.16,10 http://www.refworld.org/docid/3ae68cdc14.html (accessed 2018-09-27); UN Ad Hoc Committee on Refugees and Stateless Persons, Ad Hoc Committee on Statelessness and related problems, First Session: Summary record of the twentieth meeting held at Lake Success, New York, on Wednesday 1 February 1950, at 2.30. p.m., 10 February 1950, E/AC.32/SR.20 http://www.refworld.org/docidd/3ae68c1c0.html (accessed 2018-09-27); Weis *The Refugee Convention* 303.

114 Weis *The Refugee Convention* 303.

115 *Ibid*.

116 UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Fourteenth Meeting, 22 November 1951, A/CONF.2/SR.14 http://www.refworld.org/docid/3ae68cdb0.html (accessed 2018-09-27).

117 Weis *The Refugee Convention* 303.

118 Weis *The Refugee Convention* 304.

119 *Republic v Ilola Shabani,* Kigoma District Court at Kigoma (unreported) Criminal Case No. 162 of 2001.

120 The Refugee Act 1998, Tanzania.

the village handed them over to the police for onward transmission to the UNHCR.[121] However, they were incarcerated for over a year and docketed as criminals who were illegitimately present in the nation.[122] Also, in *Adbul Rahim v Minister of Home Affairs,*[123] the plaintiffs were denied an asylum permit and appealed against the adjudication. While the decision of the appeal was still pending, they were declared illegal immigrants and were arrested and detained in preparation for repatriation to their countries of origin.

The phrase "without delay" is problematic, because the Convention does not define this phraseology. It is submitted here that this gap gives contracting states a wide discretion to determine what constitutes "without delay". This could imply that a refugee should report to the authorities the very moment he or she steps into the host country. For instance, section 4(1)(*i*) of the South African Refugees Amendment Act,[124] expects a refugee to report to a Refugee Reception Office within five days of entry into the country. This is not always practicable as South Africa has only five reception centres, spread across nine provinces, at great distances from each other.[125] As a consequence, a refugee who enters the country from ports of entry without reception centres will have to go in search of a reception centre, which may take anything from one day to two months. Refugees who enter Zambia are expected to apply for asylum within seven days,[126] while those who arrive in Lesotho lawfully must apply for refugee status as soon as "practicable",[127] but if they come in unlawfully they must report to an immigration officer within 14 days.[128] The Sierra Leone Refugees Protection Act says "as soon as possible".[129] The Refugee Proclamation Act of the Federal Democratic Republic of Ethiopia says "within 15 days",[130] while Ghana allows 14 days or "as permitted by the refugee board".[131] Uganda allows for 30 days.[132]

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121 *Republic v Ilola Shabani supra*.

122 *Republic v Ilola Shabani supra*.

123 (965/2013) [2015] ZASCA 92 (29 May 2015).

124 11 of 2017.

125 Department of Home Affairs "Cape Town Refugee Reception Office, Durban Refugee Centre, Musina Refugee Reception Centre, Port Elizabeth Refugee Reception Centre (closed to new applications) and Pretoria: Marabastad in Refugee reception centres" 2018 Department of Home Affairs http://www.dha.gov.za/index.php/contact-us/24-refugee-centres/29-pretoria (accessed 2018-09-12).

126 S 11(1) of Act 1 of 2017 (Zambia).

127 S 7 of the Refugee Act 18 of 1983 (Lesotho).

128 S 9(2) of Act 18 of 1983 (Lesotho).

129 S 8(2) of the Refugees Protection Act 6 of 2007 (Sierra Leone).

130 S 13(1) of the Refugee Proclamation No 409/2004 (Ethiopia).

131 S 8(1) of the Refugee Law, 1992 (Ghana).

132 S 19(1) of the Refugees Act 21 of 2006 (Uganda); A/CONF.2/SR.24, 27 Nov. 1951; UNHCR, Guidelines on International Protection (2003); UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twenty-Ninth Meeting, 28 November 1951, A/CONF.2/SR.29, http://www.refworld.org/docid/3ae68cdf4.html> (accessed 2018-09-27); UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirty-Fifth Meeting, 3 December 1951, A/CONF.2/SR.35, item 5(a) 27 and 28 Nov. and 3 Dec. 1951 http://www.refworld.org/docid/3ae68ceb4.html (accessed 2018-09-27); Weis *The Refugee*

Practically, we know that it might take a refugee some time to identify the appropriate body to which to present themselves given the current state of hostility toward refugees. Sometimes, in the process of enquiry, they could also be criminalised, which will compound their problem as seen in the case of the *Republic v Ilola Shabani*: the two refugees reported to the appropriate authority in accordance with the Refugee Act of Tanzania, but were still criminalised and detained for more than a year. Similarly, the Refugee Convention does not define what the phrase "show good cause" encompasses; this is vague.

The analysis above reveals that both articles 1F and 31 are ambiguous and should be amended.

3 CONCLUSION

An analysis of the application of article 1F of the Refugee Convention reveals that article 1F(b) is unclear. Since the Refugee Convention is not clear on what constitutes a non-political crime, there are varying interpretations among contracting states as to what constitutes crimes that are non-political. This can cause challenges for asylum seekers. However, the Constitutional Court of South Africa outlines the principles and criteria for the identification of species of crime that resort to the category of political crime in order to identify crimes that are non-political.

4 RECOMMENDATIONS

To cure the ambiguity, the author recommends that article 1F(b) of the Refugee Convention be amended. A "non-political crime" should be defined as one committed without a political intention; it must be not proportional to a political purpose, be for private benefit, and not be committed within "specific events and time". In this regard, crimes having a political objective mean crime committed to defend "fundamental human rights" – namely, the right to life, equality, human dignity, political involvement, with no discrimination because of sex or race. The political purpose must protect and promote the rule of law, liberty of individuals, faith, beliefs, views, expression, principles, and the establishment of an open and autonomous social order.

With regard to article 31 of the Refugee Convention, the author suggests an amendment; asylum seekers should be given about three months to report to the nearest appropriate body because of the mixed nature of their circumstances, which contributes to delays in submitting their applications.

Convention, 1951: The Travaux Préparatoires Analysed With a Commentary by the Late Dr Paul Weis (1995) 332*; Fitzpatrick "The Post-Exclusion Phase: Extradition, Prosecution and Expulsion" 2000 12 International Journal of Refugee Law 272.*

THE PATCHWORK TEXT AS ASSESSMENT TOOL FOR POSTGRADUATE LAW TEACHING IN SOUTH AFRICA

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SUMMARY

In the increasingly competitive higher education sphere, delivering graduates with a sound academic grounding in their discipline is no longer enough. Institutions of higher learning must yield lifelong learners who are employable and equipped with the practical skills required by the profession. To ensure this, the right assessment approach is key. While assessment has always been a crucial component of instruction, traditional assessment tools run the risk of being mere tools for certification, facilitating surface learning instead of deep learning. Assessment approaches need to be re-evaluated to strike a balance between encouraging deep learning and instilling proper academic knowledge in graduates. To contribute to such a re-evaluation of traditional assessment methods, this article reports on the introduction of the patchwork text (PWT) as an alternative assessment tool in postgraduate law teaching at the University of the Free State (UFS). After making the case for the move towards more authentic, alternative assessment techniques, the authors embark on a discussion of the main features of the PWT, as well as guidelines for drafting a PWT assessment. The focus then shifts to an overview of PWT implementation in other postgraduate modules, ending with a discussion of the authors' experience introducing the PWT in their own teaching. Useful information about the authors' approach is shared, including examples of formative assessment exercises used as part of the PWT, specifics regarding the portfolio of evidence of learning to be handed in, and an outline of the four "patches" making up the assessment. It is concluded that the PWT has proven to be a viable tool for assessing postgraduate students in certain law modules at the UFS. It has managed to promote deep learning, develop students into critical thinkers and problem-solvers, and compel them to continuously engage with the study material – all while achieving the intended learning outcomes. The PWT is therefore recommended to lecturers who seek to equip students with a macro-vision of their field of study, the ability to

integrate and contextualise different areas of the discipline, and the skill to reflect critically on new, emerging developments in the field.

1 INTRODUCTION

Competition in higher education is fierce. Institutions of higher learning first vie for the best students, and then compete to deliver graduates of the best quality. Law faculties in particular are required to yield graduates with not only a sound academic grounding, but also the practical experience expected by the profession.

To ensure that graduates have the desired knowledge as well as the practical skills to add value to the workplace, the right assessment approach is key. Indeed, assessment has always been a crucial component of instruction.[1] However, considering the new, modern-day demands on higher education and on the graduates it delivers, traditional assessment methods run the risk of being mere tools for certification, instead of equipping students as lifelong learners ready for the workplace.[2] Therefore, there is a need to re-evaluate assessment approaches and take positive action.

Using an appropriate assessment method may encourage students to engage continuously with the study material, which may lead to a deeper level of understanding and a firmer grasp of module content. That would satisfy the ultimate aim of higher education – namely, to enable deep learning instead of mere surface learning.[3] Constant reflection on assessment strategies in the higher education sphere is vital to determine whether current practices encourage only superficial learning and, if so, what changes should be introduced. This implies that, in selecting and designing assessment tools, faculties need to strike a balance between encouraging deep learning and instilling proper academic knowledge in graduates.

As lecturers in two postgraduate coursework law modules at the University of the Free State (UFS), South Africa, the authors too became acutely aware of the need to explore and pursue more effective assessment practices to achieve the tricky balance stated above. As their contribution in this regard, this article evaluates the feasibility of the patchwork text (PWT) as an alternative assessment tool, as implemented in the authors' respective modules. The primary objective is to identify whether the PWT is a viable tool to compel students in postgraduate law modules to engage continuously with the study material. A secondary objective is to determine whether the PWT succeeds in achieving the intended learning outcomes of the modules.

For purposes of this article, the PWT is seen as an alternative assessment tool made up of a number of challenging tasks ("patches") linked to real-life situations, which are shared with peers in a critical manner. Patches are selected in consultation with peers and are presented in an

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1 Dikli "Assessment at a Distance: Traditional vs. Alternative Assessment" 2003 2 *Turkish Online Journal of Educational Technology* 13 13.

2 Bourner "The Broadening of the Higher Education Curriculum" 2004 36 *Higher Education Review* 39 46.

3 Biggs *Teaching For Quality Learning at University* 2ed (2003) 14–18.

abridged portfolio, in which they are "stitched together" through final reflection, and learning is consolidated.[4] The PWT develops important generic skills, such as a macro-vision of the field of study, critical thinking skills, technology skills and teamwork through peer discussion. A more detailed discussion of the PWT follows under heading 4.

2 THE CHOICE OF ACTION RESEARCH

Being integrally involved in the process of implementing the PWT, and driven by the need to critically evaluate the success of this assessment tool, the authors opted for the action research approach as the most appropriate methodology.

Action research pursues both action and research simultaneously.[5] It is defined as:

> "[a] form of collective self-reflective enquiry undertaken by participants in social situations in order to improve … their own social or educational practices, as well as their understanding of these practices and the situations in which the practices are carried out."[6]

This type of research is participatory (with researchers contributing equally) and collaborative (with researchers partnering *with* and *for* those affected by the "problem"), and typically arises from the clarification of concerns generally shared by a group.[7]

The action research approach involves (i) identifying the problem, (ii) action planning, (iii) implementation of the action plan, (iv) evaluation and, finally, (v) reflection.[8] For this article, the authors identified the problem, being a need for change in assessment methods to deliver law graduates who are both immediately employable and committed to lifelong learning. The researchers then planned the assessments to be used in two postgraduate law modules, implemented the assessments, observed their effects, and critically reflected on the findings so as to improve the assessment tool and current practices. The authors acted as critical change agents, conducting evaluative research in pursuit of ways to change both their practice and themselves for the better. The accountability of this methodology lies in the publication of the learning process and its results.

Some benefits of action research include that it solves a practical problem systematically and collaboratively. It improves the practice of learning,

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4 Winter "Contextualising the Patchwork Text: Addressing Problems of Coursework Assessment in Higher Education" 2003 40 *Innovations in Education and Teaching International* 112 112.

5 Dick, as cited in Altrichter, Kemmis, McTaggart and Zuber-Skerritt "The Concept of Action Research" 2002 9 *The Learning Organization* 125 131.

6 Kemmis and McTaggart *The Action Research Reader* (1988) 5.

7 Altrichter *et al* 2002 *The Learning Organization* 131.

8 *Ibid*.

teaching, training, management and professional development, as well as the social context and conditions in which this practice takes place.[9]

This research method was previously used in a similar study to evaluate the implementation of the patchwork text, albeit in a different discipline. The researchers in that study found that implementation of the patchwork text as an assessment tool had to be monitored through the deliberate use of an action research plan to result in improvement and quality assurance.[10] This served as further motivation for the authors' choice of action research for this study.

3 WHY THE MOVE TOWARDS ALTERNATIVE ASSESSMENT?

Traditionally, assessment was seen mainly as a tool to determine whether a student may proceed to the next level. However, since the 1990s, the need to prepare students as lifelong learners has become more prominent, with assessment no longer regarded as a mere tool for certification.[11] Assessment is central to the student learning experience,[12] and assessment tools are said to be among the greatest influences on how and what students learn.[13] Poor assessment practices are often the reason for low-quality instruction and learning.[14]

As such, student assessment first needs to be appreciated for its role in student learning and, secondly, must be carefully planned to achieve the desired outcomes.

3 1 Assessment shapes learning

One might think that learning is shaped by module outcomes or structure. Yet, learning is in fact shaped by assessment. If lecturers wish to change the way students learn, they must change the way students are assessed.[15] Assessment should not be used as a mere tool to test students, but should form part of the learning process itself.[16]

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9 Zuber-Skerritt "Participatory Action Learning and Action Research (PALAR) for Community Engagement: A Theoretical Framework" 2015 4 *Educational Research for Social Change* 5 17–18.

10 Van Tonder, Wilkinson and Van Schoor "Patchwork Text: Innovative Assessment to Address the Diverse Needs of Postgraduate Learners at the African University of the 21st Century" 2005 19 *SAJHE* 1282 1302–1303.

11 Bourner 2004 *Higher Education Review* 46.

12 Brown and Knight in Upton and Taylor "Is Online Patchwork Text Assessment a Panacea for Assessment Practices in Higher Education?" 2013 19 *Psychology Teaching Review* 44 44.

13 Hong Kong Baptist University "Assessment of Student Learning" (1998) http://www.hkbu.edu.hk/~ar/staff/qa/tlqprii.htm (accessed 2004-06-25).

14 Dochy and McDowell "Assessment as a Tool for Learning" 1997 23 *Studies in Educational Evaluation* 279 286.

15 Brown "Assessment: A Guide for Lecturers" (2001) http://www.ltsn.ac.uk (accessed 2018-11-02).

16 Trevelyan and Wilson "Using Patchwork Texts in Assessment: Clarifying and Categorizing Choices in Their Use" 2012 37 *Assessment and Evaluation in Higher Education* 487 488.

Assessment enables the lecturer to understand the processes and outcomes of student learning, and to determine the quality of learning that has taken place.[17] The choice of assessment method will encourage different approaches to learning.[18] It follows, then, that lecturers seeking to foster deep learning in their students should choose an assessment tool to achieve that.

For purposes of this article, assessment tools are defined as those instruments, including tests and assignments, used as part of the structured process of gathering evidence and making judgements about an individual's performance against registered national standards.[19] The selection of an assessment tool when designing a module is integral to the module's success, as it acts as an intervention in student learning,[20] developing skills and competencies that students will need beyond the course. The chosen assessment must also develop important generic skills, such as the ability to have a macro-view of the field of study, and the skill to collaborate with peers as part of a team. When a degree is awarded, this should signify that the graduate has largely achieved the outcomes of the curriculum, and that what has been achieved is transferable not only to the workplace, but to other spheres of life as well.[21] The testing of core knowledge and skills must be geared towards this purpose, and the threshold between fail and pass must be very distinct.[22] Upon graduation, undergraduate law students, for instance, must have developed generic skills and applied competencies such as critical thinking skills, research skills, communication and literacy skills, problem-solving skills and the transfer of acquired knowledge.[23] Critical thinking skills should include legal reasoning, critical analysis and creative thinking.[24]

A valid and credible assessment tool should therefore include appropriate tasks for testing the desired skills. In addition, it must assess what it initially set out to assess, and not what is merely easy to assess.[25] According to Geyser,[26] such credibility of assessment can be attained if:

- the assessment is an integral part of learning (focusing on deep, active learning and involving high-order cognitive skills), of programme and module design, and of quality assurance procedures;

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17 Hong Kong Baptist University http://www.hkbu.edu.hk/~ar/staff/qa/tlqprii.htm.

18 *Ibid*.

19 Dikli 2003 *Turkish Online Journal of Educational Technology* 14; SAQA *Criteria and Guidelines for Assessment of NQF Registered Unit Standards and Qualifications* (2001) 16.

20 Bearman, Dawson, Boud, Bennet, Hall and Molloy "Support for Assessment Practice: Developing the Assessment Design Decisions Framework" 2016 21 *Teaching in Higher Education* 545 547.

21 Knight "Summative Assessment in Higher Education: Practices in Disarray" 2002 27 *Studies in Higher Education* 275 276.

22 Brown http://www.ltsn.ac.uk.

23 CHE *Qualification Standard for Bachelor of Laws (LLB)* (2015) 9.

24 Burton "Teaching and Assessing Problem Solving: An Example of an Incremental Approach to Using IRAC in Legal Education" 2016 13 *Journal of University Teaching and Learning Practice* 1 1.

25 Joubert "Paradigm Shift in Assessment Methodology for Law Students in South Africa" 2013 10 *Journal of College Teaching and Learning* 55 56.

26 Geyser "Learning From Assessment" in Gravett and Geyser (eds) *Teaching and Learning in Higher Education* (2004) 92.

- the assessment purpose determines the assessment methods and techniques;
- the assessment criteria are clearly identified and applied;
- the assessment processes are reliable;
- the assessment tasks are valid and practicable;
- the assessment is transparent and fair;
- the assessment workload is realistic;
- the assessment includes a wide range of approaches and methods; and
- the assessor provides feedback to support the learning process.

Consequently, in light of the key role of assessment in fostering deep learning and true engagement with learning material, the importance of selecting the most appropriate assessment tool cannot be overstated.

3 2 Drawbacks of traditional assessment

With traditional assessment methods, students focus only on the topic being assessed, while other areas of learning fade away,[27] resulting in mere surface learning. This type of higher education assessment may be described as assessment *of* learning, whereas the focus of alternative assessment is on assessment *for* learning.[28]

For the most part, the UFS Faculty of Law still applies the traditional assessment method at postgraduate level. Lecturers set assignments in the form of essay questions, which are then scored to produce a semester or year mark, while a closed-book examination containing similar essay-type questions is used as summative assessment.[29]

Generally, the focus is more on summative assessment, with little to no attention being paid to formative assessment. Summative assessment is used to evaluate students during the module, and contributes towards their final mark. Formative assessment, on the other hand, is used not to evaluate students, but to afford them an opportunity to ascertain for themselves, often based on lecturer feedback, their progress towards achieving the intended module outcomes.[30] An overemphasis on summative assessment is said to be the breeding ground for surface learning.[31]

One of the drawbacks of traditional assessment is the lack of feedback from the lecturer or the person assessing the work.[32] When done properly,

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27 Wesson "Introducing Patchwork Assessment to a Social Psychology Module: The Utility of Feedback" 2013 19 *Psychology Teaching Review* 97 97.

28 Williams "Squaring the Circle: A New Alternative to Alternative-Assessment" 2014 19 *Teaching in Higher Education* 565 566.

29 UFS *General Rules for Undergraduate Qualifications, Postgraduate Diplomas, Bachelor Honours Degrees, Master's Degrees, Doctoral Degrees, Higher Doctorates, Honorary Degrees and the Convocation* https://www.ufs.ac.za/docs/default-source/all-documents/2018a-general-rules-final-version-7-for-publication-2---24-january-2018---final_ese80ccae65b146fc79f4fff0600aa9400.pdf?sfvrsn=4418a521_0 7 (accessed 2020-03-05).

30 Geyser *Teaching and Learning in Higher Education* 92.

31 Knight 2002 *Studies in Higher Education* 278.

32 Williams 2014 *Teaching in Higher Education* 566.

feedback should motivate students and guide them on how well they have done and how they can improve further.[33] Instead of providing only brief, after-the-fact feedback when the learning cycle has already been completed,[34] feedback should be "timely, perceived as relevant, meaningful, encouraging and offer suggestions for improvement that are within a students' grasp".[35] When a lecturer provides constructive feedback, it has been shown to have a high motivational value that enhances a student's learning and improves the learning process.[36]

Another drawback of traditional assessment is that students graduate without having mastered the skills really required in the workplace. There is growing concern about the discrepancy between graduates' skills and competencies, and the requirements of future employers. In the law curriculum specifically, the focus of assessment should be on problem-solving and accomplishing tasks as experienced in the profession.[37] The general outcomes prescribed by the faculty for successfully completing a postgraduate degree entails higher order learning by placing a major emphasis on high-level theoretical-intellectual engagement that can be applied in legal practice. Furthermore, students need to master the ability to select and employ methods and techniques to apply to complex practical and theoretical problems in law.[38]

Many higher education stakeholders struggle with the question of what skills should be imparted to turn students into lifelong learners and enable them to compete effectively in the workforce.[39] In some instances, even students transitioning from undergraduate to postgraduate studies lack the skills and competencies prescribed by the South African Qualifications Authority (SAQA). Therefore, it is essential for assessment at both undergraduate and postgraduate level to be designed so as to develop these desired skills and competencies in graduates. Such assessment needs to be authentic and to focus on real-life experiences.[40] The assessment criteria must be transparent and simple, fair and reliable, and must align with the outcomes initially set.[41]

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33 Brown http://www.ltsn.ac.uk.

34 Williams 2014 *Teaching in Higher Education* 567.

35 Brown http://www.ltsn.ac.uk.

36 Williams 2014 *Teaching in Higher Education* 567; Biggs *Teaching for Quality Learning at University* 141.

37 Burton 2016 *Journal of University Teaching and Learning Practice* 1.

38 UFS *Faculty of Law Postgraduate Degrees and Diplomas* (2018) https://apps.ufs.ac.za/dl/yearbooks/311_yearbook_eng.pdf 23–24 (accessed 2020-03-05).

39 Volkov and Volkov "Teamwork Benefits in Tertiary Education: Student Perceptions That Lead to Best Practice Assessment Design" 2015 57 *Education and Training* 262 263.

40 McMillan *Classroom Assessment: Principles and Practice for Effective Instruction* (2004) 14–17.

41 University of Sheffield "Principles of Assessment" (undated) https://www.sheffield.ac.uk/polopoly_fs/1.209653!file/Principles_of_Assessment.pdf (accessed 2018-12-13); McMillan *Classroom Assessment: Principles and Practice for Effective Instruction* 99–101.

3 3 The need for more authentic, alternative assessment

It is this need for a more authentic assessment method, which fosters real understanding and results in a deeper level of learning, that compelled the authors to investigate alternative assessment tools for use in their own postgraduate modules.

The terms "authentic" and "alternative" assessment are used interchangeably. Authentic (and, thus, alternative) assessment is defined as follows:

> "[M]ethods of assessment which influence teaching and learning positively in ways which contribute to realizing educational objectives, requiring realistic (or 'authentic') tasks to be performed and focusing on relevant content and skills, essentially similar to the tasks involved in the regular learning processes in the classroom."[42]

The aim of alternative assessment is "to relate the instruction to the real-world experiences of learners".[43] Alternative assessment tools help students become more actively engaged and take ownership of their learning by reflecting their knowledge of course material "in their own ways by using various intelligences".[44] Assisting students to become autonomous learners,[45] alternative assessment focuses on the student's growth and performance,[46] and requires "higher-order thinking skills so that students can solve real-life related problems".[47]

Aside from the PWT, Winter[48] identifies another two alternative assessment tools – namely, the coursework essay and the portfolio.

The coursework essay is a popular form of assessment to teach students scientific writing skills. The essay can be easily distributed and administered, and can evaluate important intellectual skills. Nevertheless, while the coursework essay evaluates integrated knowledge and understanding, it often fails to facilitate reflective learning. By testing knowledge instead of ability, it frequently results in mere surface learning. In addition, the coursework essay tends to reflect what students perceive to be expected of them (the "rules"), without applying this to their own personal experience; and where knowledge is applied, it is mostly done in an incoherent and poorly constructed fashion. The essay presents learning as an authoritative product instead of a gradual process during which learning is assimilated through reading, discussion and personal reflection.[49]

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42 Nisbet in Dochy and McDowell 1997 *Studies in Educational Evaluation* 5.

43 Simonson, Smaldino, Albright and Zvacek "Assessment for Distance Education" in Dikli 2003 *Turkish Online Journal of Educational Technology* 14.

44 Dikli 2003 *Turkish Online Journal of Educational Technology* 14.

45 Ovens "Using the Patchwork Text to Develop a Critical Understanding of Science" 2003 40 *Innovations in Education and Teaching International* 133 133.

46 Dikli 2003 *Turkish Online Journal of Educational Technology* 15.

47 Winkler in Dikli 2003 *Turkish Online Journal of Educational Technology* 14.

48 Winter 2003 *Innovations in Education and Teaching International* 116–117.

49 *Ibid*.

As such, the most effective way to use a coursework essay is in conjunction with other forms of assessment that do require critical reflection.[50] This, unfortunately, is impractical due to time-consuming marking processes and the possibility of subjective marking.[51] So, although the coursework essay has the potential to test various important skills, it rarely does, with "cutting and pasting" of assignments and information sourced from the Internet a frequent occurrence.

A portfolio, in turn, is a typical example of an evidence-based learning assessment tool, being a collection of papers and other forms of evidence that show that learning has taken place.[52] It is also defined as a purposeful collection of student work that exhibits students' efforts, progress and achievements in one or more areas. Representing a reflective, developmental process of learning by encouraging self-awareness in students, the portfolio must present evidence of self-reflection to serve its purpose.[53] When using the portfolio as an alternative assessment tool, selectivity is key, as it can easily become too bulky and fail to demonstrate clearly that students have grasped the overall course structure. Other drawbacks include its impracticality for external examination and moderation purposes, and the need for careful planning to avoid "gaps" in assessment.[54]

Even though both the coursework essay and portfolio offer an opportunity for feedback from the lecturer, which is a key feature of alternative, authentic assessment, they leave little room for critical self-reflection by the student.[55] In all disciplines, and in law in particular, self-reflection is crucial to gaining deeper insight into the field of study. For this reason, the authors opted to implement the PWT as alternative assessment tool in two LLM modules taught at the UFS, to see whether this method would test the skills that students are required to master.

4 THE PATCHWORK TEXT (PWT) AS AN ALTERNATIVE ASSESSMENT TOOL

The PWT is a series of short, challenging tasks ("patches") prepared in the course of a module. Individual preparation of these patches is usually followed by group sharing to allow for not only self-evaluation, but also evaluation by peers. The student normally selects the "best" task to include in a final portfolio, complemented by short student reflections on the different tasks and their own learning. This is characterised by a final, short overview, in which all the learning patches are "stitched" together to show that the student has gained a macro-vision of the module.[56]

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50 Winter 2003 *Innovations in Education and Teaching International* 117.

51 Simonson *et al* in Dikli 2003 *Turkish Online Journal of Educational Technology* 14.

52 Davis, Friedman, Harden, Howie, Ker, McGhee, Pippard and Snadden "Portfolio Assessment in Medical Students' Final Examinations" 2001 23 *Medical Teacher* 357 357.

53 Dikli 2003 *Turkish Online Journal of Educational Technology* 14.

54 Winter 2003 *Innovations in Education and Teaching International* 9.

55 Surridge, Jenkins, Mabbett, Warring and Gwynn "Patchwork Text: A Praxis Oriented Means of Assessment in District Nurse Education" 2010 10 *Nurse Education in Practice* 128

56 Winter in Van Tonder *et al* 2005 *SAJHE* 1285.

The PWT differs from the portfolio described in the previous section, in that it is an abridged version of a portfolio. In the PWT, the student chooses from a varied selection of short assignments and creates a coherent end product. The PWT should not be merely a collection of items, which the portfolio sometimes is, but should tell a well-structured story of learning, in which the students themselves interpret course material and select key tasks. These tasks should pertain to different skills, from academic writing to experiential accounts, allowing students to draw on their strengths as well as improve on their weaknesses. The central part played by the student in this assessment method makes PWT the ultimate learner-centred assessment tool.

According to Trevelyan and Wilson,[57] the objectives of the PWT are continuous learning, deep learning, integrated understanding and critical self-reflection. These also happen to be the desired graduate attributes suggested by the Council on Higher Education (CHE).[58] Moreover, the PWT is reliable, valid and credible, which is in line with SAQA's stated principles for assessment.[59] This alignment with these key guiding documents in the South African higher education sphere confirms that the PWT can be a valuable tool to deliver students with the right skills to meet the demands of the workplace.

Requiring students to gain new knowledge or perspectives, and critically reflect on work previously done, the PWT promotes active learning. Active learning engages students in an activity that forces them to think about and comment on the information presented.[60] Moreover, it assists students to analyse, synthesise and evaluate information in discussion with peers by asking questions, or through writing.[61] All of this challenges them to higher-order thinking. Social feedback from peers is equally critical.[62] This entails comments from peers and teachers because one advantage of formative assessment is that the emphasis is on learning as a process rather than a measurement exercise. This is normally achieved when students present their tasks in a workshop fashion at prearranged contact sessions, where open discussions take place. The aim is to improve the presented task through self-assessment as well as assessment by peers and the facilitator.

As mentioned earlier, the final task of the PWT should be a "stitching together of the different patches" to make up a comprehensible, coherent whole in the form of a retrospective commentary resembling a reflective journal. Far from being random pieces of writing, the value of this final task lies in its organic nature[63] as students systematically produce a personal reflection on their learning progression in the module.[64] This is critical to the

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57 Trevelyan and Wilson 2012 *Assessment and Evaluation in Higher Education* 487.

58 CHE *Qualification Standard for Bachelor of Laws (LLB).*

59 SAQA *Criteria and Guidelines for Assessment of NQF Registered Unit Standards and Qualifications* 43.

60 Stanford University "Active Learning: Getting Students to Work and Think in the Classroom" 1993 5 *Stanford University Newsletter on Teaching* 1 1.

61 *Ibid*.

62 Upton and Taylor 2013 *Psychology Teaching Review* 45.

63 Richardson and Healy "Beneath the Patchwork Quilt: Unravelling Assessment" 2013 38 *Assessment and Evaluation in Higher Education* 847 848.

64 Upton and Taylor 2013 *Psychology Teaching Review* 45.

success of the PWT. Students tend to study in compartments and lose sight of the bigger picture. This final task forces them to develop a macro-vision, and shows whether they have reflected and gained deeper insight as opposed to mere rote learning.[65] This reflection fosters the deep learning so sought after in higher education, and can be further enhanced by appropriate lecturer feedback. Self-reflection also helps with lifelong learning, as it teaches students how to identify gaps in their own work that need to be filled. In summary, therefore, the PWT enables gradual learning that is facilitated by ongoing feedback and evaluation through critical reflection and peer evaluation.[66]

In light of the above, replacing the traditional essays and written examinations of a structured master's programme with the PWT should prove valuable. While various research skills are already assessed in the master's programme, certain gaps persist; the PWT may bridge or narrow these gaps. For instance, when asking students to write essays, only a certain section or topic of the work is covered; with the PWT, a variety of topics is addressed.

5 GUIDELINES FOR DRAFTING THE PWT ASSESSMENT

The flexibility of the PWT, lending itself to be adapted to suit virtually any module, is one of its greatest strengths.[67] But, although highly flexible, the PWT assessment requires the presence of certain core elements in order to be defined as such. It must comprise multiple assessment tasks, which must be properly paced and, eventually, form an integrated, comprehensive whole.[68] Before reporting on the findings of the implementation of the PWT in postgraduate law modules at the UFS, this section therefore provides a few broad guidelines to be considered in drafting and implementing this type of assessment.

First, both lecturers and students need to be clear as to the benefits associated with the implementation of the PWT. Learners must be thoroughly informed of what is expected of them in completing the PWT; the process must be clearly understood, practically executable, and properly regulated by the responsible lecturer.[69] This also contributes to the transparency of the assessment. The various short tasks should be carefully planned and documented beforehand, with clear instructions.[70]

Secondly, the PWT must allow for self-assessment as well as assessment by peers and facilitators throughout, based on pre-formulated, properly communicated criteria. Self-reflection can help students plan their work, monitor their own progress, and evaluate and value their own

65 Winter 2003 *Innovations in Education and Teaching International* 118–120.
66 Wesson 2013 *Psychology Teaching Review* 98.
67 Trevelyan and Wilson 2012 *Assessment and Evaluation in Higher Education* 388.
68 Trevelyan and Wilson 2012 *Assessment and Evaluation in Higher Education* 494.
69 Joubert 2013 *Journal of College Teaching and Learning* 56.
70 Van Tonder *et al* 2005 *SAJHE* 1303.

accomplishments.[71] Learners should be carefully guided to master the art of critical self-reflection, which can be done as part of a short assignment. The connection between the short assignments and the macro-vision of the module must be emphasised. In addition to self-reflection, discussion with peers is important, as different perspectives can be appreciated, while lecturers should also provide constructive feedback.

Thirdly, careful consideration is required when selecting the appropriate tasks to test the desired skills and learning outcomes. Different skills can be tested by different tasks. Proper task selection could also enhance previously underdeveloped skills, which may become valuable assets to the student. Ultimately, the selected tasks should give students an overall view of the subject and force them constantly to work and review what they have done. One way of achieving this is to allow students to write various short pieces of text at a time (perhaps on a weekly basis), which they can then join together to create a framework for a final written assessment.[72]

The only area in which this form of assessment may be faulted is its impracticality in large classes. Wesson agrees,[73] stating that the PWT assessment is "suited to small, motivated and coherent groups of students where the workload of both the staff and students can be more easily managed". For this reason, implementing the PWT in undergraduate modules might prove more challenging. However, applying it in postgraduate modules, where student numbers are usually low, makes perfect sense.

To draft this form of assessment and update it every year could be challenging and time-consuming, but is worth the effort. It not only reassures the lecturer that students' broader knowledge of the law, as demanded by the profession, is being tested more credibly than by any other form of assessment, but also benefits the student by developing vital legal writing and communication skills.

6 IMPLEMENTING THE PWT FOR POSTGRADUATE TEACHING

The authors were both personally introduced to the PWT as part of the Master of Arts in Higher Education Studies (MA HES) programme at the UFS, where this assessment technique was implemented by Van Tonder and colleagues.[74] Despite challenges with arranging meetings for group work and ensuring all group members' participation, the authors' experience of participating in group work, obtaining a macro-vision and building "teamship" was largely positive.

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71 Joubert 2013 *Journal of College Teaching and Learning* 58.
72 Richardson and Healy 2013 *Assessment and Evaluation in Higher Education* 848.
73 Wesson 2013 *Psychology Teaching Review* 104.
74 Van Tonder *et al* 2005 *SAJHE* 1302–1303.

6 1 Practical application in other postgraduate modules

The PWT assessment tool was used to good effect in higher-learning programmes in health and social care in the United Kingdom.[75] Students experienced it very positively, although one indicated that some group members frequently made excuses for not completing the work, which was to the detriment of others as complete idea-sharing could not take place. The student found it very frustrating that some group members gave more, while others ended up taking more.[76] As mentioned above, this was the authors' own experience as well.

To resolve this problem, it is suggested that proper peer evaluation be done frequently and honestly, so that group members can relay and report on the actual group dynamics. Although frustrating, it is unfortunately a fact of life that some people do more, and others get away with doing less. The PWT forces students into a situation where they need to learn to cope with this reality, a valuable skill in itself. In addition, students usually benefit from sharing their work, as it gives them greater insight into the subject and opens their minds to views other than their own. Students in the health and social care programmes mentioned above echoed these sentiments and indicated that they had gained deeper insight into other people's roles and professions. One student indicated that the PWT had stimulated him to further analyse his ideas, which resulted in an increased sense of self-awareness.[77] These are all desired teaching-and-learning outcomes in any discipline taught at a higher level.

The PWT was successfully introduced in a Master of Arts in Business Management group, also in the United Kingdom.[78] Here too, the lecturer experienced the same challenge with group work but noticed a changing dynamic between the students. Soon, those who did not commit fully started to feel the pressure due to group norms, resulting in an emerging sense of group responsibility. The lecturer observed a natural form of coaching between students, with the stronger students helping the weaker ones.[79] She acknowledged the challenges of the PWT, but found that the benefits outweighed the difficulties, and that students developed a more in-depth understanding of the module.[80]

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75 Crow, Smith and Jones "Using the Patchwork Text as a Vehicle for Promoting Interprofessional Health and Social Care Collaboration in Higher Education" 2005 4 *Learning in Health and Social Care* 117 117–128.

76 Crow *et al* 2005 *Learning in Health and Social Care* 122.

77 Crow *et al* 2005 *Learning in Health and Social Care* 123.

78 Illes "The Patchwork Text and Business Education: Rethinking the Importance of Personal Reflection and Co-operative Cultures" 2003 40 *Innovations in Education and Teaching International* 209 209.

79 Illes 2003 *Innovations in Education and Teaching International* 211.

80 Illes 2003 *Innovations in Education and Teaching International* 212.

6 2 Practical application in the Advanced Property Law module of the structured Master of Law programme at the UFS

The authors of this article have implemented the PWT in two modules – namely, Advanced Property Law, and International Free Trade and Free Trade Agreements. Both form part of the structured Master of Law programme at the UFS. For the purposes of this article, discussion is limited to the introduction of the PWT in Advanced Property Law.

The lecturer presents the module in a resource-based mode, with the underlying assumption that candidates will learn through direct confrontation with learning resources, as well as activities linked to those resources, instead of through a conventional exposition of content. Therefore, students are expected to take greater responsibility themselves.[81] Self-study is expected, and thorough preparation for formative assessment exercises is a prerequisite. Attendance of workshops is compulsory.

Formative assessment exercises are designed to enhance the students' knowledge of and insight into the topic. Students must each prepare their assignments for the workshops in advance. These formative exercises then constitute the basis of workshop discussions. During the workshops, the exercises are assessed and improvements suggested through peer and facilitator input. The final exercises are compiled in a portfolio of evidence of learning, on the basis of which the summative assessment is conducted and a semester mark is obtained.

Examples of the formative assessment exercises introduced include the following:

a) writing a book review in which students have to compare the property clause in the South African Constitution to the property clause in the constitutions of two other countries of their choice;
b) preparing a PowerPoint presentation (with notes included), explaining the difference between expropriation and deprivation, introducing the proposed new Expropriation Bill, and indicating the changes that will affect the current position;
c) designing a Venn diagram or mind map on differences in the application and procedure of land-reform legislation;
d) preparing a short newspaper article in which students inform the community on a certain property-law issue identified by the lecturer;
e) writing a formal letter to the editor of a newspaper explaining misconceptions regarding the owner's right to evict illegal occupants from his property;
f) drafting a table to indicate different legislation promulgated in the land reform space;

[81] UFS "UFS Form 5: Short Learning Programme" (2005) https://apps.ufs.ac.za/dl/slp/91-Assessment%20of%20learning%20in%20Higher%20Education%20UFS%20FORM%205.pdf (accessed 2011-03-12).

g) participating in a mock radio interview as part of a fictitious programme called "What Does the Law Say?" with "listeners" (peers) phoning in with problems that need to be solved;

h) presenting students with a set of facts on which they are expected to provide legal advice to a client;

i) conducting an interview to determine a peer's perspective on the "public trust" doctrine currently applicable in South Africa's water law, and then preparing a write-up of the interview; and

j) conducting a debate with peers to ascertain different cultural perspectives on the relationship between private law rights and socio-economic rights as influenced by the new water legislation dispensation, with students being expected to write their own critical reflection on the various perspectives following the debate, as well as record their own learning experiences throughout the exercise.

As these exercises require a vast amount of reading and reflection involving higher-order thinking skills, tasks need to be carefully selected to ensure that all learning outcomes are covered – not only in terms of module content, but also the range of skills that students are expected to acquire during the module. The ultimate selection of tasks to be included in the PWT depends on the lecturer, who should decide which exercises are more suitable for the particular module. The exercises selected should stimulate students to reflect critically on the value of their learning, and should encourage a deeper sense of understanding of the module content and the relevance of knowledge. Furthermore, it should promote the use of technology and enhance learners' technological skills, which are crucial in this digital age. Students should also be urged to research their own reference material, and must receive credit for doing so.

In order to obtain a year mark (predicate) that contributes 20 per cent towards the final mark, the formative assessments are submitted in the format of a portfolio. This portfolio of evidence of learning is handed in together with the PWT assessment. However, the PWT forms the basis of the summative assessment (examination). Thus, the PWT itself serves as the summative assessment tool. Initially, students completed a set, open-book examination at a computer laboratory that had word-processing features, but no internet or other type of collaborative access. However, as the module developed, it became clear that the time constraints and set examination venue negatively affected students' creative and reflective output. At present, therefore, the paper is designed as a take-home, open-book examination on the full scope of work dealt with in the various units. As supported by external examiners' reports and personal experience, it is most likely that the students' success in the assessment is integrally linked to their ability to display a macro-vision of the subject, integrate and contextualise the different areas of property law, and reflect critically on new, emerging developments in the field.

As to the set-up of the examination paper,[82] students are required to design a cover page for their PWT, indicating their details and the module

[82] This was adapted from a study guide used in the MA HES course at the UFS, drafted by Dr Fanus van Tonder.

code. The background of the cover page should include a collage to serve as a visual PWT of the main themes they have dealt with in the module. Students may make use of any media reports, pictures or other electronically available visual material to depict the theme of their study. They then have to compile a complete table of contents for the PWT and portfolio, clearly indicating the page numbers of all assignments and appendices. Next, students are given four tasks that will make up the "patches" of the PWT. The purpose of the first three patches is to afford them an opportunity to look back and reflect critically on the three themes explored during the semester. Task four is a reflective commentary on the module as a whole, in which students have to "stitch together" the different patches of their learning and development.

Tasks one, two and three are essentially the same. These patches require students to reflect critically on their experiences relating to each unit, indicating the possible value of their experiences, what they have learnt, and how they can apply (or have applied) their newly acquired knowledge in the field of property law or any other discipline. They could also suggest how the theme as a whole may be improved or adapted. In task four, students then indicate how all the assignments relate to one another, and how each learning experience (both individually and cumulatively) contributed to the attainment of the critical and specific learning outcomes of the module. With this final task, students need to display a macro-vision of the latest developments in the field of property law as well as in their personal development.

7 CONCLUSION

The authors' experience is that the PWT has forced students to engage deeply with the study material. It fosters deep learning and enables students to focus on the module as a whole rather than only on those parts relevant to assignments. The formative tasks not only develop various generic skills, including group work, use of technology, and legal writing, but also ensure critical reflection on the learning material. The critical self-reflection fostered by the PWT helps motivate students to achieve even more and monitor their own progress. As such, it empowers students to take control of their own learning and gain deeper insight into the discipline of law. The peer evaluation component, in turn, contributes to the transparency of the assessment tool and ensures participation throughout the module. Finally, the ultimate "stitching together" of the patches ensures the development of a macro-vision of the field of study.

Feedback from both the external moderators and students has been very positive, and their recommendations will be included in the future development of the assessment tool. One external moderator gave the following feedback:

> "This is an excellent and innovative module. As one of the students stated him- or herself, it does not simply require the students to "cram". Instead, it requires students to analyse, debate and critically reflect on the material they have covered in a structured manner. It is quite clear to me that the lecturer has given careful thought to the manner in which the module should be structured, taught and assessed. I am not aware of any other postgraduate

> law module which uses the patchwork approach. This is unfortunate because it seems to me that this is particularly suitable for postgraduate studies."

In their feedback, the students commented mainly on the skills they had acquired, such as critical, analytical and comparative skills. They seemed to have experienced the module as a fresh approach compared to traditional assessment. Students also indicated that the way in which the paper was set forced them to gain insight into, and develop a macro-vision of, property law in general.

Overall, the PWT has proved to be a viable tool for assessing postgraduate students in the selected law modules at the UFS, and could even be employed at undergraduate level where class sizes permit. It promotes deep learning, critical thinking and problem-solving, and forces students to engage continuously with the study material. In addition, the PWT achieved the intended learning outcomes of the modules. Thus, it is envisaged that the PWT will continue to be used going forward.

A CRITICAL ANALYSIS OF SOUTH AFRICAN ANTI-MONEY LAUNDERING LEGISLATION WITH REGARD TO CRYPTOCURRENCY

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SUMMARY

Cryptocurrencies are decentralised virtual currencies, using blockchain technology to process peer-to-peer electronic payments. In 2009, the first successful cryptocurrency, Bitcoin, was established. This article discusses concepts of cryptocurrency, its relevance in the financial sector, its associated risks and establishes whether regulatory interference is necessary in order to combat money laundering using cryptocurrency. Currently, cryptocurrencies remain unregulated in South Africa. The article concludes that regulatory intervention is necessary and that cryptocurrencies should be integrated into relevant existing legislation.

1 INTRODUCTION

The online medium of exchange has evolved from Electronic Funds Transfer (EFT), credit cards and PayPal[1] to cryptocurrencies.[2] However, the birth of the Internet has brought with it a new type of criminal – namely,

[1] PayPal is a payment service that enables the user to accept payments more securely as well as pay for goods and services. The user's information is protected by encryption methods. Thus, PayPal is a safe and easy way to pay and receive online payments.

[2] Mothokoa *Regulating Crypto-Currencies in South Africa: The Need for an Effective Legal Framework to Mitigate the Associated Risks* (master's mini-dissertation, University of Pretoria) 2017 1.

cyberlaunderers.[3] Cryptocurrencies are increasingly used by criminals to launder illicit funds obtained through criminal activities. However, cryptocurrency is legal in South Africa, despite its controversial nature. The majority of cryptocurrencies are decentralised and therefore operate without administration or authority by the State or banks. In the case of cryptocurrencies such as Bitcoin,[4] users remain largely anonymous, thereby making transactions difficult to trace back to a particular user. Thus, it is easy to see why cryptocurrencies are used to launder money. Despite these risks, cryptocurrencies remain largely unregulated in South Africa; they also have no legal status.

For the purposes of this article, Bitcoin is used as an example of cryptocurrency; it is referred to throughout, as it has the largest number of contributing computer nodes and has achieved one of the highest market capitalisations.[5] Note that this article focuses on cryptocurrency and not the wider subject of virtual currency. Although Bitcoin is used as a main example of cryptocurrency, the article's scope is not limited to Bitcoin, but to cryptocurrencies as a whole; Bitcoin is merely used as a proxy in order to understand the concepts more easily.

2 MONEY LAUNDERING USING CRYPTOCURRENCY

As the saying goes, "there are two sides to every coin". Where Bitcoin is concerned, two contrasting views have gained popularity: some are of the opinion that cryptocurrencies are the future of payment systems, allowing for fast and effective transactions between users; others believe that cryptocurrencies provide criminals with a very powerful tool to store and move their illegal proceeds, while avoiding law enforcement agencies and other authorities.[6]

2 1 How does cryptocurrency work?

Before one can understand the term "cryptocurrencies", it is first necessary to discuss how the system works. Bitcoin would not exist without a whole network of users and cryptography. Cryptography is a security measure that circumvents the need for trust, using keys to keep Bitcoin relatively safe.[7]

Bitcoins can either be mined or bought with fiat currency. In order to acquire bitcoins, the user must first have a digital wallet.[8] This wallet

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3 Leslie *Anti-Cyberlaundering Regulation and Control* (master's dissertation, University of the Western Cape) 2010 1.

4 Bitcoin is a type of digital currency; it uses encryption methods to regulate the production of the units of currency as well as to verify transactions. Bitcoin operates independently of a central bank.

5 Gipp, Meuschke and Gernandt "Decentralized Trusted Timestamping Using the Crypto Currency Bitcoin" 2015 *Proceedings of the iConference* 1 1.

6 FATF "Virtual Currencies: Key Definitions and Potential AML/CFT Risks" (June 2014) http://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf (accessed 2018-08-08) 3.

7 Small "Bitcoin: The Napster of Currency" 2015 37 *Houston Journal of International Law* 582 588.

8 Small 2015 *Houston Journal of International Law* 588.

contains both a public and a private key. The public key is similar to an email address that users send to each other in order to transfer bitcoins. The private key can be compared to a pin code for a debit card and acts as the user's signature. No other user has access to the private key, and nor can it be replicated. The private key is used to confirm the transfer of bitcoins.[9] Put differently, if the public key of a user works, then it is proof that the message was signed by the private key and that the sender intended to send it. Unlike a signature or credit card number, the keys cannot be forged or faked by a scammer.[10] Bitcoin is said to be pseudo-anonymous as the transfers and public keys of a user are made public, while the personal identity of the user is not disclosed.[11]

Each time bitcoins are transferred, the transaction is recorded on the blockchain. The blockchain is a public ledger that contains the history of each and every bitcoin transaction. In the blockchain, transactions are shared among multiple computers or servers, which are known as the member nodes in the network.[12] The ledger is decentralised, meaning that no person or entity controls or owns the data.[13] It is important to note that any attempt to change or manipulate the information in the blockchain can be traced back to the individual member node.[14]

Bitcoin mining has two main functions. First, it creates new bitcoins and secondly, it validates and confirms each transaction on the network. The second function is most important as it creates the tamper-proof system that forms the basis of the blockchain. The process of mining is recorded in a ledger, which is a list of blocks making up the blockchain.[15] Put differently, users on the network are able to "mine" the cryptocurrency using algorithms in the form of mathematical equations in order to verify the transactions and add these transactions on the digital ledger. This means that the cryptocurrency is essentially "unhackable", and also prevents the problem of double spending.[16] On average, a block is added to the chain every ten to twelve minutes, although the precise interval is unpredictable as the process requires the computers to solve complex mathematical algorithms. Each time a miner's computer solves an algorithm, the miner receives a reward of bitcoins for contributing computing power.[17] The design of the algorithms is such that over time they become increasingly difficult to solve in order to ensure that the blockchain, and the bitcoins, are not created too quickly.[18]

Using the Internet, the blockchain is regularly updated and transferred to all users – hence the term, "peer-to-peer". The validity of the blockchain is

9 *Ibid.*
10 *Ibid.*
11 FATF http://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf 6.
12 Small 2015 *Houston Journal of International Law* 589.
13 Ramracheya "The Dawn of Our Tech-Economy: An Introduction to Bitcoin and Cryptocurrency" 2017 *Without Prejudice* 32 33.
14 Ramracheya 2017 *Without Prejudice* 33.
15 Hayes and Tasca "Blockchain and Crypto-Currencies" in Chishti and Barberis *The FinTech Book* (2016) 217.
16 Ramracheya 2017 *Without Prejudice* 33.
17 Small 2015 *Houston Journal of International Law* 589.
18 Small 2015 *Houston Journal of International Law* 590.

secured through hashes. Hashes form part of each block in the blockchain; they represent a mathematical link to the block directly before. Simply put, hashes chain the individual blocks together to create the blockchain.[19] These individual hashes continue to build on one another to ensure that complete and constant control of the validity is possible. In order to ensure that a bitcoin sender is an authorised user, the software uses a formula to check the network users.[20]

The transaction is attached to the next block in the blockchain and is credited to the recipient only when a majority of the users on the network confirms the correctness of the transaction. This process is known as the proof-of-work. Only once the block has been added is a new mathematical problem generated for solving. If multiple people solve the mathematical problem roughly at the same time, the network picks one upon which to keep building. This then becomes the longest and most trusted chain.[21]

2 2 What is cryptocurrency?

Simply put, cryptocurrencies refer to mathematically based, decentralised, convertible, virtual currencies that are protected by cryptography. Virtual currencies refer to a digital representation of value that can be traded digitally. Virtual currencies can function as a medium of exchange, units of account as well as a store of value; however, they do not qualify as legal tender within any jurisdiction.[22]

Cryptocurrency refers essentially to the digital asset that forms the foundation of the peer-to-peer electronic cash system, and which uses cryptography as a security measure.

Cryptocurrencies are not illegal *per se* and are often used by consumers as a form of payment owing to its highly secure nature, as well as its fast transferability around the world without third-party costs. Criminals exploit these benefits in order to further their illegal acts, such as money laundering. With this in mind, the reasons that criminals opt for cryptocurrency become obvious.[23]

2 3 How do cryptocurrencies acquire value?

Gold originally acquired its value from the vast amount of time and resources used to try to mine it.[24] The same mining concept applies to Bitcoin. Users spend time and resources building and maintaining a transaction system and get compensated with bitcoins. However, the value of a good is determined

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19 Omlor "Digitalization of Money and Currency Under German and EU Law" 2018 3 *TSAR* 613 615.

20 Omlor 2018 *TSAR* 615.

21 *Ibid.*

22 FATF http://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf 26.

23 De Mink "Dangers Inherent in Bitcoin and Other Cryptocurrencies" 2018 33 *De Rebus* 33.

24 Zhang "Why Does Bitcoin Have Any Value?" (25 November 2017) https://medium.com/@zmeric5/why-does-bitcoin-has-any-value-520bdc012d46 (accessed 2018-08-07).

by the desire for it. Even though time and resources are spent on an object that may prove useful, this does not necessarily mean that the object holds any value.[25] As with all finite resources, the number of bitcoins will eventually run out: only 21 million bitcoins will be produced. Similar to mining in the real world, the last few bitcoins will be the most difficult and expensive to mine.[26]

2 4 Inherent dangers of cryptocurrencies

Although cryptocurrency is used for both legitimate and illegal means, it clearly poses a number of inherent dangers, such as simplifying the money laundering process. This is because the traditional stages of money laundering can easily now be merged into one another with the help of information technology; cryptocurrencies are sent anonymously and directly to a recipient without any need for identification or monitoring of transaction amounts.[27]

One of the mechanisms used to combat traditional money laundering is the "know your customer" policy (KYC).[28] The KYC policy aims to identify the consumers of financial institutions adequately, by requiring legal identification, residency information as well as a valid photograph.[29] By contrast, Bitcoin is known for its high degree of anonymity; the only aspect that identifies a bitcoin user is his or her public key. No other personal information of the user is disclosed. This ensures a high level of protection against identity theft. However, criminals use this mechanism in their favour to circumvent traditional anti-money-laundering mechanisms, such as the KYC policy.[30]

As a result of Bitcoin's decentralised nature, transactions are made directly between users without the need for a third-party intermediary. This means that the cryptocurrency-based payment system may operate or may be located in any jurisdiction with weak anti-money-laundering frameworks.[31] The aim of the traditional anti-money-laundering directive was to monitor the intermediaries. However, the lack of intermediaries in the bitcoin network makes this traditional approach impossible to apply, which poses the risk that criminals may intentionally seek out jurisdictions with inadequate anti-money-laundering mechanisms, thereby enhancing their ability to launder their money or provide a money laundering service to other users.[32]

Another inherent danger of cryptocurrencies is that transfers can be made across national borders without government interference. Transfers take place at high speeds and sometimes instantaneously, meaning that even if a transaction is detected, the proceeds of the illegal activity are difficult to

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25 Zhang https://medium.com/@zmeric5/why-does-bitcoin-has-any-value-520bdc012d46.
26 Nieman "A Few South African Cents' Worth on Bitcoin" 2015 18 *PER* 1979 1987.
27 De Mink 2018 *De Rebus* 33.
28 Bååth *How to Combat Money Laundering in Bitcoin?* (published thesis, Linköpings Universitet) 2016 2.
29 Bååth *How to Combat Money Laundering in Bitcoin?* 7.
30 Bååth *How to Combat Money Laundering in Bitcoin?* 10.
31 De Mink 2018 *De Rebus* 34.
32 *Ibid* .

confiscate.[33] Furthermore, bitcoin transfers are irreversible. Therefore, it becomes almost impossible to recover illegal proceeds once a transfer has been recorded.[34]

The lack of transactional recordkeeping is yet another risk of Bitcoin. During an ordinary money-laundering investigation, following the money trail would be the method used. With Bitcoin, all transactions are made public, but such transactions are only published in computer code. When law enforcement attempts to make a connection between the public key and the user behind it, there is a problem;[35] it is difficult to trace the identities of users without their co-operation.[36]

The final risk factor relates to the jurisdictional issues that arise owing to the fact that there is no internationally accepted regulation or framework regarding cryptocurrency; each jurisdiction individually has the cumbersome task of attempting to regulate cryptocurrency transactions. As discussed above, this becomes a difficult task when such transactions are concluded directly with another user anywhere in the world. According to the Financial Action Task Force (FATF) report on virtual currencies,[37] records linking identification and transactions of users may be kept by different entities within any jurisdiction. However, access by law enforcement agencies and regulators may be hampered or limited in this regard.[38]

2 5 Money laundering using cryptocurrency

For the general public, anonymous browsing has been made available using the Tor-browser, otherwise known as the Onion Router. By routing Internet traffic through multiple Tor nodes, network traffic is encrypted, thereby rendering a user's IP-address[39] untraceable and unidentifiable. Put differently, it allows Tor users to browse the Internet without disclosing the originating IP-address. This system allows the user to browse the Dark Web, while remaining anonymous.[40] The Dark Web is a part of the Internet that is not indexed by search engines and should only be accessed through the use of an anonymising browser or encryption software, such as Tor and a virtual private network (VPN),[41] to ensure anonymity. The Dark Web can be used for anything, from the purchase of usernames and passwords to hacking

33 *Ibid*.
34 *Ibid*.
35 Brown "Cryptocurrency and Criminality: The Bitcoin Opportunity" 2016 89 *Police Journal: Theory, Practice and Principles* 327 333.
36 De Mink 2018 *De Rebus* 35.
37 FATF http://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf 6.
38 De Mink 2018 *De Rebus* 35.
39 An Internet Protocol address is a unique string of numbers that identifies each computer within a network.
40 Van Wegberg, Oerlemans and Van Deventer "Bitcoin Money Laundering: Mixed Results? An Explorative Study on Money Laundering of Cybercrime Proceeds Using Bitcoin" 2018 25 *Journal of Financial Crime* 419 421.
41 A virtual private network is technology that creates an encrypted and safe connection over a less secure network, such as the Internet; Burke "Virtual Private Network (VPN)" (September 2018) https://searchnetworking.techtarget.com/definition/virtual-private-network (accessed 2018-12-04).

services and illegal porn.[42] As a result of its anonymous nature, Bitcoin is the main form of currency on the Dark Web.[43]

The blockchain is a public ledger that makes all previous transactions and bitcoin addresses available to all users – which is favourable to the law enforcement authorities. As a result of the blockchain design, bitcoin transactions are linked to one another. Simply put, each input is inevitably the output of a previous transaction.[44] For cybercriminals, this poses a risk as their transactions are linked and may be traced back to the illegal source. The Dark Web offers services to anonymise bitcoins further in order to assist in bitcoin laundering. There are two aspects to bitcoin laundering. First, there are bitcoin mixers or tumblers,[45] a service that aims to disconnect bitcoins from their illegal source. Secondly, there are bitcoin exchanges, a service that attempts anonymously to convert bitcoins into actual money.[46]

Mixing services break the money trail of bitcoin transactions. The customer is given a newly generated bitcoin address in order to make a deposit. Once a mixing fee has been deducted, the mixing service pays out bitcoins from its reserve to an address that is provided by the customer. In order to ensure a higher level of anonymity, the payouts are spread out over time and also introduce an aspect of unpredictability in the division of amounts.[47] To clarify, a mixer is a type of anonymiser disguising the chain of transactions in the blockchain by connecting all the transactions in the same bitcoin address and sending these transactions together, in such a way that it appears to have been sent from another address. The mixer sends the transactions through a complex series of fake transactions, thereby making it difficult to connect the coins with a specific transaction.[48] Once the bitcoin mixing has taken place, it becomes almost impossible to trace it to the illegal source.[49]

The exchange services are used once the bitcoins have been successfully mixed. In terms of this, a exchange agrees to receive bitcoins in exchange for any other currency, thereby allowing users to buy and sell bitcoins online. Output platforms such as Luno[50] are used to ensure that the exchanged currency ends up in the possession of the user.[51] Generally, these output platforms require a valid and active account in order to be used as a cash-out strategy. This provides an added layer of protection to identify and trace

42 Small 2015 *Houston Journal of International Law* 582.
43 *Ibid*.
44 Van Wegberg *et al* 2018 *Journal of Financial Crime* 423.
45 Van Wegberg *et al* 2018 *Journal of Financial Crime* 420.
46 *Ibid.*
47 Van Wegberg *et al* 2018 *Journal of Financial Crime* 423.
48 FATF http://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf 6.
49 Van Wegberg *et al* 2018 *Journal of Financial Crime* 424.
50 Luno is a bitcoin-related company with its headquarters in the UK. It facilitates bitcoin storage and transactions, including buying, selling and paying through the bitcoin wallet services. It also operates exchanges between fiat currencies and Bitcoin.
51 Van Wegberg *et al* 2018 *Journal of Financial Crime* 429; Luno "About Luno" (undated) https://www.luno.com/en/about (accessed 2018-11-27).

suspected criminal activity and to identify the user.[52] However, these accounts are available to be purchased on the Dark Web, thereby creating a mechanism for erasing any connection to criminal users.[53] Criminals can either use the exchange services available on the Dark Web or can exchange currency through a bitcoin ATM, provided that amounts are sufficiently low so as not to raise any suspicion and trigger the requirement of identification verification.[54] It is submitted that in some cases personal or banking information is not required in order to complete a transaction at a bitcoin ATM.[55]

3 REGULATION OF CRYPTOCURRENCY

The general opinion on Bitcoin is that it is unregulated. However, this is both vague and unclear. It may be more accurate to say that the peer-to-peer network and technology are unregulated. In fact, these two aspects cannot be regulated. This is because the peer-to-peer network is decentralised. Therefore, to say that Bitcoin itself is unregulated is incorrect; Bitcoin is a set of rules that regulates the decentralised digital currency, while the peer-to-peer network ensures that these rules are enforced. Therefore, it is more correct to say that the bitcoin network is self-regulated.[56]

Although cryptocurrency is not expressly mentioned in law or regulation, the use of such new technology may be covered by existing laws.[57] In fact, regulation may occur without any laws. It is submitted that Bitcoin is already well regulated, not by laws set in place by legislatures, banks or payment processors, but by the mathematical algorithms and consensus of the users in the globally accessible system. Furthermore, should a user in the bitcoin network not follow the rules and regulations programmed by the network, they are identified as irrelevant and easily ignored by other users.[58] Therefore, it is submitted that it would be more accurate to say that Bitcoin is unregulated by laws and frameworks in the majority of jurisdictions.

3 1 Cryptocurrency and the current anti-money-laundering framework within South Africa

Jurisdictions such as Canada, the United States of America (USA) and the European Union (EU) have taken steps in order to regulate cryptocurrencies in an effort to combat money laundering. However, South Africa has not been so quick to enact such regulations. The South African Reserve Bank (SARB) has stated its intention to investigate the possibility of the blockchain

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52 Hyman "Bitcoin ATM: A Criminal's Laundromat for Cleaning Money" 2015 27 *St. Thomas Law Review* 296 303.

53 Van Wegberg *et al* 2018 *Journal of Financial Crime* 429.

54 Gruber "Trust, Identity, and Disclosure: Are Bitcoin Exchanges the Next Virtual Havens for Money Laundering and Tax Evasion?" 2013 32 *Quinnipiac Law Review* 135 139.

55 Hyman 2015 *St. Thomas Law Review* 304.

56 Hoegner *The Law of Bitcoin* (2015) 2.

57 Hoegner *The Law of Bitcoin* 3.

58 Gruber 2013 *Quinnipiac Law Review* 185.

and has expressed its concerns with the risks involving cryptocurrencies.[59] As the current position stands, South Africa does not regard cryptocurrencies as legal tender, but cryptocurrencies may be used.[60] Given that cryptocurrencies are not regulated by a central authority such as a bank, they fail to meet the definition of legal tender as provided by the South African Reserve Bank Act.[61] This means that any supplier may refuse cryptocurrencies as a form of payment without being in breach of the law. This was confirmed by the National Treasury, which has warned users that there are currently no laws or regulations that address cryptocurrencies. As a result, users have no legal protection or remedies available to them.[62]

The risk-based approach, as applied to the anti-money-laundering framework by the FATF and the EU, emphasised the importance of identifying money-laundering risks associated with payment mechanisms such as cryptocurrencies. One of these risks is the high degree of anonymity of cryptocurrencies and their ability to bypass anti-money-laundering systems. Although these risks are apparent, South Africa has failed to take steps to combat them.[63] In general, the legal framework for the financial sector is comprehensive and has kept up with international standards. Moreover, South Africa has been regarded as a jurisdiction with relatively strong anti-money-laundering laws. However, the same cannot be said for the regulation of cryptocurrencies, which can be used for money laundering.[64]

Compared to other jurisdictions, South Africa has also not completely ignored the matter of cryptocurrencies. SARB's Position Paper on Virtual Currencies, released in 2014, seemed promising with regard to the regulation of cryptocurrencies. However, the Position Paper merely confirms the lack of legal and regulatory framework for cryptocurrencies. SARB emphasises that it does not regulate, supervise or oversee cryptocurrency networks. Therefore, any transaction or activity relating to cryptocurrency is entirely at the risk of the user, who has no recourse to SARB.[65]

Furthermore, SARB recognised that there was no substantial risk to financial stability relating to virtual currencies at the time. However, it reserved the right to change this view according to market developments. Since cryptocurrencies are not defined as a payment instrument or financial product, cryptocurrencies also fall outside the ambit of regulation by the Prudential Authority, forming part of SARB, and the Financial Sector Conduct Authority.[66]

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59 Ramracheya 2017 *Without Prejudice* 33.

60 *Ibid.*

61 90 of 1989.

62 National Treasury "Unregulated in South Africa" in *User Alert: Monitoring of Virtual Currencies* (2014) 2.

63 Mothokoa *Regulating Crypto-Currencies in South Africa* 39.

64 *Ibid.*

65 Nieman 2015 *PER* 1979 1988.

66 Intergovernmental FinTech Working Group "Position Paper on Crypto Assets" (2018) http://www.treasury.gov.za/comm_media/press/2020/20200414%20IFWG%20Position%20Paper%20on%20Crypto%20Assets.pdf (accessed 2020-08-01) 8.

South Africa has been criticised for adopting a "wait and see" approach, as central banks have only published notices and disclaimers stating that users hold cryptocurrencies at their own risk. This is not an effective method to combat money laundering using cryptocurrencies. It is submitted that regulators should be actively involved with cryptocurrencies to understand how they work, and to be able to regulate them effectively.[67] Owing to the decentralised nature of Bitcoin, there is no central organisation upon which money-laundering regulations may be imposed.[68] From a regulatory perspective, anti-money-laundering laws currently in place in South Africa cannot be used. The current framework is based on the assumption that there is a central authority or business that can impose obligations.[69] It thus becomes clear that current anti-money-laundering frameworks need to be developed to include cryptocurrencies, as the current approach is not viable to combat money laundering that uses cryptocurrencies.

Currently, the anti-money-laundering framework to combat traditional money-laundering techniques is strong. However, it is weak for money laundering using cryptocurrencies. This is owing to a failure to amend existing legislation. The existing legislation does not define cryptocurrencies, and nor does it provide any regulation for businesses that trade in cryptocurrencies. In addition, there is no mention of miners or users.

By comparison, existing legislation in Canada[70] was amended to include cryptocurrencies as well as to authorise the Financial Transactions and Reports Analysis of Canada (FinTRAC) to ensure compliance with existing legislation, by applying the KYC policy to businesses transacting in cryptocurrency and to exchanges. The US and EU applied a different approach by promulgating legislation to regulate cryptocurrencies separately, as well as clarifying the position of the users and businesses that transact with cryptocurrencies.

In 2017, the South African government began working with a blockchain-based solutions provider, Bankymoon, to create a balanced approach to cryptocurrency regulation.[71] Furthermore, SARB released a media statement in February 2018 establishing the Financial Technology (FinTech) programme. The first goal of the FinTech programme was to review the position of SARB regarding cryptocurrencies and to inform an appropriate policy and regulation framework.[72] Although this can be seen as a step in a positive direction, no legislative instruments to regulate cryptocurrencies and combat money laundering have been enacted as yet. One can only remain hopeful that the establishment of the FinTech programme will be the first of

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67 Motelle "The Race of Innovation in Financial Services and the Regulatory Chase: Some Thoughts on the Regulation of Crypto-Currencies" 2017 3 *Development Finance Agenda* 8 9.

68 Stokes "Virtual Money Laundering: The Case of Bitcoin and the Linden Dollar" 2012 21 *Information & Communications Technology Law* 221 230.

69 Stokes 2012 *Information & Communications Technology Law* 230.

70 The Criminal Code was amended to include cryptocurrencies in the definition of money laundering.

71 Nelson "Cryptocurrency Regulation in 2018: Where the World Stands Right Now" (1 February 2018) https://bitcoinmagazine.com/articles/cryptocurrency-regulation-2018-where-world-stands-right-now/ (accessed 2018-08-08).

72 Retief "Accounting for Cryptocurrency" 2018 *Business & Economy* 10 11.

many steps to regulate cryptocurrencies.[73] There is still uncertainty concerning the regulation of cryptocurrencies and enforcement thereof. It is therefore helpful to consider carefully the current legal framework, with particular reference to its purpose, in order to provide some guidelines for the regulation of cryptocurrencies. This framework includes FICA, as well as anti-money-laundering legislation and the KYC policy.[74]

3 2 Challenges in cryptocurrency regulation

Due to the complex and decentralised nature of Bitcoin, regulation becomes challenging. The most effective approach is to analyse each bitcoin transaction entity individually and determine an appropriate and effective way to regulate it, as opposed to regulating the bitcoin network as a whole. These entities include: sender, launderer, miner, bitcoin development team and currency exchange.[75]

Due to the pseudonymous nature of the sender's identity in the bitcoin network, attempting to regulate the sender is unrealistic. When transactions take place, no personal information is exchanged between users. Therefore, being able to identify the bitcoin user is unlikely. It is submitted that by attempting to regulate this, a greater distrust and dissatisfaction towards government is likely to arise. Furthermore, this could lead to increased anonymisation. A similar result may arise in attempting to regulate receivers or launderers. With no personal information given to link the crime to the user, law enforcement is likely to invest a large amount of time and resources in attempting to trace the user; and the reward of such efforts may be relatively small.[76] Moreover, the regulation of bitcoin miners is also likely to prove difficult. Essentially, miners replace the position of the payment processor. However, the miner is still a user on the network and the same problem as above arises with users being anonymous. Furthermore, it is the mining software that processes the transaction without user involvement. Thus, it would be illogical to regulate miners when it is the miner's software that processes bitcoin transactions.[77]

It has been argued that an effective solution lies in regulating the bitcoin development team or requiring them to change the software in order to monitor transactions as well as to de-anonymise transfers. However, this fails to recognise that Bitcoin is open-source software that is developed generally by the network. Putting a stop to the development team would not stop the distribution of code, as the development team does not operate as a central authority that controls the operation of the network. It is thus

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73 *Ibid*.

74 Bothma "Bitcoin, Blockchain, Cryptocurrencies and ICO's: Legal Enigmas for Start-up's Operating on the Future Frontier" (undated) https://dommisseattorneys.co.za/blog/bitcoin-blockchain-cryptocurrencies-icos-legal-enigmas-start-ups-operating-future-frontier/ (accessed 2018-09-15).

75 Bryans "Bitcoin and Money Laundering: Mining for an Effective Solution" 2014 89 *Indiana Law Journal* 441 469.

76 Bryans 2014 *Indiana Law Journal* 470.

77 *Ibid.*

submitted that regulating the development team would have little to no effect on lessening illegal activity that may occur through Bitcoin.[78]

Lastly, the regulation of bitcoin currency exchanges could be explored. Exchanges generally deal with fiat currencies that are likely to be regulated by money exchange laws. The credibility of exchanges is increased through the user confidence and volume. This means that if the exchange has fewer users who are willing to trade or if the exchange is not trust worthy, the stages of money laundering will not easily occur without attracting the attention of the authorities. Therefore, exchanges are less likely to be decentralised and are easier entities to regulate.[79]

Luno and IceCubed are two well-established bitcoin exchanges in South Africa. Although there are no regulations currently in place within South Africa, exchanges such as Luno have stated that they are committed to implementing and maintaining a high standard of KYC and anti-money-laundering compliance by way of a risk-based approach. This is to assist in the detection, prevention and reporting of any money-laundering activities. Luno implements the KYC policy by requiring the user to submit evidence of their identity. Thereafter, it employs effective procedures to verify the authenticity of the information. Put differently, Luno implements procedures for customer identification, record keeping, retention of transaction documents as well as reporting suspicious transactions. Furthermore, Luno does not provide services when there is good reason to believe that such transactions are associated with money laundering.[80] This illustrates that exchanges can be the site of effective regulation.

A different approach is to regulate cryptocurrencies out of existence, which has been an approach in many jurisdictions. This approach is supported by the view that Bitcoin is primarily used by criminals and should be banned in order to prevent it from being used for illegal purposes.[81] Bitcoin has been criticised for not providing any beneficial use, and therefore its eradication is justified. However, it is submitted that this is not the case.[82] Attempting to eliminate Bitcoin may be an impossible task as users can remain anonymous by using Tor to prevent having their public keys traced to their personal identities. This means that criminals would continue to operate despite government regulations. It is submitted that this approach would only eradicate the legitimate uses of Bitcoin, leaving criminals unaffected.[83]

Thus, a balanced approach should be implemented. Recognising that Bitcoin has beneficial uses, legislatures should adopt legislation that regulates this use as well as attempts to prevent money laundering. However, legislatures should bear in mind the harsh reality that is the Dark

78 Bryans 2014 *Indiana Law Journal* 471.
79 Bryans 2014 *Indiana Law Journal* 472.
80 Luno https://www.luno.com/en/legal/compliance.
81 Singh "The New Wild West: Preventing Money Laundering in the Bitcoin Network" 2015 13 *Northwestern Journal of Technology and Intellectual Property* 37 49.
82 Singh 2015 *Northwestern Journal of Technology and Intellectual Property* 49.
83 *Ibid.*

Web and understand that, at a certain point, such regulations will not be effective against those users who remain anonymous.[84]

Anonymity poses a number of challenges for law enforcement. However, money laundering using Bitcoin will eventually come out of the virtual network. This occurs when the user converts his or her bitcoins to fiat currency using a bitcoin exchange. This is where the abovementioned jurisdictions regulate Bitcoin, using a risk-based approach. Laws require the exchange to obtain relevant personal information of the user, thus creating a paper trail outside of the bitcoin system for law enforcement to follow. At some point in the process, a criminal user who has exchanged his or her cryptocurrency must launder money in the traditional manner. Doing so will raise suspicion and red flags typically associated with a cash-based money-laundering system.[85]

It is submitted that the need for bitcoin ATMs has spiked in recent years, owing to the increased availability of Bitcoin to the public, especially the underbanked. The need to follow a balanced approach is evident, having regard to the strict requirement of identifying the user and the fact that the underbanked do not usually have the documentation that is traditionally required at a bank. The anonymity of Bitcoin is also a factor to be considered when formulating regulations as many bitcoin users have turned to cryptocurrency in order to protect their personal identity.[86]

Some jurisdictions have put into place regulations that require users to provide identification when transacting for more than a certain amount. This requirement can easily be avoided by using a fake or stolen identification in order to complete the transaction. To resolve this issue, it has been suggested that the following installations be required for the operation of bitcoin ATMs: first, a scanner that is able to scan identity or passport barcodes; secondly, software that is able to match the scanned data to a national database; thirdly, a camera to take a real-time photograph of the user; and lastly, facial recognition software that is able to match the identity document to the picture taken and the database.[87]

The scanner helps to verify the authenticity of the identification document, as currently anyone can use a bitcoin ATM using a fake identification document to complete the transaction. By using this technology, a transaction cannot be completed without a valid identification document that matches the national database. For further protection, a real-time photograph is taken, and facial recognition is used in order to verify that the user is indeed using a valid identification document.[88]

However, this approach is not without its sceptics; it could also be a potentially costly operation. What is true, as technology develops, is that governments cannot expect to apply old regulations to an entirely new

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84 *Ibid.*
85 Singh 2015 *Northwestern Journal of Technology and Intellectual Property* 60.
86 Hyman 2015 *St. Thomas Law Review* 314.
87 *Ibid.*
88 Hyman 2015 *St. Thomas Law Review* 315.

concept. Therefore, there must be developments within the regulatory framework.[89]

3 3 The question of jurisdiction

Due to the Internet being an international phenomenon, the jurisdictional question arises as to where a cyberlaunderer is to be apprehended and prosecuted. This becomes particularly problematic as the cyberlaundering concept is yet to be adequately addressed in either international or national laws.[90] It is submitted that cyberlaundering falls under the category of cyber crimes, and therefore remedies are available in terms of cyber law. This may be a starting point for determining jurisdiction.[91] In terms of the Electronic Communications and Transactions Act,[92] a South African court has jurisdiction over the cyber offences provided for by the Act in terms of the territoriality principle, effects principle or active personality principle.[93]

The activity principle provides that a person who has committed a cyber crime is to be prosecuted in the country where he or she is a national. However, this principle may not be well suited to cyberlaundering as it is difficult to apprehend a cyberlaunderer physically.[94] The effects principle provides that the country seeking jurisdiction must have felt the effects of the crime. However, the effects in question may in reality be difficult to establish owing to the unpredictable nature of cyberlaundering.[95] Therefore, it is submitted that the territoriality principle is the best solution to the question of jurisdiction. In terms of this principle, a court has jurisdiction where the offence is committed, within the territory of the country seeking jurisdiction.[96]

Simply put, in a case of cyberlaundering, the country where a website is registered has jurisdiction to prosecute. This principle is supported by the European Union Convention on Cybercrimes.[97] However, this approach is not without problems, particularly in countries known for a weak anti-money-laundering framework. In addition to this, many websites are not registered, adding yet another problem to many others.[98]

3 4 Approaches to regulating cryptocurrency

It is submitted that cryptocurrency should be clearly defined in legislation. Furthermore, the definition of money laundering in existing legislation should specifically include the use of cryptocurrency for such purposes. While states go back and forth on deciding whether cryptocurrency constitutes

89 *Ibid.*
90 Leslie *Anti-Cyberlaundering Regulation and Control* 1.
91 Leslie *Anti-Cyberlaundering Regulation and Control* 72.
92 S 90 of Act 25 of 2002.
93 Leslie *Anti-Cyberlaundering Regulation and Control* 73.
94 *Ibid.*
95 *Ibid.*
96 *Ibid.*
97 The European Union Convention on Cybercrimes 23. XI. Adopted on 12 April 2001, and came into force on 1 July 2004.
98 Leslie *Anti-Cyberlaundering Regulation and Control* 73.

money, there is no doubt that such currencies have monetary value. That said, the definition of money laundering could be interpreted to imply the inclusion of cryptocurrency laundering – for example, when a user moves bitcoins from an address that is linked to illegal activities to a new address in such a way as to conceal the original source of the proceeds, thus indicating the user's intention to "clean" the bitcoins from their illegal source. This would amount to "bitcoin laundering".[99]

Therefore, financial institutions in all jurisdictions are urged to implement regulations and increase anti-money-laundering enforcement targeting mixers and exchanges. It is submitted that most mixers and exchanges, which are used online, conceal their location in an attempt to evade regulations that have been put in place to promote transparency. It is for this reason that law enforcement agencies should target these services. Regulations should be put into place to enforce stronger anti-money-laundering practices by exchanges, which should verify their customers as well as validate the source of their proceeds.[100] In addition, law enforcement agencies should target the Dark Web and websites that offer mixing or exchange services by uncovering their vulnerabilities. Attempting to shut down these websites is merely a temporary solution. Law enforcers should use the Dark Web to interact with users, while remaining completely anonymous. Although some users may be confident using the Dark Web, the idea that law enforcement is lurking on the Dark Web may discourage those users.[101]

It is submitted that once regulations begin to form within jurisdictions, such jurisdictions should share these lessons with other states, which can then impose similar regulations. Due to the boundless nature of Bitcoin, states need to cooperate and work together in order to regulate cryptocurrencies on an international level.[102] Given the nature of cryptocurrencies, a coordinated approach at an international level may be important for regulations to be fully effective. This is because these currencies live online, in the virtual world and are not limited by national jurisdictions.[103] Therefore, it is submitted that in order to regulate cryptocurrencies effectively at an international level, there needs to be cooperation and assistance between states. Moreover, the Recommendations of the FATF and its risk-based approach should be applied to the regulation of cryptocurrencies.[104] The FATF suggests that national authorities should set up mechanisms to share information in order for countries to fully understand the risks of money laundering within the cryptocurrency network. The FATF also suggests that a risk-based approach be used, whereby authorities target the nodes that are most likely to be used in the money-laundering process. It specifies that exchanges should be targeted and monitored, but requires the exchanges

99 Fanusie and Tobinson *Bitcoin Laundering: An Analysis of Illicit Flows into Digital Currency Services* (2018) 11.

100 Fanusie and Tobinson *Bitcoin Laundering* 11.

101 Fanusie and Tobinson *Bitcoin Laundering* 12.

102 *Ibid.*

103 Campbell-Verduyn "Bitcoin, Crypto-Coins, and Global Anti-Money Laundering Governance" 2017 *Crime, Law and Social Change* 1 10.

104 Campbell-Verduyn 2017 *Crime, Law and Social Change* 11.

themselves to apply the KYC policy when carrying out transactions or establishing business relations.

Furthermore, it requires exchanges to do so by using reliable and independent documents or information.[105] It suggests that exchanges should identify users using a national identity number or Internet Protocol addresses, as well as conduct online searches for activity information that validates, and is consistent with, customers' transactions.[106]

While it is clear that Bitcoin offers benefits, it also gives rise to a number of risks owing to the malicious use of these benefits by criminals wishing to launder their money. Some countries have attempted to regulate cryptocurrencies by either amending existing laws or adopting new ones. Canada opted for the first approach, whereby existing laws were amended so as to include reference to cryptocurrencies in the definition of money laundering. In addition, businesses that transact with cryptocurrencies, as well as exchange services, are required to be registered. Canadian law requires these entities to be transparent, despite the anonymity of cryptocurrencies. The reason is that disclosure of information reduces the number of illegal exchanges, as authorities are able to identify the exchanges that do not disclose their information as illegal services. Other countries and blocs, such as the US and the EU, have opted for the second approach. These jurisdictions have created new legislation to regulate cryptocurrencies. However, they fundamentally follow the same approach as Canada, by regulating the businesses that transact using cryptocurrencies, as well as obliging such entities to disclose the required information.

It has been submitted that the best approach to be followed by states is the balanced approach; a balance should be drawn between the benefits of cryptocurrencies and associated risks. Although regulators in many countries have been unwilling to regulate cryptocurrencies owing to their complex nature, there is a need for financial regulation in order to ensure harmony between the economy and financial sector. Therefore, it is submitted that in order to combat money laundering using cryptocurrencies, countries need to regulate cryptocurrencies. South Africa has done nothing more than publish Position Papers that clarify that cryptocurrencies remain unregulated. Furthermore, the position papers fail to give an indication on how cryptocurrencies would be regulated in the future. This can be seen as South Africa's downfall in the anti-money-laundering framework. It is submitted that South Africa has expected answers from the FATF in this regard, as opposed to taking progressive steps to regulate cryptocurrencies at a national level. As discussed above, it is not necessary for South Africa to promulgate a single Act for the regulation of cryptocurrencies; rather, it can integrate such regulation into existing laws. By following the steps that Canada has taken, South Africa can incorporate cryptocurrencies into existing legislation in order to offer immediate relief and protection.[107]

There is clearly a need for regulators to be actively involved with cryptocurrencies to understand how they operate, before they can effectively

[105] Campbell-Verduyn 2017 *Crime, Law and Social Change* 12.
[106] *Ibid.*
[107] Mothokoa *Regulating Crypto-Currencies in South Africa* 55.

regulate it.[108] It is strange that despite the growth of Bitcoin giving rise to a number of risks, South Africa, and many other jurisdictions, have not developed any legal or regulatory frameworks in response. To date, South Africa has not promulgated any legislation regarding the regulation of cryptocurrencies in an attempt to combat money laundering.[109] What is clear is that, without national or international laws and regulations, there will be no clear instructions on how to deal with criminals who launder illicit funds using cryptocurrencies, and no clarity on where to prosecute them. Nonetheless, this article has shown that the existing South African legislative framework is capable of embracing cryptocurrency in its legal structure and of addressing the concerns of money laundering using cryptocurrency.

4 CONCLUSION AND RECOMMENDATIONS

In order to ensure an effective prevention and prosecution strategy against money laundering using cryptocurrencies, jurisdictions should not ignore the traditional methods of detection and investigation. Since cryptocurrency is still a relatively new form of currency, it is not yet typically accepted as a form of payment. This means that criminals still need to convert their cryptocurrency into physical cash, thereby using traditional third-party institutions.[110]

Installing and regulating gatekeepers would require registration as well as bringing dealers and exchanges in line with the scope of legislation, such as the Financial Intelligence Centre Act (FICA),[111] which obliges a person to report suspicious transactions. Currently, various downloadable digital wallets, such as Luno, require the user to disclose personal information in order to ensure verification. It is submitted that this promotes transparency and could be an effective way to combat money laundering using cryptocurrency, as each user needs a digital wallet.[112] Cyberlaundering should be a focus for government, law enforcement agencies, legislatures and researchers. The traditional concepts of currency and money laundering, within the current anti-money-laundering framework, need to be expanded and clarified to expressly include cryptocurrencies and cyberlaundering.[113]

In an attempt to strengthen the fight against money laundering, the FATF revised and updated its Recommendations in 2012. One recommendation included an increased emphasis on the risk-based approach, which is now regarded as the foundation of any country's anti-money-laundering system. The risk-based approach means that a country should work together with its authorities and accountable institutions in order to identify, assess and understand the money-laundering risks that the country may face, as well as

[108] Motelle 2017 *Development Finance Agenda* 8 9.
[109] Nieman 2015 *PER* 1999
[110] De Mink 2018 *De Rebus* 35.
[111] 38 of 2001.
[112] De Mink 2018 *De Rebus* 34.
[113] Leslie *Anti-Cyberlaundering Regulation and Control* 79.

adopt any appropriate anti-money-laundering measures.[114] However, in South Africa, the accountable institutions are not compelled by law to apply this risk-based approach to anti-money-laundering techniques.[115]

There is also a need for uniform international regulation of cryptocurrencies. Because of the global and boundless nature of cryptocurrencies, users may abuse weak anti-money-laundering laws of a jurisdiction. Therefore, it has been submitted that the United Nations Commission on International Trade Law (UNCITRAL) or the Organisation for Economic Co-operation and Development (OECD) should devise a model law that governs the regulation of cryptocurrencies at an international level.[116]

The use of cryptocurrencies is gaining popularity in South Africa, but remains unregulated and as such, is vulnerable to misuse. Thus, there is a need for regulatory intervention within South Africa to ensure that measures are implemented to prevent corrosion of the financial sector by cryptocurrencies.[117] In seeking to regulate cryptocurrencies, it is submitted that South African authorities should first ensure that such regulation will be proportional to the risks. Risks within the cryptocurrency system should be identified and dealt with accordingly. Secondly, it is submitted that exchanges should be accredited and regulated. Furthermore, it is suggested that a centralised platform be established where all initial coin offerings (ICO)[118] available to the public should be listed. Registering all ICO with a central body would allow for monitoring of the credibility and quality of the issuers within the network.[119] Lastly, the way in which cryptocurrencies are to be defined is an important aspect when applying a regulation. It is submitted that the scope of existing legislation should be expressly extended to include cryptocurrencies, rather than developing new legislation, which may quickly become obsolete due to the rapid development of technology.[120]

In short, legislatures have two options: either amend existing legislation by expanding definitions to include cryptocurrencies or create new legislation. As discussed above, South Africa has a well-developed legal framework regulating the financial-services industry. As such, amending existing legislation would require substantial organisation among regulators.[121] Amending existing definitions may also have an effect on the current financial instruments, services or products. If regulators opt for new regulatory legislation targeting cryptocurrencies, it may result in users being

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114 Williams *An Analysis of the Critical Shortcomings in South Africa's Anti-Money Laundering Legislation* (2017) 42.

115 Williams *An Analysis of the Critical Shortcomings in South Africa's Anti-Money Laundering Legislation* 43.

116 Mothokoa *Regulating Crypto-Currencies in South Africa* 61.

117 Mothokoa *Regulating Crypto-Currencies in South Africa* 60.

118 Initial Coin Offering acts similar to a fundraiser. A company looking to create a new type of coin will launch an ICO. Investors buy into the offering with fiat currency or a pre-existing digital token. In exchange for their support, investors receive the new cryptocurrency that is specific to the ICO.

119 Intergovernmental FinTech Working Group http://www.treasury.gov.za/comm_media/press/2020/20200414%20IFWG%20Position%20Paper%20on%20Crypto%20Assets.pdf.

120 FinTech *Intergovernmental FinTech Working Group* 10.

121 FinTech *Intergovernmental FinTech Working Group* 13.

subject to more onerous regulations. It is submitted that the existing regulatory framework may adequately regulate the cryptocurrency network.[122] With reference to the approaches taken in the above-mentioned jurisdictions, several recommendations are made.

Currently, the list of "accountable institutions" in terms of FICA has been amended to include any person or category of person used or likely to be used for the purpose of money laundering.[123] It is submitted that this definition should be expressly amended to include institutions that mine, exchange or hold cryptocurrencies.[124] Furthermore, it is recommended that all institutions dealing with cryptocurrencies, such as exchanges and wallet providers, should comply with the provisions of FICA. These institutions will then have the personal identity records of the user, which would make it easier to follow a trail of suspicious transactions related to money laundering.[125] Furthermore, in terms of the Prevention of Organized Crime Act (POCA),[126] it is submitted that cryptocurrencies should be included in the definition of "property". Extending the definition would mean that a person is guilty of the offence of money laundering if he or she launders money using cryptocurrencies.

It is evident that the application of the South African anti-money-laundering legislation, as it stands, is powerless against secretive organisations as provided for on the Dark Web. Therefore, it is submitted that the legislature should focus less on these organisations and more on regulating exchanges and wallet services. Although there is still much uncertainty regarding the regulation of cryptocurrencies and enforcement thereof in South Africa, it may be helpful for the legislature to consider carefully the current legal framework, with particular reference to its purpose, which may provide guidelines in regulating cryptocurrencies. The current framework includes FICA, anti-money-laundering legislation and the KYC policy.

Bankymoon has expressed its intention to create a balanced approach to regulation. This approach is particularly favoured for the regulation of bitcoin ATMs. However, the risk-based approach has been favoured for the regulation of exchanges, such as Luno, and has been shown to be effective. Technology is developing and changing at a rapid pace. Thus, the risks and growth of cryptocurrencies must be supervised. As such, government cannot expect to apply old regulations to an entirely new concept. Therefore, there must be developments within the regulatory framework.

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122 *Ibid.*

123 Mothokoa *Regulating Crypto-Currencies in South Africa* 60.

124 Itzikowitz, Meiring and Gunning "South Africa" in Dewey (ed) *Blockchain & Cryptocurrency Regulation* (2019) 432.

125 Mothokoa *Regulating Crypto-Currencies in South Africa* 60.

126 121 of 1998.

EXPOSING THE ICT REGULATORY DILEMMA: THE TEST FOR GOVERNMENTS

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SUMMARY

Information and Communications Technologies (ICTs) generate both benefits and challenges for society. For example, ICTs augment social development and encourage equality and inclusivity. In addition, these technologies create a new space – that is, cyberspace. This space is separate from physical or offline space. The emergence of this space has resulted in regulators having difficulty establishing suitable regulations. The latter are regulations that understand the workings and dynamics of ICTs. Mostly, regulators adopt regulatory frameworks that are suitable for controlling physical or offline environments. These regulations accept, *inter alia*, that the source of regulating is the law or legal rules. In the main, regulators continuously re-invent the ICT regulatory wheel in the hope that, by chance, suitable ICT regulations will emerge or be found. Consequently, ICT regulations often exacerbate the existing ICT regulatory dilemma. This article examines an alternative approach to regulations that is external to the law or legal rules. The structure accepts that a proper ICT regulatory framework is one that understands the workings and dynamics of these technologies. Given this understanding, ICT regulations should be bound to the technology and be able to develop or evolve with it.

1 INTRODUCTION

Information and communications technologies (ICTs) generate opportunities for society. Specifically, the Internet of things (IoT)[1] alone is likely to contribute 14 trillion US dollars to the global economy by 2030.[2] This contribution has the effect of intensifying economic development, lessening

[1] IoT is a combination of the Internet and things – for example, gadgets, smart devices, human beings, and hardware. See Minteer *Analytics of the Internet of Things* (2017) 14–15 and Khidadadi, Dastjerdi and Buyya "Internet of Things: An Overview" in Buyya and Dastjerdi (eds) *Internet of Things: Principles and Pradigms* (2016) 3 3. It measures, digitally controls and deals with the convergence of "previously unconnected things, reaching people and objects that technology could previously not reach and in the process also supports sustainable development element". See Vermesan and Friess *Internet of Things: From Research and Innovation to Market Development* (2014) 3 and World Economic Forum "Internet of Things: Guidelines for Sustainability" https://www.weforum.org/whitepapers/internet-of-things-guidelines-for-sustainability (accessed 2018-10-10).

[2] Häuser "Digital Business, Autonomous Systems and the Legal Challenges" 2014 2 *Internet & Law* 26 26–27.

inequality and encouraging inclusivity.[3] Because these technologies are comprehensive and inter-connected,[4] they have become instrumental in facilitating compliance with the United Nation's Sustainable Development Goals – for example, ending extreme poverty, improving quality of life and fostering innovation.[5] Despite these contributions, shortcomings in technology regulations, limited societal innovation and the uneven adoption of technologies undermine the opportunities that ICTs produce. As regards technology regulation, the cardinal view on the process of regulating is that the law or legal rules regulate.[6] In this manner, law prescribes the limit and extent to which society ought to conduct itself. It also "tells individuals not to deduct more than 50% of the cost of business meals from their income tax; it tells corporations not to resist unionisation; it tells police not to coerce confessions from suspects".[7] In this regulatory exercise, the State or government plays an indispensable function.[8] Specifically, the State relies on tools of detection and effecting for regulatory or governance purposes.[9]

Tools of detection largely enable government to gather information about those who are regulated – that is, society – and, using state channels, affect the behaviour of society towards a particular desired end.[10] For example, in cases where an allegation of wrongdoing is made, the State investigates (using tools of detection). The rationale is to guarantee that the elements of the alleged wrongdoing are present. Thereafter, it imposes (using tools of effecting) a sanction – that is, the threat of *ex post facto* punishment[11] – on those who defy or disobey the established legal rules. By so doing, the State follows the command-and-control procedure[12] wherein the law is a structure in terms of which legal rules are employed to control the activities of society and (legal) sanctions are imposed on those who transgress the law.[13]

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3 Minteer *Analytics of the Internet of Things* 14–15 and Khidadadi, Dastjerdi and Buyya in Buyya and Dastjerdi *Internet of Things: Principles and Pradigms* 3 3.

4 Okin *The Internet Revolution: The Not-For-Dummies Guide to the History, Technology, and Use of the Internet* (2005) 19; and Reed *Internet Law: Text and Materials* 2ed (2004) 8.

5 See United Nations Development Programme (UNDP) "Sustainable Development Goals" http://www.undp.org/content/dam/undp/library/corporate/brochure/SDGs_Booklet_Web_En.pdf (accessed 2018-10-10).

6 Black *Critical Reflections on Regulation* (2002) 2; and Ding "Internet Regulation" in Campbell, C Bán, S Bán and Szabo (eds) *Legal Issues in the Global Information Society* (2005) 279 281–282.

7 Lessig "The Constitution of Code: Limitation on Choice-Based Critiques of Cyberspace Regulation" 1997 5 *CommLaw Conspectus* 181 181.

8 Torfing *Politics, Regulation and the Modern Welfare State* (1998) 142.

9 Hood and Margetts *The Tools of Government in the Digital Age* (2007) 2.

10 Hood and Margetts *The Tools of Government in the Digital Age* 3.

11 Lessig 1997 *CommLaw Conspectus* 181.

12 Baldwin and Cave *Understanding Regulation: Theory, Strategy, and Practice* (1999) 1–2; and Coglianese and Mendelson "Meta-Regulation and Self-Regulation" in Baldwin, Cave and Lodge (eds) *The Oxford Handbook of Regulation* (2010) 146 146.

13 Black *Critical Reflections on Regulation* 2. The basis of the command-and-control procedure is that "law … shows a man (or woman) the way to a righteous life on earth, a socially acceptable secular behaviour; for completion of man's (or woman's) destiny on the supernatural level". See Strömholm *A Short History of Legal Thinking in the West* (1985) 111. The above-mentioned is the case because "law is nothing else than a rational ordering of things which concern the common good, promulgated by whoever is in charge with the care of community". See Aquinas "Law and the Common Good" in Kent (ed) *Law and Philosophy: Readings in Legal Philosophy* (1970) 552.

Watson provides one of the finest descriptions of the above-mentioned structure by stating that legal rules

> "[c]laim[ ] to be authoritative, the rules are part of a system, the system claims jurisdiction in a wide range of matters, the rules elicit obedience, and the rules are or derive from a sovereign's command".[14]

One of the prominent features of the command-and-control system is that it is mostly stagnant and cumbersome.[15] It usually arises in situations where there is already a legal dispute. A legal process is then commenced to react to the established dispute.[16] Furthermore, the command-and-control system requires strict observance to certain accepted sets of rules. An examination of the law-making process in South Africa can be used as an example. This process is contained in Chapter 4 of the Constitution of the Republic of South Africa, 1996 (Constitution). The law-making process begins with a discussion document referred to as a Green Paper. The Green Paper is followed by a second document known as a White Paper, which generally formulates the policy programmes of the State. Thereafter, a Bill that includes a draft version of the envisaged law is prepared.[17] The Bill is tabled in the National Assembly, or the National Council of Provinces, for consideration by the members. Subsequently, it is referred to the related committee or committees of the National Assembly, or National Council of Provinces, and published for public comment in the *Government Gazette*. The latter committees debate the Bill and make certain modifications, if necessary. The last stage of the law-making process is to have the Bill assented to and signed into law by the President.[18]

Given the rigidity of the law-making process, the legal rules that inform it are likely to fail to deal sufficiently with conventional challenges. In this article, the most pertinent of these challenges relate to those that are generated by ICTs.[19] The examples include phishing, computer cracking,

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14 Watson *The Nature of Law* (1977) 35.

15 Barlow "Selling Wine Without Bottles: The Economy of Mind on the Global Net" http://w2.eff.org/Misc/Publications/John_Perry_Barlow/HTML/idea_economy_article.html (accessed 2016-10-13).

16 Watson *The Nature of Law* 18.

17 Various types of Bill may be distinguished – namely: Ordinary Bills (s 75 Bills), Ordinary Bills that affect provinces (s 76 Bills), Money Bills (s 77 Bills) and Constitutional Amendments (s 74 Bills). See Parliamentary Monitoring Group (PMG) "The Legislative Process" http://www.pmg.org.za/parlinfo/sectionb3 (accessed 2016-11-2).

18 Ss 74(9), 75(1)(*d*) and 76(1)–(3) of the Constitution. It is important to note that the provision of assenting to and signing of Money Bills by the President is not expressly set out in the Constitution. See s 77 of the Constitution.

19 The term "ICTs" is usually described differently to the word "technology" – that is, the "material artifacts (objects, devices, processes etc.) as well as the knowledge concerning these artifacts, and the activity aiming at the satisfaction of particular human and social needs through devising appropriate artifacts as well as the knowledge concerning this activity". See Arageorgis and Baltas "Demarcating Technology From Science: Problems and Problem Solving in Technology" 1989 XX *Zeitschrift für Allgemeine Wissenschaftstheorie* 212. ICTs refer, *inter alia*, to the Internet and the World Wide Web or Web. On the one hand, the term "Internet" refers to the interconnected system of networks that connect computers around the world using the Transmission Control Protocol/Internet Protocol or TCP/IP and includes future versions thereof. See s 1 of the Electronic Communications and Transactions Act 25 of 2002 (ECT Act). In simple terms, it is "that medium through which your e-mail is delivered and web pages get published". See Lessig

cyber-stalking and cyber-bullying. The insufficiency of the law to deal with novel ICT consternations can be revealed after examining certain related aspects of Chapter XIII of the Electronic Communications and Transactions Act (ECT Act).[20] This chapter states, *inter alia*, that a person or computer user is guilty of an offence if he or she accesses[21] or interferes with data[22] without having obtained the required authority to do so.[23] Thus, the limitation of Chapter XIII of the ECT Act is associated with its inability to address the conventional ways of accessing or interfering with data. For example, modern criminals do not necessarily need to be connected to a computer in order to access or interfere with data wrongfully. Any device or gadget that can be connected to the Internet can be used to access and interfere with data. Therefore, although Chapter XIII of the ECT Act may have dealt adequately with cases relating to the unauthorised accessing of data at the time that the ECT Act was passed, this may not be true as regards controlling the novel and future ways of accessing and interfering with data. This is because the reach that criminals currently have in being able to access personal information[24] stored online is incomparable to that which is envisaged by the ECT Act. Consequently, the latter chapter does not seem to recognise that the Internet[25] (or its future iterations) will generate additional openings for criminals to access and interfere with data using unconventional means.

The shortcomings of law as an ICT regulatory mechanism have to do with the limitations of human conduct in general. Particularly, they are a product of what Dewey refers to as the "blind hunch".[26] This blind hunch exists in situations where human beings act "not upon deliberation, but from routine, instinct, the direct pressure of appetite."[27] ICT regulators rely on blind hunch to regulate ICTs, using common sense; and sometimes they withhold reasons for the chosen regulations fearing that they may be illegitimate. An example of such a hunch, in the South African context, is found in the Electronic Communication and Transactions Amendment Bill, 2012. The Bill seeks, among other things, to supplement the ECT Act. However, it fails to do this. Instead, it compounds the existing ICT regulatory challenges by creating a multitude of what are to be considered "e-crimes" in the future. Some of these so-called e-crimes do not make sense to an ordinary

Code: Version 2.0 (2006) 9. On the other hand, the word "Web" is defined in s 1 of the ECT Act as an information browsing framework that allows a user to locate and access information stored on a remote computer and to follow references from one computer to related information on another computer.

20 25 of 2002.

21 In terms of s 85 of the ECT Act, the term "access" includes the actions of a person who, after taking note of any data, becomes aware of the fact that he or she is not authorised to access that data and still continues to access that data.

22 Data refers to the electronic representations of information in any form. See s 1 of the ECT Act.

23 See ss 86 and 87 of the ECT Act. See also s 119 read with ss 124 and 125 of the Ghanaian Electronic Transactions Act 777 of 2008.

24 For a definition of the term "personal information", see s 1 of the ECT Act.

25 The term "Internet" is defined in s 1 of the ECT Act as the interconnected system of networks that connects computers around the world using the TCT/IP and includes future versions thereof.

26 Dewey "Logical Method and Law" 1924 33 *The Philosophical Review* 560 560.

27 Dewey 1924 *The Philosophical Review* 560.

computer user. Specifically, e-crimes may hinder some important aspects of ICT – for example, availability, neutrality and privacy.

Therefore, an ICT regulatory approach that is external to the law is examined. This approach is abstracted from regulations and accepts that regulations, as opposed to legal rules, are flexible.[28] Particularly, regulations do not require a stringent following of the law-making process. Furthermore, the approach provides for an amorphous controlling framework that is or can be applied to any widely derived source of control or direction.[29] In investigating the ICT regulatory approach modelled from regulations, this article is divided into a number of sections. The second section studies the current debate regarding the ICT regulatory process. In particular, it exposes the opposing views as to whether it is possible to regulate recent technologies. The third section investigates some of the theories[30] for this regulation. The fourth section discusses the possible structure for ICT regulations. This suggested structure is founded on some of the existing principles of regulation. The last section of the article is the conclusion, comprising a general summary of the facts and a recommended way forward for the meaning and structure of ICT regulations in South Africa.

2 ICT REGULATORY DEBATE

This section examines the existing debate regarding the ICT regulatory process. In particular, it exposes the opposing views on whether it is possible to regulate recent technologies. The question regarding whether or not it is possible to regulate (or govern) ICTs has been the subject of academic scrutiny for many years.[31] There are some who argue that these technologies are impossible to regulate.[32] They base this claim on the fact that ICTs possess or create their own spaces.[33] This space is referred to as "cyberspace".[34] Cyberspace is described as a space where no one is in charge. Simply put, it is a computer-generated condition having the look and feel of the physical world.[35] A computer user is attracted into this space by its radiance, efficiency and effectiveness.[36] When people relocate to cyberspace, they become free from offline or state command and control.[37] In this context, cyberspace becomes a "mysterious conglomeration of virtual

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28 Stenning, Shearing, Addario and Condon "Controlling Interests: Two Conceptions of Order in Regulating a Financial Market" in Friedland (ed) *Securing Compliance: Seven Case Studies* (1990) 88 102.

29 Murray "Conceptualising the Post-Regulatory (Cyber) State" in Brownsword and Yeung (eds) *Regulating Technologies: Legal Futures, Regulatory Frames and Technological Fixes* (2008) 287 288.

30 For purposes of this article, the term theory means "a set of propositions or hypothesis about why regulations or regulatory processes emerge, which actors contribute to that emergence and typical patterns of integration between regulatory actors".

31 See Weber *Shaping Internet Governance: Regulatory Challenges* (2009) 203.

32 Johnson and Post "Law and Borders: The Rise of Law in Cyberspace" 1996 48 *Stanford Law Review* 1366 1379.

33 Johnson and Post 1996 *Stanford Law Review* 1379.

34 Murray in Brownsword and Yeung *Regulating Technologies* 300.

35 Gibson *Neuromancer* (1984) 16.

36 Lessig *Code: Version 2.0* 9.

37 Lessig *Code and Other Laws of Cyberspace* (1999) 135.

communities"[38] and a "lawless frontier where anarchy and vigilantism are alive and well".[39] In this space, regulations

> "[a]dapt by continuous increments and at pace second to geology in its stateliness. Technology advances in ... lunging jerks like punctuation of biological evolution grotesquely accelerated ... this Mismatch is permanent".[40]

On the basis of the discussion made above, technology and regulations become adversaries. Technology represents contemporary undertakings and innovation.[41] This does not imply that technology is separate or even more significant in society than other innovative imperatives – for example, science. It simply signifies that technology innovation augments the development of the qualities of a society. In other words, it facilitates growth and expansion. This development normally occurs without technology being tied to a particular jurisdiction or regulations. However, regulations signify command, bureaucracy and an affront to development.[42] In other words, they assume the undertones of legal positivism – that is, they become a set of legal rules that determine when they should be imposed on those not obeying a particular command.[43]

In addition, there are those who discard the supposed individuality of cyberspace.[44] They state that cyberspace is related to the physical space.[45] Specifically, the activities that are carried out through the use of technologies have importance to the computer users or other entities that rely on computers.[46] For example, suppose that Mike is a client of Brown Bank. Mike wishes to access Brown Bank's Internet banking (e-banking) facilities in order to transfer money to Clara. In terms of Brown Bank's e-banking facilities, all its customers must punch in their identifying details (pin, password or code) before they can log in to Brown Bank's e-banking facilities. Accordingly, Mike has to comply with the regulations of his resident country, of the country where Brown Bank's computers are located, and of the country where Brown Bank is physically situated. These regulations are, *inter alia*, those that relate to the privacy and protection of national borders. Once logged in to Brown Bank's e-banking facilities, Mike has to comply with the regulations that are created for and by cyberspace. These include those that regulate the manner of processing and sharing information online,

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38 These communities are referred to as the "persistent, interactive, simulated social places where (computer) users employ avatars". See Castronova *Synthetic Worlds: The Business and Culture of Online Games* (2005) 287.

39 Biegel *Beyond Our Control? Confronting the Limits of Our Legal Systems in the Age of Cyberspace* (2003) 1–2.

40 Barlow http://w2.eff.org/Misc/Publications/John_Perry_Barlow/HTML/idea_economy_article.html.

41 Wiener "The Regulation of Technology, and the Technology of Regulation" 2004 26 *Journal of Technology in Society* 483 483.

42 Wiener 2004 *Journal of Technology in Society* 483. See also Raymond *The Cathedral and the Bazaar: Musings on Linux and Open Source by an Accidental Revolution* (1999) 55–61.

43 Eastbrook "Cyberspace and the Law of the Horse" 1996 *University of Chicago Legal Forum* 207 209.

44 See Kerr "The Problem of Perspective in Internet Law" 2003 91 *Georgetown Law Journal* 357 362–363. See also Weber *Shaping Internet Governance: Regulatory Challenges* 3–4 and Bonnici *Self-Regulation in Cyberspace* (2008) 1.

45 Weber *Shaping Internet Governance: Regulatory Challenges* 3–4.

46 Bonnici *Self-Regulation in Cyberspace* 1.

encryption and e-authentication.[47] With this in mind, it is submitted that ICT regulation is not a phenomenon or process completely disconnected from real or physical space. Specifically, an activity undertaken through the use of these technologies has an impact on other activities that occur in non-virtual spaces. Accordingly, cyberspace is a space or sphere where regulations apply or should apply.

This article takes the view that ICTs can be regulated. Specifically, it accepts that regulating an ever-changing phenomenon like ICTs is always cumbersome. Every technological innovation (such as steam energy, magnetic or electronic forces, steel, electricity and chemicals, computers and the Internet) requires a society to adjust to contemporary developments. The question then is how to regulate these technologies. ICT regulatory structures may vary from country to country. For example, Germany is examining ways of developing strict liability principles, founded in or to be deduced from the law of contract, to deal with developments associated with the Fourth Industrial Revolution.[48] This is because big or massive data is constantly used in concluding contracts online. However, there may be a point where consensus is reached regarding the proper regulatory scheme to be followed.

In this regard, it is helpful to consider a number of theories for ICT regulations. These theories are not ICT regulations as such. They simply assist in establishing suitable ICT regulations.[49] The theories discussed in this article are the codes-based theory, the danger or AIS theory, the systems theory and the good regulator theorem.

3 SELECTED ICT REGULATORY THEORIES

This section studies theories for ICT regulation. It is essential to note that these theories are not necessarily law or regulations. They simply assist in establishing ICT regulations. Specifically, the theories support the creation of a method of ICT regulatory reasoning that is bound to the technologies to be regulated and that is able to progress with them. Such regulatory thinking renounces the idea of re-inventing the ICT regulatory wheel.[50]

3 1 Codes-based theory

The codes-based theory found its significance during the 1990s. Some of the prominent proponents of this theory are Reidenberg[51] and Lessig.[52] The

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47 For a full discussion of how the e-authentication process operates, or should be operated, in South Africa, see Ch VI (Authentication Service Providers) of the ECT Act.

48 Hereinafter referred to as 4IR, which signifies the amalgamation of digital technologies – for example, computers hardware, software and networks, and the manner in which these technologies communicate across the physical, digital and biological domains.

49 For further interesting reading, see McGregor "Law on a Boundless Frontier: The Internet and International Law" 1999 88 *Kentucky Law Journal* 967 969.

50 Susskind *The Future of Law: Facing the Challenges of Information Technology* (1996) 2–43.

51 See Reidenberg "*Lex Informatica:* The Formulation of Information Policy Rules Through Technology" 1998 76 *Texas Law Review* 553.

theory is sometimes compared with techno-regulation.[53] Techno-regulation regards the codes as well as the design of the codes to be important in the regulatory repertoire. Codes refer to computer codes – for example, a password, pin or username.[54] Furthermore, codes refer to the architecture[55] or the technical architecture of the Internet[56] – for example, the hardware and software.[57] In the latter regard, it includes the layers that constitute an information system.[58] These are the content layer (symbols and images), the application layer (underlying infrastructure on which the Internet or Web programmes operate), the transport (TCP) layer, the Internet protocol (IP) layer (infrastructure that handles the flow of data), the link layer (interface between the physical layer and network layer) and the physical layer (copper, wire and links).[59]

The codes-based theory that Reidenberg propagates is called the *lex informatica* and is discussed in the section below. Thereafter, Lessig's theory of regulation by codes or "code is law" is investigated.

3 1 1 Lex informatica

Lex informatica is inspired by the work of the Law Merchant (*lex mercatoria*) of the Middle Ages.[60] The Law Merchant was simply the law of diverse nations.[61] This law was drawn from the practices and customs of these nations.[62] It regulated issues relating to cross-border trading[63] and was

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52 See generally Lessig *Code and Other Laws of Cyberspace*, and Lessig "The Path of Cyberlaw" 1995 104 *The Yale Law Journal* 17–46.

53 Brownsword "What the World Needs Now: Techno-Regulation, Human Rights and Human Dignity" in *Global Governance and the Quest for Justice* (2005) 203 203–206.

54 Koops "Criteria for Normative Technology: The Acceptability of 'Code as Law' in Light of Democratic and Constitutional Values" in Brownsword and Yeung *Regulating Technologies* 157 158.

55 Lessig *Code and Other Laws of Cyberspace* 134.

56 Bonnici *Self-Regulation in Cyberspace* 115.

57 Kesan and Shah "Deconstruction Code" 2003 *Yale Journal of Law and Technology* 281. It is essential to note that the distinction between hardware and software is important for ICT regulatory purposes. Grübler provides that hardware involves a collection of tools that enhance the ability of a person to do a job. See Grübler *Technology and Global Change* (1998) 20. Software refers to the (non-human elements of) systems or codes that propel a technology to operate in a particular manner. See Arageorgis and Baltas 1989 *Zeitschrift für Allgemeine Wissenschaftstheorie* 212 212.

58 An information system is a system for generating, sending, receiving, storing, displaying or otherwise processing data messages (data that is generated, sent, received or stored by electronic means, and includes a voice, where the voice is used in an automated transaction – that is, an electronic transaction conducted or performed, in whole or in part, by means of data messages in which the conduct or data messages of one or both parties are not reviewed by a natural person in the ordinary course of such natural person's business or employment; and a stored record) and includes the Internet. See s 1 of the ECT Act.

59 See Chung and Solum "The Layers Principle: Internet Architecture and the Law" 2004 79 *Notre Dame Law Review* 815.

60 Johnson and Post 1996 *Stanford Law Review* 1389.

61 Pollock and Maitland *The History of English Law Before the Time of Edward I* 2ed (1968) 467; Trakman "From the Medieval Law Merchant to E-Merchant Law" 2003 53 *University of Toronto Law Journal* 265 265.

62 Trakman 2003 *University of Toronto Law Journal* 265.

abstracted from the merchant rules applied by special merchant courts.[64] Given the success of these rules in regulating issues of trade, Reidenberg developed what he referred to as the *lex informatica*. The *lex informatica* examines the differences between the law and the technical architecture of the Internet. The *lex informatica* recognises that legal rules operate differently from technological rules. This divergence lies in the structures that form the basis of these rules. For example, Reidenberg argues that the rudimentary structure for legal regulation is the law,[65] while the foundation for the *lex informatica* is the Internet as an architecture – that is, the HTTP and the default rules.[66] He further argues that the basis for legal rules is the State or government,[67] while the foundation for the *lex informatica* is the technology developer and the social process in terms of which the use of the technology develops.[68]

Accordingly, Reidenberg submits that technologies generally impose regulations on computer users.[69] The structure of these technologies – that is, the design choices – requires compliance with these rules. Therefore, ICTs are regulated through or by reference to their design choices.[70] The latter arises because the manner in which they are designed determines who may access these technologies and who should not.[71] This access depends on whether a person – namely, a computer user – holds the required key, such as a username or password.

3 1 2 Code is law

This theory builds on or is an extension of the *lex informatica*. It accepts that there is a separation between physical space and cyberspace. The notion of "dual presence" is introduced in order to illustrate this difference. The latter indicates that computer users generally occupy two spaces at once. They are both offline and online at the same time. Because of this dual presence, computer users communicate and transact online in ways not known or possible in physical spaces.[72] More specifically, computer users

> "[m]eet, and talk, and live in cyberspace in ways not possible in real space. They build and define themselves in cyberspace in ways not possible in real space. And before they get cut apart by regulation, we should know something about their form, and more about their potential".[73]

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63 Benson "It Takes Two Invisible Hands to Make a Market: *Lex Mercatoria* (Law Merchant) Always Emerges to Facilitate Emerging Market Activity" 2010 3 *Studies in Emerging Order* 100 101; Kerr "The Origin and Development of the Law Merchant" 1929 15 *Virginia Law Review* 350.

64 Mefford "*Lex Informatica*: Foundations of Law on the Internet" 1997 5 *Indiana Journal of Global Legal Studies* 211 223–224.

65 Reidenberg 1998 *Texas Law Review* 566–567.

66 *Ibid.*

67 *Ibid.*

68 *Ibid.*

69 Murray *The Regulation of the Internet: Control in the Online Environment* (2007) 8 and Paré *Internet Governance in Transition: Who is the Master of This Domain?* (2003) 54.

70 Ong *Mobile Communication and the Protection of Children* (2010).

71 Paré *Internet Governance in Transition* 54.

72 Lessig 1995 *The Yale Law Journal* 17–46.

73 *Ibid*.

In real spaces, legal rules regulate and constrain the manner in which computer users communicate and transact. Examples include copyright laws, defamation laws, online child pornography laws, and cyberstalking laws.[74] However, codes regulate the manner in which computer users communicate and transact in cyberspace.[75] One example of online regulation is the software known as Internet filtering, which prevents or limits access to and distribution of particular data.[76] It is clear that the interaction between legal rules and the technical structures of ICTs is essential for ICT regulations.

3 2 Danger or AIS theory

The danger theory is inspired by biology. It is motivated by the workings of the biological immune system (BIS).[77] For example, the BIS has a number of cells or molecules or lymphocytes, macrophages, dendritic cells, natural killer cells, mast cells, interleukins and interferons.[78] It is a defence organism or mechanism for the human or organic body.[79] This defence is provided against certain unknown or external attacks (pathogens).[80] These attacks can be in the form of bacteria and viruses.[81] Generally, the BIS distinguishes and discriminates between known or self-attacks and unknown or non-self-attacks.[82] For these attacks to be recognised by a system, alarm signals (pattern recognition receptors) from injured tissues are reported.[83] Subsequently, the immune system reacts by breaking down these attacks. It does all this in order to restore a balance in the body.[84] In cases where a balance could not be maintained, the immune system collapses and it subsequently becomes necessary to immunise the system with needed security-improving or enrichment measures.

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74 Lessig "Law Regulating Code Regulating Law" 2003 35 *Loyola University Chicago Law Journal* 1 1.

75 Lessig *Code: Version 2.0* 88. See also, Grimmelmann "Regulation by Software" 2005 114 *The Yale Law Journal* 1719 1721.

76 McIntyre and Scott "Internet Filtering: Rhetoric, Legitimacy, Accountability and Responsibility" in Brownsword and Yeung *Regulating Technologies* 109.

77 Lee, Kim and Hong "Biologically Inspired Computer Virus Detection System" in Ijspeert, Murata and Wakamiya (eds) *Biologically Inspired Approaches to Advanced Information Technology* (2004) 153 155.

78 Hofmeyr and Forrest "Immunity by Design: An Artificial Immune System" in *Genetic and Evolutionary Computation* (papers presented at the Genetic and Evolutionary Computation Conference (GECCO-99) Orlando Florida 1999) 1289 1290.

79 Rowe *Theoretical Models in Biology: The Origin of Life, the Immune System and the Brain* (1994) 121.

80 Rowe *Theoretical Models in Biology* 121.

81 *Ibid*.

82 Matzinger "The Danger Model: A Renewed Sense of Self" 2002 296 *Science* 301 301. For an interesting study of self-non-self-attacks, see Bretscher and Cohn "A Theory of Self-Non-Self-Discrimination" 1970 169 *Science* 1042 1042–1046.

83 Matzinger 2002 *Science* 301.

84 *Ibid*.

The artificial immune system (AIS) theory argues that a biological body can be understood in terms of codes, dispersals or networks.[85] These codes are robust, adaptable and autonomous,[86] making for similarities between the workings of a human body and that of a computer.[87] Computers are dynamic, in that programmes and software are installed and erased whenever needed, new computer users emerge regularly, and configurations always change.[88] The danger theory proposes that computers be built with self-protective codes analogous to the BIS. The system has to be able to respond to self and non-self-attacks. These attacks must be measured by "damage to cells indicated by distress signals that are sent out when cells die an unnatural death (cell stress or lytic cell death, as opposed to programmed cell death or *apoptosis*)".[89] A set of detectors – that is, an intrusion detection system – has to be built within the system. These detectors should identify anomalies in a system.[90] Thereafter, the anomalies have to be matched with known or probed intrusions. In cases where a match is established, the detectors must be automatically activated.[91] This activation has to lead to a process whereby a report is sent to an operator or administrator of a system who must then assess the anomalies and take appropriate action.[92]

3 3 Systems theory

Ludwig Von Bertalanffy introduced the systems theory in the 1930s. For Von Bertalanffy, an examination of systems has been a province for academic scrutiny over many years. However, academics have omitted to investigate the dynamics of systems. Because of this omission, Von Bertalanffy presented the idea of a General System Theory,[93] which starts from the premise that "every living organism is an open system, characterised by a continuous import and export of substances or subsystems".[94] Therefore, systems are elements of an operated organism.[95] Such an organism is referred to as the whole or wholeness of a system; a computer is an

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85 Birke *Feminism and the Biological Body* (1999) 142 and Dasgupta, Yu and Nino "Recent Advances in Artificial Immune Systems: Models and Applications" 2011 1 *Applied Soft Computing* 1574 1574–1575.

86 Hofmeyr and Forrest "Architecture for an Artificial Immune System" 1999 7 *Evolutionary Computation* 45–68 45.

87 Hofmeyr and Forrest 1999 *Evolutionary Computation* 46.

88 *Ibid*.

89 Aickelin and Cayzer "The Danger Theory and its Application to Artificial Immune Systems" (papers delivered at the 1st Intentional Conference on Artificial Immune Systems (ICARIS-2002), 2002 Canterbury) 141 141.

90 Aickelin, Bentley, Cayzer, Kim and Mcleod "Danger Theory: The Link Between AIS and IDS?" in Timmis, Bentley and Hart (eds) *Artificial Immune Systems* (2003) 147 147–148.

91 Aickelin *et al* in Timmis, Bentley and Hart *Artificial Immune Systems* 148–149.

92 Aickelin *et al* in Timmis, Bentley and Hart *Artificial Immune Systems* 150.

93 See Von Bertalanffy *General System Theory: Foundations, Development, Applications* (1968) and Von Bertalanffy *Perspectives on General System Theory: Scientific-Philosophical Studies* (1975).

94 Von Bertalanffy *Perspectives on General System Theory* 38.

95 Von Bertalanffy *Perspectives on General System Theory* 159.

example.[96] The aforesaid organism includes a "set of social, biological, technological or material partners that collaborate on a common purpose".[97]

For the sake of completeness, the idea of computers operating like living organisms requires clarification. This idea does not necessarily advocate that computers have a life of their own, nor does it imply that computers operate in a manner as described in Plato's two-world theory – namely, the sensible and intelligible worlds.[98] Specifically, computers carry out functions as directed by computer users. These tasks are usually beyond the scope of what is normally anticipated in offline spaces. In other words, computers fall within the category of objects that could be referred to as artificial or man-made things.[99] The latter are products generated by art rather than nature and do not have relations with the essence of matter – for example, the force of gravity.[100]

For ICT regulatory purposes, the theory by Von Bertalanffy argues that systems produce their own existence within a living organism.[101] They cultivate their own languages. These languages are appropriately understood by those who habitually or consistently work with the living organism. The latter include technicians or computer programmers,[102] but do not include, what Von Bertalanffy refers to as, computer morons, button-pushers or learned idiots[103] – that is, those who do not contribute to computer innovation and to solving prevailing technology regulatory challenges.[104]

Consequently, Von Bertalanffy submits that any framework to regulate ICTs should involve a suitable examination of the whole or wholeness of the systems that constitute the living organism.[105] This scrutiny requires or compels ICT regulators to study the elements of the living organism and comprehend the manner in which these elements operate, both exclusively and together.

3 4 Good regulator theorem

Conant and Ashby support the good regulator theorem.[106] They postulate that every good regulator of any arrangement must be a reproduction of that

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96 Von Bertalanffy *General System Theory* 5; Von Bertalanffy *Perspectives on General System Theory* 157.

97 Febbrajo "The Rules of the Game in the Welfare State" in Teubner (ed) *Dilemmas of Law in the Welfare State* (1986) 129.

98 Huard *Plato's Political Philosophy: The Cave* (2007) 35–37. See also Solomon and Higgins *The Big Questions: A Short Introduction to Philosophy* 8ed (2010) 121–123.

99 Simon *The Sciences of the Artificial* 3ed (1996) 3–5.

100 Simon *The Sciences of the Artificial* 4.

101 Samuelson "Five Challenges for Regulating the Global Information Society" in Marsden (ed) *Regulating the Global Information Society* (2000) 317.

102 Von Bertalanffy *General System Theory* 10.

103 *Ibid*.

104 *Ibid*.

105 Von Bertalanffy *Perspectives on General System Theory* 157.

106 See in general Conant and Ashby "Every Good Regulator of a System Must Be a Model of That System" 1970 1 *International Journal of Systems Science* 89. See also Scholten "A Primer for Conant & Ashby's Good-Regulator Theorem" http://www.goodregulatorproject.

specific arrangement.[107] An agenda to regulate ICTs must accordingly be a representation of the hardware and software that is elementary to the technology to be regulated.[108] This view is best captured by the notion that "every good key must be a model of a lock it opens".[109] Simply put:

> "The *pursuit* of a goal by some dynamic agent in the face of a source of obstacles places at least one particular and unavoidable *demand* on that agent, which is that the agent's behaviours *must* be executed in such reliable and predictable way that they can serve as a *representation* of that source of obstacles".[110]

It has to be remembered that ICTs are a mishmash of systems and networks, many of which have sub-systems and sub-networks. The systems and networks have similar appearances and these appearances have similar structures. For ICT regulatory purposes, regulators should develop regulatory models that appreciate the functioning or non-functioning of the systems and networks. The rationale ought to be to establish a regulatory agenda that not only controls existing hindrances, but also is able to provide solutions to potential disputes.[111] This agenda has to discourage regulators from invariably re-inventing the technology regulatory wheel.[112] Instead, regulators must anticipate the workings of a system or network.[113] Subsequently, they must create regulations that are bound to the technology to be regulated and are able to evolve with it.[114]

3 5 From theory to ICT regulation

In the sections above, it was stated that a better way to study ICT regulations is to look outside or beyond legal rules. This is the position because legal rules are inflexible and follow an elongated process. It was therefore surmised that certain ICT theories could provide a basis for an ICT regulatory structure that is external to legal rules. The next section examines an ICT structure that is gleaned from the ICT regulatory theories discussed above. It postulates a number of role-players for ICT regulation. Particularly, it recognises that these role-players can, in the process of regulating ICTs, elect a particular ICT regulatory agenda. This agenda can be extrapolated from the manner and form of the technology to be regulated. In this manner, the law or legal rules only play a persuasive function.

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org/images/A_Primer_For_Conant_And_Ashby_s_Good-Regulator_Theorem.pdf (accessed 2016-11-18).

107 Conant and Ashby 1970 *International Journal of Systems Science* 89.

108 Murray in Brownsword and Yeung *Regulating Technologies* 290.

109 Scholten "Every Good Key Must Be a Model of the Lock it Opens – (The Conant and Ashby Theorem revisited)" http://www.goodregulatorproject.org/images/Every_Good_Key_Must_Be_A_Model _Of_The_Lock_It_Opens.pdf. (accessed 2020-01-16).

110 *Ibid*.

111 Susskind *The Future of Law* 2–43.

112 Brownsword "So What Does the World Need Now? Reflections on Regulating Technologies" in Brownsword and Yeung *Regulating Technologies* 23 30.

113 Forrester "Industrial Dynamics: A Major Breakthrough for Decision Makers" 1958 36 *Harvard Business Review* 37 37.

114 Brownsword *Reflections on Regulating Technologies* 27.

4 ICT REGULATORY STRUCTURE

4 1 Overview

Generally, developing flawless regulations is almost impossible. There will always be some who seek ways to bypass ICT systems (computer hardware, software, Internet, data or computer applications) and thus create loopholes in regulations. A proper understanding here requires one to separate so-called real programmers from computer crackers. Real programmers are computer experts who assiduously test and evaluate the security of ICT systems.[115] Because these programmers have to do with Open-Source Development, they design hacking attacks and launch those attacks against a system.[116] The intention is to ensure that the system is secure before it is rolled out to the general public. In contrast, computer crackers use nefarious means to compromise and gain entry into ICT systems;[117] the crackers alter, access or retrieve information belonging to another person without the latter's consent. Therefore, ICT regulations seek to alleviate the extent of the risks to which ICTs may be exposed through computer cracking.

To improve ICT regulations, it is argued that a decentring analysis of regulations can provide suitable solutions to the regulatory agenda. In this way, regulations become a product of diverse role-players. These could be the State and the regulated industries – for example, society, communities, private and public institutions and computer users. The purpose is to establish Better (ICT) Regulations.[118] These regulations have everything to do with promoting Good ICT Regulations.[119] Good Regulations imply that for every ICT regulatory framework ICT regulations conform to specific standards.[120] These are that: a legislative authority should support the regulations; there has to be a suitable structure for accountability; the regulatory structure ought to be reasonable, accessible and open; and ICT regulators have to possess the necessary skills and expertise.[121]

In the aforementioned regard, regulatory role-players have to determine the standards to be applied in each case. In doing so, they can elect an agenda based on smart regulations, self-regulation, meta- or reflexive regulations, or co-regulations.[122]

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115 Raymond *The Cathedral and the Bazaar: Musings on Linux and Open Source by an Accidental Revolution* (2001) 3–4.

116 Bossler and Burruss "The General Theory of Crime and Computer Hacking: Low Self-Control Hackers?" in Holt and Schell (eds) *Corporate Hacking and Technology-Driven Crime: Social Dynamics and Implications* (2011) 38 40.

117 S 86(1)–(2) of the ECT Act.

118 Gunningham "Enforcement and Compliance Strategies" in Baldwin, Cave and Lodge (eds) *The Oxford Handbook of Regulation* 120 131. Better ICT Regulations are the opposite of "Less ICT Regulations". See Kirkpatrick and Parker "Regulatory Impact Assessment: An Overview" in *Regulatory Impact Assessment: Towards Better Regulation* (2007) 1 1–2.

119 Baldwin and Cave *Understanding Regulation* 76.

120 *Ibid*.

121 *Ibid*.

122 See Baldwin "Better Regulation in Troubled Times" 2006 1 *Health Economics, Policy and Law* 203.

4 2 ICT regulatory agenda

4 2 1 Smart regulations

Smart regulations are distinguished from dumb regulations. Dumb regulations demonstrate themselves in countless ways. They place pointless burdens on businesses and they fail to reflect changing technology. To put it bluntly, Flemming argues that dumb regulations leave "investors as sheep to be sheared".[123] However, smart regulations support development outside of government rules.[124] They provide the basis for the view that legal rules are usually unsatisfactory in controlling social behaviour.[125] In other words, smart regulations generally accept the existence of a variety of regulatory methods outside of the command-and-control way of regulating; thus, smart regulations provide a flexible, imaginative and innovative form of social control. For this reason, the Organisation for Economic Co-operation and Development (OECD) stipulates that these regulations signify a shift away from unnecessary regulatory red tape to a smart and simplified regulatory process. This is because smart regulations encourage management of the role of the State, business and individual computer users.[126] This normally occurs because these regulations require a suitable examination of legal rules and the normative standards that are set by these rules.[127]

In practice, the consumer and environmental fields remain examples of areas where smart regulations are applied. For example, the European Consumer Organisation (the BEUC)[128] articulates the need for smart regulations.[129] It acknowledges that this form of regulating is crucial because it places the welfare of consumers at the forefront of the regulatory process.[130] In turn, the OECD developed the document *From Red Tape to*

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123 Flemming "The Importance of Smart Regulation" https://www.sec.gov/news/speech/importance-of-smart-regulation.html (accessed 2016-03-13).

124 House of Commons Regulatory Reform Committee *Getting Results: The Better Regulation Executive and the Impact of the Regulatory Reform Agenda* (2008) 181–184 and Gunningham "Regulating Biotechnology: Lessons from Environmental Policy" in Somsen (ed) *The Regulatory Challenge of Biotechnology: Human Genetics, Food and Patents* (2007) 3 6.

125 House of Commons Regulatory Reform Committee *Getting Results* 181–184.

126 Gunningham and Sinclair "Designing Principles for Smart Regulations" in Ramesh and Howlett (eds) *Deregulation and its Discontents: Rewriting the Rules in Asia* (2006) 195 195–196.

127 European Commission "Smart Regulation in the European Union" (8 October 2010) http://ec.europa.eu/smart-regulation/ (accessed 2015-05-13) 2–3.

128 The BEUC is an umbrella group that was founded in 1962. It investigates European Union (EU) decisions and developments that are likely to affect consumers. It does all this by focussing on its five main priorities – that is, financial services, food, digital rights, consumer rights and enforcement and sustainability. See European Consumer Organisation (BEUC) http://www.beuc.eu/about-beuc/who-we-are (accessed 2016-11-21).

129 European Consumer Organisation "Smart Regulation: BEUC Response to the Stakeholder Consultation" http://ec.europa.eu/smart-regulation/consultation_2012/docs/registered_organisations/beuc_en.pdf (accessed 2016-03-13).

130 European Consumer Organisation http://ec.europa.eu/smart-regulation/consultation_2012/docs/registered_organisations/beuc_en.pdf.

Smart Tape: Administrative Simplification in OECD Countries,[131] which argues for a flexible and ICT-driven self-regulatory system that should, in general, reduce the administrative burden (red tape) associated with regulations.[132] In addition, such a system should promote innovation, trade, investment and economic efficiency (smart tape).[133] In this article, these are referred to as smart regulations.

4 2 2 Self-regulation

Self-regulation basically implies self-control and self-correction[134] and is a significant human quality. For example, Zimmerman illustrates this understanding by stating:

> "Perhaps our most important quality as humans is our capacity to self-regulate. It has provided us with an adaptive edge that enabled our ancestors to survive and flourish when changing conditions led other species to extinction. Our regulatory skill or lack thereof is the source of our perception of personal urgency that lies at the core of our sense of self."[135]

Following this passage, Zimmerman defines self-regulation as "self-generated thoughts, feelings, and actions that are planned and cyclically adapted to the attainment of personal goals".[136] In terms of this definition, there are multiple traits, abilities or stages of competencies necessary for self-regulation. For example, regulatory role-players regulate their activities or affairs in order for those activities and affairs to be in line with certain anticipated ends.[137] The triadic understanding of self-regulation – that is, personal, behavioural and environmental processes – informs the achievement of these ends. Specifically, it determines how the regulatory role-players interact with each other in a manner that establishes a set of regulatory standards for their compliance.[138]

Schraw, Crippen and Hartley argue that self-regulation is fundamental in science education.[139] From the forgoing, regulators identify the intended regulatory objectives and eliminate certain factors that prevent or are likely

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131 See OECD *From Red Tape to Smart Tape: Administrative Simplification in OECD Countries* (2003).

132 OECD *From Red Tape to Smart Tape* 5.

133 OECD *From Red Tape to Smart Tape* 8.

134 Carver and Scheier "Self-Regulation of Action and Affect" in Vohs and Baumeister (eds) *Handbook of Self-Regulation, Second Edition: Research, Theory, and Applications* (2011) 3 3–4.

135 Zimmerman "Attaining Self-Regulation: A Social Cognitive Perspective" in Boekaerts, Pintrich and Zeidner (eds) *Handbook of Self-Regulations* (2000) 13 13.

136 Zimmerman in Boekaerts, Pintrich and Zeidner *Handbook of Self-Regulations* 13.

137 Hrabok and Kerns "The Development of Self-Regulation: A Neuropsychological Perspective" in Solok, Müller, Carpendale, Young and Larocci (eds) *Self and Social Regulation: Social Interaction and the Development of Social Understanding and Executive Functions* (2010) 129 129.

138 Bonnici *Self-Regulation in Cyberspace* 10.

139 See in general Schraw, Crippen and Hartley "Promoting Self-Regulation in Science Education: Metacognition as Part of a Broader Perspective on Learning" 2006 36 *Research in Science Education* 111.

to prevent the goals from being achieved.[140] In order to do this, the regulators select strategies that assist in achieving the identified goals, implement those strategies, and monitor the progress towards the attainment of the goals.[141] This process is not simply a box-ticking exercise. However, it is an involving process that requires a proper understanding of and engagement with the regulations, and the scheme to be regulated. For example, the triad underpinning self-regulation and how it relates to the regulatory process or process is essential.

4 2 3 Meta-regulations

Meta-regulations are also called reflexive regulations because "meta", in the sense in which it is used, posits some form of flexibility that cannot be ascribed to self-regulation.[142] Essentially, this flexibility is such that it becomes accepted that

> "[f]ormal rules are based on the principles, not prescription, to allow for the necessary flexibility in regulatory practice; law (the regulator) is reflexive and responsive (although this means different things in the detail), in order to learn about what works to meet the public interest and to include relevant stakeholders in regulatory processes ... Third parties such as non-governmental organisations and activists support regulation by acting as civil regulators, providing further relief for regulatory resources as well as reducing the chance of regulatory capture by industry."[143]

Therefore, reflexive regulations, which are the domain of reflexive governance,[144] provide a structure to control other associated regulatory structures.[145] In this manner, reflexive regulations discourage the traditional view of the State as the primary role-player in ICT regulations.[146] For example, the regulator (usually the State) observes how role-players to self-regulations regulate themselves. It (the regulator) only comes to the fore in situations where a self-regulatory breach is identified. For this reason, the capacity of the regulator to conceptualise regulations declines dramatically.[147]

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[140] Schraw, Crippen and Hartley 2006 *Research in Science Education* 111. See also Leventhal, Brissette and Leventhal "The Common-Sense Model of Self-Regulation of Health and Illness" in Cameron and Leventhal (eds) *The Self-Regulation of Health and Illness Behaviour* (2003) 42 43.

[141] Schraw, Crippen and Hartley 2006 *Research in Science Education* 111.

[142] Simon *Meta-Regulation in Practice: Beyond Normative Views of Morality and Rationality* (2017) 3.

[143] Simon *Meta-Regulation in Practice* 3.

[144] This implies the conditions to ensure the collective maximisation of certain normative or regulatory expectations. See Lenoble and Maesschalck "Renewing the Theory of Public Interest: The Quest for a Reflexive and Learning-Based Approach to Governance" in De Schutter and Lenoble (eds) *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (2010) 3 3–4.

[145] Levi-Faur "Regulation and Regulatory Governance" in Levi-Faur (ed) *Handbook on the Politics of Regulation* (2011) 3 11.

[146] Lee "In the Prison of the Mind: Punishment, Social Order, Self-Regulation" in Saral, Douglas and Umphrey (eds) *Law as Punishment or Law as Regulation* (2011) 124–154 127.

[147] Gunningham in Baldwin, Cave and Lodge *The Oxford Handbook of Regulation* 8.

The association of meta-regulations with reflexive regulations seems sensible. For example, Morgan argues that meta-regulations "capture[ ] a desire to think reflexively about regulation, such that rather than regulating social and individual action directly, the process of regulation itself becomes regulated".[148] In this manner, regulations become a support structure for the regulatory role-players in establishing their own systems of control and management.[149] In the process, the role of government becomes about regulating at a distance,[150] and sometimes being an agency within which regulations apply.[151]

Studies in, *inter alia*, environmental sciences provide a useful guide for the application of meta-regulations. In these studies, meta-regulations have been found to be helpful in alleviating the dangers caused by pollution.[152] This success has to do with the fact that the regulatory role-players adopt specific regulatory measures and are also able to assess their own performance in meeting these regulations.[153] In South Africa, for example, this form of regulation seems to be preferred by the Health Professions Council of South Africa (HPCSA).[154]

4 2 4 Co-regulation

Co-regulation refers loosely to co-operative regulation or regulation by co-operation. It signifies the combination of government regulation and self-regulation.[155] In this instance, government and self-regulatory industries collaborate in order to establish a particular regulatory paradigm.[156] The government recommends specific regulatory frameworks,[157] and the self-regulatory industries generate principles, methods and ways of administering the government regulations.[158]

The APEC-OECD Integrated Checklist on Regulatory Reform of 2005 issued a policy framework for self-regulation. This framework can be commended given its enunciation of the characteristics for self-regulation (efficiency, transparency and accountability). In terms of this framework, so-called "horizontal criteria concerning regulatory reform"[159] were developed.

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148 Morgan "The Economisation of Politics: Meta-Regulation as a Form of Nonjudicial Legality" 2003 12 *Journal of Social and Legal Studies* 489 490.

149 Coglianese and Mendelson in Baldwin, Cave and Lodge *The Oxford Handbook of Regulation* 147.

150 Braithwaite "The New Regulatory State and the Transformation of Criminology" 2000 40 *British Journal of Criminology* 222 225.

151 McHarg "Devolution and the Regulatory State: Constraints and Opportunities" in Oliver, Prosser and Rawlings (eds) *The Regulatory State: Constitutional Implications* (2010) 67 80.

152 Gilad "It Runs in the Family: Meta-Regulation and Its Sibling" 2010 4 *Regulation and Governance* 485 491.

153 Gilad 2010 *Regulation and Governance* 491–492.

154 A statutory body established in terms of the Health Professions Act 56 of 1974. See preamble to the Health Professions Act 56 of 1974.

155 Bonnici *Self-Regulation in Cyberspace* 15.

156 *Ibid*.

157 *Ibid*.

158 *Ibid*.

159 Regulatory reform deals with the changes that seek to improve the quality of regulations and augment the economic performance, cost-effectiveness and quality of legal regulations.

These criteria support the idea of integrating policy for regulatory reform in a manner that ensures that the policy is able to deal with other factors – for example, competition and market openness. For example, co-regulations have been found to be productive in the area of food safety.[160] In this field, they are considered to be the most transparent and trustworthy of all regulatory structures.[161] Accordingly, the idea behind co-regulation is to maximise the efficiency, transparency and accountability of the regulations.

5 CONCLUSION

The traditional view is that the regulation process is based on the law or legal rules. These rules typically demand that a command-and-control procedure should be followed. In South Africa, the rules to regulate ICTs are contained, *inter alia*, in the ECT Act. The parts of this Act that are important to this article are those that relate to the wrongful or unauthorised accessing and interference with data. The ECT Act governs the conventional ways of accessing and interfering with data. However, it fails to deal with or anticipate future ways of accessing and interfering with information online. Consequently, the ECT Act does not recognise that an evolution of these technologies necessarily brings about contemporary ways of accessing and interfering with information. In other words, the ECT Act ignores the fact that developments in ICTs will mean an expansion of the reach that criminals possess in order to access and interfere with information online.

In this article, the above-mentioned limitations are attributed not only to the ECT Act. Specifically, they also relate to shortcomings in the overall law-making process in South Africa. This has to do with the fact that the law demands compliance with certain established rules. These rules are naturally stagnant and are commonly averse to development. As an alternative response, this article discusses an ICT regulatory approach founded outside of the legal rules. This approach does not necessarily discard the importance of the law in regulating ICTs. Simply, it accepts that regulations, rather than the law, should be flexible. Given the inflexibility of legal rules, legal regulations are likely to prevent a continuous process of regulating in an endeavour to control an evolving phenomenon – namely, ICTs. Such obstruction may be prevented if legal regulations are allowed to assume a facilitative role or function in the sense of channelling the meaning and structure of ICT regulations.

For ICT regulatory purposes, it is submitted that regulations should follow a framework that is different from the one used offline. A suitable understanding of how systems and networks operate is required. This understanding is not a matter of guesswork or ticking boxes. It enjoins regulators – that is, lawmakers and developers of ICTs – to undertake a meaningful study of systems and the dynamics of systems. For example, it

See APEC-OECD "Integrated Checklist on Regulatory Reform" (2005) http://publications.apec.org/Publications/2005/09/APEC-OECD-Integrated-Checklist-on-Regulatory-Reform.

160 Martinez, Fearne, Caswell and Henson "Co-Regulation as a Possible Model for Food Safety Governance: Opportunities for Public–Private Partnerships" 2007 32 *Food Policy* 299 301.

161 Martinez *et al* 2007 *Food Policy* 303–304.

may be necessary to follow the codes-based theory – that is, regulating by means of codes and, thus, "code is law". Furthermore, regulators may adopt the danger theory, wherein regulations are founded on a diligent examination of the systems and networks that form the basis of the technology to be regulated. Such regulations aim to establish ICT regulations that are bound to the technology and are able to develop with it.

Generally, better or good regulations are proposed as the avenue towards achieving the above-mentioned regulatory structure. This means that the ICT regulations must not be a product of a single actor, usually the State. All role-players in the proposed regulatory agenda ought to be involved in the ICT regulatory process. These are, *inter alia*, the State, society, communities, private and public institutions and computer users. To complement this process, the developers of ICTs – that is, the real programmers – ought to be involved in the establishment of ICT regulations. The rationale for this involvement should be to ensure that regulations are not only generated through the mind or skill of the role-players, but also that the role-players take ownership of the said regulations. Consequently, regulators could elect to adopt any or a combination of smart, reflexive, self or co-regulatory structures. The law – that is, the ECT Act – has to be expansive enough to guarantee that this recommended good ICT regulatory framework operates effectively and efficiently.

PALLIATIVE CARE AS A FORM OF RELIEF FOR THE DYING: A SOUTH AFRICAN PERSPECTIVE

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SUMMARY

This article has a critical look at the current state of affairs in palliative care in South Africa. While euthanasia remains unlawful in South Africa, there is only one alternative – namely, palliative care – to mitigate pain and symptoms, make life tolerable, and ease the emotional stress of dying for patients and their families. Palliative care, unlike euthanasia, has always been regarded as a sound medical practice, ethically, morally and legally. The practice the world over includes family, friends and community. However, no system or legislation has been put in place in South Africa to serve as a guideline for end-of-life practices. The focus of this article is to try to establish guidelines through a multidisciplinary approach that includes the family and makes use of community resources to improve the quality of life of patients and families facing the problems associated with life-threatening illness, through the prevention and relief of suffering.

1 INTRODUCTION

Besides the certainty that all human beings will die, there is also a degree of certainty that death is often preceded by intractable and unbearable illnesses, which illnesses can cause immense suffering to both the dying and their loved ones. It is here that palliative care the world over has sought to address not only physical suffering but also the emotional, social and spiritual suffering of people with life-limiting conditions. Generally, palliative

care refers to the treatment of patients who are in the final stages of their illness and, most probably, their lives. However, palliative-care treatment, in conjunction with other therapies, is also applicable early in the course of a patient's illness. This type of treatment, as well as other applicable therapies, is intended to prolong life. Other applicable therapies include both chemotherapy and radiation therapy.[1]

The object of palliative care is to seek medical relief. This end-of-life care focuses on controlling distressing symptoms and providing emotional and social support, as well as spiritual care in order to assist the patient to live his or her life as actively as possible.[2] Furthermore, palliative-care specialists assist not only the patients, but also their families in order to determine an appropriate course of treatment. This treatment serves as relief to the dying, as well as providing comfort to the patient's family in the sense that they are aware that the patient is given good care.

A brief glimpse at palliative care from a historical point of view reveals that this type of treatment is not new. The first traces thereof date back many centuries when sick and dying people in primitive communities, through communal rituals, received pain-relief treatment, albeit in rudimentary form.[3] As communities became more sophisticated, so did the methods of treatment, until the form of palliative practices known today were introduced.

Those practices eventually found their way to South Africa. It is especially the Hospice Palliative Care Association of South Africa (HPCA) that has sought to improve quality of life for patients and their families facing the problems associated with life-threatening illnesses.[4] The HPCA sets guidelines with regard to palliative treatment. Treatment is provided for, *inter alia*, cancer, pulmonary disorders, renal disease, HIV/AIDS, progressive neurological conditions and, more recently, children with serious illnesses.[5] The HPCA guidelines include services that are available to persons of any age suffering from a life-limiting condition, care and support available to patients and their families, as well as referrals for palliative care by a variety of people, including patients themselves, their families, neighbours, friends, doctors or nurses.[6] Provided that the patient qualifies for palliative care and consents to the treatment, he or she will be enrolled in a palliative-care programme at an institution, like a hospice, and treated by a palliative-care

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1 World Health Organisation "WHO Definition of Palliative Care" (2019) https://www.who.int/cancer/palliative/definition/en/ (accessed 2019-05-29).

2 Gwyther "When Should One Start Palliative Care?*"* 2011 *CME: Your South African Journal of CPD: Palliative Care* 292; Kirk and Collins "Difference in Quality of Life of Referred Hospital Patients After Hospital Palliative Care Team Intervention" 2006 *South African Medical Journal* 101 101.

3 Gonzalez and Ruiz "The Cultural History of Palliative Care in Primitive Societies: An Integrative Review" http://www.scielo.br/scielo.php?pid=S0080-62342012000400033&script=sci_arttext&tlng=en (accessed 2020-02-15).

4 Hospice Palliative Care Association of South Africa "Who Qualifies" https://hpca.co.za/palliative-care/who-qualifies (accessed 2019-05-24).

5 Wikipedia "Palliative Care" https://en.wikipedia.org/wiki/Palliative_care (accessed 2019-05-29).

6 World Health Organisation https://www.who.int/cancer/palliative/definition/en/.

nurse.[7] Palliative practitioners can assist patients with pain and symptom control, psycho-social support and appropriate advice in that regard, spiritual, emotional and bereavement support, as well as the provision of necessary equipment – for example, wheelchairs.[8]

Despite HPCA's noble attempts to promote palliative care in South Africa, this mechanism to care for the ill and to improve their quality of life has not gained much momentum in South Africa. Moreover, assisted suicide, a more contentious issue than palliative care, has attracted greater attention from academic writers and courts alike all around the world. For this reason, there is less debate about the role that a comprehensive palliative and hospice healthcare service can play in assisting terminally ill patients to endure less extreme suffering and accompanying loss of dignity.

Recently, the Supreme Court of Appeal, in *Minister of Justice and Correctional Services v Estate Stransham-Ford,*[9] rejected the argument that assisted suicide should be legalised. Instead, the court seemed to hint at introducing the practice of palliative care in assisting end-of-life care.[10] A hallmark of this acceptable medical practice is that it enhances quality of life by managing distressing clinical complications of those with life-threatening illnesses and assists the dying to die in dignity. In this light, the need for a forensic investigation into the worth of palliative and hospice care becomes apparent. This article aims to provide arguments as to why such a mechanism is vital in South Africa given our constitutionally aligned values.

The questions sought to be answered can be formulated as follows:

(a) Would a comprehensive palliative and hospice healthcare service legally help negate end-of-life suffering of the dying?
(b) What exactly are the legal boundaries, if any, within which palliative and hospice-care treatment should operate?

A good way to understand the law in this regard is to look at the origin of palliative and hospice-care treatment, as well as the development of the legal principles regulating it. Furthermore, it is worth investigating the principles relating to palliative care applied in other progressive jurisdictions in order to determine whether the principles applicable in South Africa require reconsideration. In this regard, the legal positions in the Netherlands and Canada are discussed. The Constitution[11] provides a strong foundation for the direction in which the law relating to palliative care should strive to develop. Section 27 provides:

> "(1) Everyone has the right to have access to–
> (a) health care services, including reproductive health care;
> (b) sufficient food and water; and
> (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

7 *Ibid.*
8 HPCA https://hpca.co.za/palliative-care/who-qualifies/.
9 (531/2015) 2016 ZASCA 197(6).
10 Par 98–99.
11 Constitution of the Republic of South Africa, 1996.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of the rights.
(3) No one may be refused emergency medical treatment."

It is argued that palliative-care services are included in the "health care services" referred to in this section. It is also argued that should a patient in need of palliative care not have sufficient funding to provide for such treatment, the State should provide the patient with social security measures in order to access such services. In order to give full effect to this section, it is furthermore also recommended that the government should promulgate legislation, in the very near future, to provide for palliative-care institutions and quality palliative-care services to be instated all over South Africa.[12] In this regard, the National Health Insurance Bill of 2019 may be a significant start.[13]

2 HISTORY AND BASIS OF PALLIATIVE CARE

The term "palliative care" is not a modern concept. It is an idea already known to primitive societies whose communities had to deal with extreme illness and death long before the invention of sophisticated medical practices. The aim then also included the lessening of pain experienced by those who were dying. Tribal rituals and primitive cultures played important roles in this regard.[14]

It was during the rise of paleopathology that humans started experimenting with medicine and commenced proving their knowledge on illnesses. Although this era introduced changed beliefs, the form of palliative care and practices applied were founded in traditional customs.[15]

During the Animist period, the ideal of communitarianism continued. Each person was given a role in their respective cultural groups to promote social cooperation that benefitted the entire human group. It was during times of hardship, and just before the death of a person, that the group would attend to the sick and provide care to the family. This care can be equated to the modern concept of palliative care and promoted solidarity within the family and the group.[16]

The etymology of palliative care emerged from the ancient Roman era. "Care" derives its meaning from the Latin word "*cogitare"*, which implies a concern with the past, present or future problems.[17] Palliative care and death

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12 See heading 6 2 in this regard.
13 See heading 3 2 in this regard.
14 Kleinman "Indigenous Systems of Healing: Questions for Professional, Folk and Popular Care" in Warren Salmon J (ed) *Alternative Medicines, Popular and Policy Perspectives* (1984) 138–164; repeated in Gonzalez and Ruiz http://www.scielo.br/scielo.php?pid=S0080-62342012000400033&script=sci_arttext&tlng=en; 2012 46(4) *Revista da Escola de Enfermagem USP* 1015.
15 Gonzales and Ruiz http://www.scielo.br/scielo.php?pid=S0080-62342012000400033&script=sci_arttext&tlng=en.
16 *Ibid.*
17 *Ibid.*

then were also associated with cases of sick people's extreme suffering as well as those who experienced unbearable pain and despair.[18] Hippocrates (ca. 460 BC–370 BC) stipulated as follows in the original Oath:

> "To please no one will I prescribe a deadly drug nor give advice which may cause his death."[19]

That statement served as a clear indicator at the time that euthanasia was not favoured by Hippocrates. What was advocated instead was palliative care. The term "palliative" is derived from the Latin verb "*palliare"*, a concept generally indicating the action of cape or cover. In the care context, palliative action meant a therapeutic action that served to mitigate the problems that diseases cause, without looking to cure them.[20] What followed was the establishment of codes of ethics and legislation featuring palliative directives, the purpose of which were to bring relief to those dying. To this end, when the health of a patient could no longer be restored, there was an ethical duty on caregivers to alleviate the pain experienced by their patients.[21] The effect was that a healthcare practitioner had a duty to preserve life through palliative care as a means to take away pain, as well as to ease the last days or weeks of a patient's life. This still seems to be the position in modern times.[22]

The concept of a hospice seems to have developed as an offshoot from palliative care in its most rudimentary form in primitive days and beyond. It evolved over many centuries in Europe with the setting-up of shelters for travellers in around the fourth century AD.[23] Palliative care, dispensed from the hospices, took a more structured form. The Greeks called these hospices *xenodochia* or "refuges for the strangers". They became known in Roman times as *hospitium,* derived from the Latin word *hospes* or "*host*".[24] However, it was especially during the Middle Ages that hospices proliferated. Not only were travellers sheltered, but hospices also served as havens for sick and dying persons. However, for inexplicable reasons, hospices ceased to exist in the sixteenth century, resulting in great human suffering.[25] However, hospices resurfaced towards the end of the nineteenth century when religious orders re-established them in places like Dublin, Lyons and Sydney. The aim of these hospices was specifically to care for the dying.[26]

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18 *Ibid.*

19 This section of the Hippocratic Oath is quoted by the MNT Knowledge Centre "What Is Euthanasia (Assisted Suicide)? What Is the Definition of Assisted Suicide or Euthanasia?" (26 September 2014) http://www.medicalnewstoday.com/articles/182951.php (accessed 2014-12-01).

20 Gonzales and Ruiz http://www.scielo.br/scielo.php?pid=S0080-62342012000400033&script=sci_arttext&tlng=en.

21 Mdhluli "Your Life, Your Decision? The Constitution and Euthanasia" June 2017 *De Rebus* 25 26.

22 Dippenaar "Assisted Death and the Law" (10 October 2016) http://www.fin24.com/Money/Wills-and-trusts/assisted-death-and-the-law-20161010 (accessed 2017-09-29).

23 Devaraj "Palliative Care: A Beginning" 2002 57(4) *Med J Malaysia* 384–389.

24 *Ibid.*

25 *Ibid.*

26 *Ibid.*

The modern hospice movement was started by the pioneer, Dame Cicely Saunders.[27] She was a nurse by profession in the St Luke's Hospice in London and worked both as nurse and social worker. She also went on to qualify as a doctor. Combining her compassion with medical skills, in 1967 she started an in-patient service for the sole purpose of bringing relief to the suffering of terminally ill patients and their families.[28] Two decades later, palliative medicine was first recognised as a speciality in the United Kingdom.[29]

Today, palliative care is viewed as an interdisciplinary approach to specialised medical and nursing care, providing people with relief from pain and suffering.[30] It is seen as an integrated system, aimed at bringing physical, psychological, emotional and spiritual care to a dying person when cure is not possible. This is in alignment with the World Health Organisation's definition of health being "[a] state of complete physical, mental and social well-being".[31] Palliative care is also viewed as a method to improve the quality of life of all those affected by a life-threatening illness.[32] Those who benefit from palliative care include the patient, the patient's family, friends and broader community.[33] The communitarian attitude and influence of the family and broader community in caring for the patient received the attention of the Supreme Court of Appeal in the *Estate Stransham-Ford* case.[34] The court seems to have attached much weight to an affidavit attested to, on behalf of the HPCA, by a palliative-care social worker employed at the Baragwanath Academic Hospital. In her affidavit, the social worker described palliative care in the black communities as "a gift to preserve life". On the question of the legitimacy of assisted suicide, she described it as "alien to the black culture".[35] The court held that, in addressing these issues, a court needs to give due consideration to the importance of "the notion of a dignified death", which must be informed by a rounded view of society and not confined to a restricted section of it.[36]

Palliative treatment has also been positively appraised in that it can be provided across multiple settings, including in hospitals, homes and skilled nursing facilities. It may also be administered as part of community palliative-care programmes.[37]

It is also worth noting that there is a distinction to be made between palliative care and hospice care. They may have similar goals, *inter alia* to promote dignity in death, but while a hospice is a concept of holistic care

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27 *Ibid.*

28 *Ibid.*

29 *Ibid.*

30 Wikipedia https://en.wikipedia.org/wiki/Palliative_care.

31 World Health Organisation https://www.who.int/cancer/palliative/definition/en/.

32 *Ibid.*

33 BBC "Anti-Euthanasia Arguments" http://www.co.uk/ethics/euthanasia/against/against_1.shtml (accessed 2014-12-01).

34 *Supra* par 99.

35 *Ibid.*

36 *Minister of Justice and Correctional Services v Estate Stransham-Ford supra* par 100.

37 *Minister of Justice and Correctional Services v Estate Stransham-Ford supra* par 99, wherein reference is made to the role of the broader community in preserving life.

without curative intent, palliative care is intended to bring relief to anyone with a serious, complex illness, whether or not they are expected to recover fully.[38]

3 PALLIATIVE CARE AND PALLIATIVE SEDATION IN SOUTH AFRICA

3 1 Definition

The End of Life Decisions Draft Bill[39] defines palliative care as "treatment and care of a terminally ill patient with the object of relieving physical, emotional and psycho-social suffering and of maintaining personal hygiene".[40] The HPCA defines palliative care as

> "an approach that improves the quality of life of patients and their families facing the problem associated with life-threatening illness, through the prevention and relief of suffering by means of early identification and impeccable assessment and treatment of pain and other problems, physical, psychosocial and spiritual."[41]

The South African Law Commission defines palliative care as "medical intervention not intended to cure but to alleviate suffering, including the emotional suffering, of the patient".[42] The Commission adds that palliative care "is concerned with the quality of life when, in the course of an illness, death becomes inevitable" and also that "with palliative care some patients can be kept comfortable until the moment of death".[43] It is submitted that the definition in the Draft Bill is much more descriptive. The World Health Organisation states that palliative care "is applicable early in the diagnosis in conjunction with other therapies that are implemented to prolong life".[44]

3 2 The current legal position

It appears that, over the years, palliative care for the dying has struggled to gain momentum. Greater use has been made of hospice services for those dying of an incurable disease. However, with more and more hospices closing down because of financial instability, the need for palliative services has increased and it will continue to do so in future. The practice of palliative care, unlike euthanasia, has always been regarded as an ethically sound medical practice, in addition to being morally and legally sound. Perhaps the

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38 Wikipedia https://en.wikipedia.org/wiki/Palliative_care.

39 This Bill appears in the South African Law Commission Discussion Paper 71 Project 86 "Euthanasia and the Artificial Preservation of Life" (1997).

40 See s 1 of the Bill quoted by Mukheibir "The Implications of the End of Life Decisions Bill for Palliative Caregivers" 1999 *Obiter* 163.

41 HPCA "Ethical Issues in Palliative Care" www.hpca.co.za/pdf/legalbook/HPCA%20 Chapter%203%20v6.pdf.

42 South African Law Commission Discussion Paper 71 Project 86 "Euthanasia and the Artificial Preservation of Life" par 3.11; Mukheibir 1999 *Obiter* 163.

43 *Ibid.*

44 Gwyther 2011 *CME: Your South African Journal of CPD: Palliative Care* 291.

reason that palliative care has always been placed on a moral and ethical pedestal is that those engaged in the treatment of their end-of-life care patients generally render high-quality services, including treating the patient and his or her family with the required respect, dignity and compassion. It is equally important for palliative-care practitioners to discuss the patient's wishes with him or her while he or she is still in a condition to have such a discussion.[45] If, for example, the patient is reassured that, by way of purposeful palliative care, his or her pain and suffering will somewhat be relieved, his or her desire for euthanasia may disappear.[46] That seems to be the position hinted at by the Supreme Court of Appeal in the *Stransham-Ford* case,[47] in which the court suggested that effective palliative care would lead to patients dying in a homely atmosphere surrounded by their families in a dignified and less anxious way.

Palliative-care clinicians and carers, like any other healthcare practitioners in their practices and treatment of their patients, are expected to act within the ethical guidelines prescribed by the South African Health Professions Council.[48] The Council has also posted on their website[49] a National Patients' Rights Charter, setting out a right of access to healthcare services, including palliative care, that is "affordable and effective in cases of incurable or terminal illness" and providing for special needs in the case of "patients in pain". The Health Professions Council provides that the core ethical values and standards required of healthcare practitioners in general (including palliative practitioners) include respect for persons, [protecting patients'] best interests or well-being (non-maleficence), beneficence, human rights, autonomy, integrity, tolerance, self-improvement and community. The medical issues and ethical dilemmas that confront palliative-care practitioners in the course and scope of their practice range widely. Accordingly, they need a good understanding of ethical principles when caring for patients.[50] One category of ethical transgression by palliative-care practitioners could centre around their competence and conduct with patients. A good understanding of medical ethics directs palliative caregivers to continue to respect the patient not only on a physical and emotional level, but also in exercising an appropriate choice when selecting the type of analgesic or opioid. Mohanti[51] opines that a lack of knowledge and skill in areas such as pain assessment, improper medication and unavailability of morphine sometimes present complex hurdles. It is for these reasons that it

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45 Gwyther 2011 *CME: Your South African Journal of CPD: Palliative Care* 292; HPCA Position Paper on Euthanasia and Assisted Suicide (2001) and reviewed (2015) 4.

46 Saunders *Hospice and Palliative Care: An Interdisciplinary Approach* (1990) 105; HPCA Position Paper on Euthanasia and Assisted Suicide 5; *Carter v Canada (Attorney-General)* (2012) BCSC 886 189.

47 *Minister of Justice and Correctional Services v Estate Stransham-Ford supra* par 35, 85 and 88.

48 Gwyther "Ethics and Palliative Care" 2011 29(7) *CME Continuing Medical Education* 274-276; The South African Health Professions Council of South Africa HPCSA General Guidelines for Health Researchers Booklet 13 2016.

49 http:www.hpscsa.co.za.

50 Gwyther 2011 *CME Continuing Medical Education* 274; Mohanti "Ethics in Palliative Care" 2009 15(2) *Indian Journal of Palliative Care* (*IJPC*) 89–92.

51 *Ibid.*

is submitted that a palliative caregiver's decisions must have a strong moral and ethical basis, based on the principle that "no one ought to [be harmed] in his life, health, liberty or possessions".[52] With many palliative patients in an advanced stage of cancer or chronic illnesses like HIV/AIDS, pain has been identified as the dominant symptom.[53] Because pain can cause a patient a lot of fear or leave him or her feeling withdrawn, emotional and agitated, unrelieved pain may lead to a miserable death and leave the deceased's family devastated and remorseful in grief.[54] The treatment and relief of pain has been recognised as a core ethical duty in treating those labouring thereunder and faced with discomfort.[55] For that reason, in most countries, there is now a legal right to pain relief by way of pain assessment and administration of medication, including morphine, which is known to hasten the death process. Consequently, it is ethical to prescribe narcotics and sedatives for intractable pain, even when there is the possibility of terminal sedation.[56] However, because euthanasia is illegal in South Africa (in that it constitutes murder),[57] it is clear that palliative practitioners may not engage in any conduct with the primary intention of causing the death of a patient.[58] They may also administer medication to a patient that will cause him or her to be sleepy, but not to the stage where the patient becomes comatose.[59]

The administration of morphine is viewed by some as hastening the death of those with incurable cancer and other terminal chronic illnesses and borders on the practice of euthanasia. Yet, it has remained both medically and ethically part of the end-of-life regime. However, a compelling argument can be made for the stark difference between euthanasia, which entails the instant termination of life, and an acceptable medical regime that is aimed at pain-and-symptom control, psychological care and end-of-life management. In a case of euthanasia, there is an intervention undertaken with the express intention of ending a person's life in order to relieve intractable suffering. By contrast, with palliative care, the palliative caregiver is purely alleviating the pain and suffering of the patient without the intention required for his or her actions to constitute murder. Theoretically speaking, if a patient dies after a course of morphine has been administered, the palliative caregiver, if prosecuted, is unlikely to be convicted of murder or culpable homicide; he or she neither acted with intent, nor was negligent in causing the death of the patient provided it is shown that the medication administered to the

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52 Mohanti 2009 *IJPC* 91 with reference to Peel "Human Rights and Medical Ethics" 2005 98 *J Soc Med*. 171–173.

53 Mohanti 2009 *IJPC* 90 with reference to Myers and Shetty "Going Beyond Efficacy: Strategies for Cancer Pain Management" 2008 15 *Curr Oncol.* S41–9.

54 Mohanti 2009 *IJPC* 89–92 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2902121/ (accessed 2019-02-08).

55 Mohanti 2009 *IJPC* 91 with reference to Fishman "Recognizing Pain Management as a Human Right: A First Step" 2007 105 *Anesth Analg*. 8–9.

56 *Ibid.*

57 *Minister of Justice and Correctional Services v Estate Stransham-Ford supra* par 101.

58 Saunders *Hospice and Palliative Care* 105; HPCA Position Paper on Euthanasia and Assisted Suicide 5.

59 Saunders *Hospice and Palliative Care* 106.

terminally ill patient had a secondary effect in causing death.[60] The practitioner acts in good faith if he or she uses normal medication in reasonable quantities, and the medication is administered with the object of relieving pain and not with the object of causing the death of the patient.[61]

It is submitted that, where the palliative caregiver acts in accordance with these guidelines, there will be no crime, for the criminal elements of unlawfulness and fault are absent. This means that the conduct of the palliative caregiver does not contravene the legal convictions of the community and that he or she did not have the required *mens rea*, as knowledge of unlawfulness was not present. Where a palliative caregiver is considering what will be the appropriate palliative treatment in particular circumstances, the following guidelines could serve as an aid to minimise the risk of unethical conduct and ultimately civil litigation. First, the caregiver should have a sound knowledge of the law on the issue in respect of which a decision needs to be made.[62] To assist in interpreting the law, the caregiver should also know the applicable professional ethics and codes applicable to palliative care practitioners.[63] Secondly, in making decisions regarding what effective palliative care plan to pursue, the palliative caregiver should be guided by four bio-ethical principles: respect for autonomy, beneficence, non-maleficence and justice.[64] It is especially the respect for autonomy that underpins the concepts of informed consent, confidentiality and truth-telling about prognosis, treatment options and side-effects.[65] In order to make informed decisions about their patients, palliative caregivers need to have a sound knowledge of the entire situation surrounding their patients and their desires or preferences. This allows palliative caregivers to make decisions with patients and their families based on all the facts available to them, and to avoid purely emotional decisions, dictated to by their own morals and ethics.[66]

Also important to note is that palliative care has gone from a discipline associated with hospices providing relief from pain and suffering of cancer-stricken patients and their families (especially during the end-of-life period) to a holistic and all-inclusive discipline, dealing with pain and death arising from HIV and other relevant diseases.[67]

South Africa has now recognised the need to create equitable access to palliative care for a range of both communicable and non-communicable diseases and that it is no longer acceptable that only certain communities

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60 Strauss *Doctor, Patient and the Law* 3ed (1993) 345; South African Law Commission Discussion Paper 71 Project 86 "Euthanasia and the Artificial Preservation of Life" par 3.29.

61 *Ibid.*

62 Saunders *Hospice and Palliative Care* 115.

63 *Ibid.*

64 Gwyther Ethics and Palliative Care 2011 *CME Continuing Medical Education.*

65 *Ibid.*

66 Saunders *Hospice and Palliative Care* 116; also see HPCA www.hpca.co.za/pdf/legalbook/HPCA%20Chapter%203%20v6.pdf 30 in this regard.

67 National Policy Framework and Strategy on Palliative Care 2017–2022 https:///www.up.ac.za/media/shared/62/Palliative%20Care%20Resources/final-npfspc-August-2017.ip166876.pdf.

benefit from such care.[68] The National Framework has as one of its main objectives the reaching out to all children and adults in need of palliative care.[69] The National Framework also recognises that such outreach can only be achieved if the focus is placed on strengthening services at primary healthcare level, which includes hospitals and clinics, as well as care within communities and in the homes of patients.[70] The National Health Insurance Bill of 2019[71] has as one of its goals the delivery of population-orientated primary healthcare services through the extensive use of community and home-based services in addition to primary healthcare. This includes community involvement and participation at community level.[72] To understand the impact of the National Policy Framework and Strategy on Palliative Care, a brief discourse is necessary on what legislative steps, if any, South Africa has taken in order to give effect to the goals of the National Framework.

3 3 Recommendations by the Hospice Palliative Care Association of South Africa

The Hospice Palliative Care Association of South Africa (HPCA) is an Association incorporated under section 21 of the Companies Act[73] and was founded in 1986 to address the needs of individual hospices and provincial associations to unify and advocate palliative care in South Africa and to provide effective, supportive care to communities in need. Members of the HPCA operate in more than 51 health districts and have more than 166 service sites.[74] The Association opposes euthanasia and assisted suicide, but promotes palliative care for those experiencing pain and nearing the end of their life.[75] The idea is to bring effective relief of pain and ease their dying.[76]

The HPCA advocates that access to effective and quality palliative care removes a patient's desire to be euthanised. The Association, besides calling for the integration of palliative care into the national healthcare system, encourages the improvement of skills development and the advancement of care planning and effective communication with end-of-life patients.[77]

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68 Wallis JA in *Minister of Justice and Correctional Services v Estate Stransham-Ford supra* par 100 cautioned: "The notion of a dignified death must be informed by a rounded view of society, not confined to a restricted section of it."

69 National Policy Framework and Strategy on Palliative Care https:///www.up.ac.za/media/shared/62/Palliative%20Care%20Resources/final-npfspc-August-2017.ip166876.pdf.

70 *Ibid.*

71 Published in *GG* 42598 of 2019-07-26.

72 The Memorandum on the objectives of the National Health Insurance Bill, 2019 48.

73 71 of 2008.

74 Hospice and Palliative Care Association of South Africa (HPCA) www.ngopulse.ors/organisation/hospice-palliative-care-association-southafrica (accessed 2019-08-04).

75 HPCA "Ethical Issues in Palliative Care" www.hpca.co.za/pdf/legalbook/HPCA%20Chapter%203%20v6.pdf 30.

76 HPCA Position Paper on Euthanasia and Assisted Suicide 5.

77 *Ibid.*

3 4 Recommendations of the South African Law Commission

The South African Law Commission, after investigating the legitimacy of euthanasia in the South African context, drafted the End of Life Decisions Draft Bill in 1999.[78] The Bill endorses an increase in the dosage of medication to a patient during palliative care, which may accelerate the death of the patient, provided that certain requirements are met.[79]

One can only assume that the Law Commission, when adopting section 4(1) of the End of Life Decisions Draft Bill, had in mind the danger for caregivers of criminal culpability in the form of *dolus eventualis* – that is, murder reasonably foreseen albeit with no direct intent. Through creating legislation of this nature, palliative caregivers who, for example, administer morphine or other similar drugs with the primary aim of suppressing pain and discomfort, knowing that those drugs have the potential to shorten patients' lives, will escape criminal prosecution once their actions are protected by law. It is suggested that the justification for section 4(1) of the Draft Bill can perhaps best be found in the fact that the palliative caregiver follows the precepts and ethics of his or her profession and prescribes a drug like morphine in a quantity merely sufficient to relieve pain. The object is clearly the relief of pain but there is also reasonable foreseeability that the patient's life may be shortened by taking the medication. Since the palliative caregiver acts within the legitimate context and sphere of his or her professional relationship with the patient, society consequently finds the palliative caregiver's conduct to be justified in accordance with its criteria of reasonableness and, therefore, not wrongful. Such a philosophical approach finds favour in other jurisdictions in the international arena, including the Netherlands and Canada.

4 PALLIATIVE CARE AND PALLIATIVE SEDATION IN THE NETHERLANDS

The Netherlands recognises both palliative care[80] and euthanasia[81] as legitimate practices to assist those suffering from an incurable illness and

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78 The End of Life Decisions Draft Bill 1999.

79 S 4 of the End of Life Decisions Draft Bill 1999 provides: "a medical practitioner may increase the dosage of medication to the patient, even if the secondary effect of such increase will be to shorten the life of the patient, subject to the following requirements: (a) it must be clear to the medical practitioner that the patient is suffering from a terminal illness; (b) it must also be clear to the medical practitioner that the patient's pain and distress cannot satisfactorily be alleviated by ordinary palliative treatment; (c) the medical practitioner must act in accordance with responsible medical practice with the object of relieving the patient's severe pain and distress; (d) the medical practitioner must not act with the intention to kill the patient."

80 De Rijksoverheid Voor Nederland "Levenseinde en Euthanasie" http://www.rijksoverheid.nl/onderwerpen/levenseinde-en-euthanasie/ (accessed 2013-10-02).

81 Euthanasia is regulated by the Termination of Life on Request and Assisted Suicide (Review Procedures) Act (2001).

who are in the final stages of their lives.[82] Palliative care exists side by side with euthanasia but they are seen as two distinct practices. In the Netherlands, palliative care and specifically "palliative sedation" does not include euthanasia as provided for in terms of the Termination of Life on Request and Assisted Suicide Act.[83] After all, the aims and objectives of introducing palliative care and palliative sedation practices have never been to kill the patient, but rather to bring relief to the patient's suffering.[84] The Netherlands, unlike South Africa, does legally recognise that, even if certain drugs shorten human life, the palliative caregiver who administers the drug will not be criminally liable for his or her conduct. Sedative medication can thus be used legitimately to keep a terminally ill patient asleep until he or she dies.[85] It is viewed as normal medical practice and not a form of euthanasia.[86] It is often referred to as "double effect" medication as, on the one hand, it alleviates the patient's suffering but, on the other hand, it also hastens his or her death.[87]

5 PALLIATIVE CARE AND PALLIATIVE SEDATION IN CANADA

5 1 General practice

The practice of palliative care is very much embraced in Canada. It is said to be founded on the ethos of patient centredness, family focus and community-based treatment. Palliative care in Canada addresses not only the physical aspect of the patient, but also concentrates on the psycho-social dynamic and the spiritual needs of patients, their families and their support networks.[88] The practice of palliative sedation is known in Canada almost along the same lines as in the Netherlands.[89] Both the Canadian courts as well as the legislature recognise palliative sedation. The Supreme Court of British Columbia, in *Carter v Canada (Attorney-General),*[90] endorsed this practice when it found that "[p]hysicians may legally administer medications even though they know that the doses of medication in question may hasten death, so long as the intention is to provide palliative care by easing the patient's pain."[91]

The Canadian authorities were serious about improving their palliative care system and, for that reason, the Parliamentary Committee on Palliative

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82 De Rijksoverheid Voor Nederland http://www.rijksoverheid.nl/onderwerpen/levenseinde-en-euthanasie/.

83 Act 194 of 2001.

84 De Rijksoverheid http://www.rijksoverheid.nl/onderwerpen/levenseinde-en-euthanasie/.

85 De Rijksoverheid http://www.rijksoverheid.nl/onderwerpen/levenseinde-en-euthanasie/palliatieve-sedatie.

86 *Ibid.*

87 *Ibid.*

88 Parliamentary Committee on Palliative and Compassionate Care "Not To Be Forgotten: Care of Vulnerable Canadians" November 2011 23.

89 See heading 4; *Carter v Canada (Attorney-General) supra* par 200.

90 *Supra*.

91 Par 231.

and Compassionate Care was established in 2011 especially to bring about uniformity in improved palliative care in the entire Canada.[92] Among its primary recommendations were the following: the development and implementation of a national strategy; the design and implementation of national standards as a benchmark of quality palliative care;[93] the coordination and dissemination of palliative-care and end-of-life care research and information resources;[94] continuous coordination and support of implementation of the national strategy;[95] the development of a flexible and integrated model of palliative-care delivery, taking into account geographic, regional and cultural diversity in Canada;[96] the provision of stable funding by government to palliative care;[97] the funding by government of a national public-awareness campaign on palliative care;[98] the strengthening by government of a home-care delivery programme that develops home-delivered palliative care resources in a manner that is sensitive to community, cultural, familial and spiritual needs;[99] and the development of rural palliative-care delivery.[100]

South Africa urgently needs to pass legislation to create a strategic framework to bring about a uniform, sustainable and high-quality palliative system for its people. It would be well advised to borrow some of the recommendations of the Canadian Parliamentary Committee as referred to. In particular, South African needs to investigate palliative home care, involving community involvement in order to achieve meaningful coverage and care for terminally ill persons.

5 2 Legislative framework introduced in Canada

The Canadian government passed the Medical Assistance in Dying Bill on 17 June 2016.[101] In terms of this Bill, medical assistance is available to eligible dying Canadians, which assistance also includes palliative care. With regard to palliative care, the Bill mainly provides that patients are required to be informed about what means are available to relieve their suffering, including palliative-care options, before they can continue with receiving assisted dying. This is to ensure that patients do not make rushed decisions

92 Parliamentary Committee on Palliative and Compassionate Care *Not to be Forgotten: Care of Vulnerable Canadians* 2011 15.

93 *Ibid.*

94 *Ibid.*

95 *Ibid.*

96 *Ibid.*

97 *Ibid.*

98 *Ibid.*

99 *Ibid.*

100 *Ibid.*

101 Government of Canada "An Act to Amend the Criminal Code and to Make Related Amendments to Other Acts (Medical Assistance in Dying)" https://laws-lois.justice.gc.ca/eng/AnnualStatutes/2016_3/FullText.html (accessed 2020-08-13). See also Health Canada "Framework on Palliative Care in Canada" (December 2018) Canada.ca/en/health-canada/services/health-care-system/reports-publications/palliative-care/framework-palliative-care-canada.html.

about their future based on misconceptions or misinformation.[102] The Framework on Palliative Care in Canada Act[103] was also passed shortly after the Medical Assistance in Dying Bill.[104] The Act commits the Canadian Parliament to examine the state of palliative care in Canada within five years of the Act coming into operation, as well as for the Minister of Health to prepare a report on the state of palliative care and also present such report to Parliament.[105]

It is evident from the aforegoing that the Canadian government is seriously committed to ensuring that palliative care is practised professionally and in the best interests of patients. This commitment is further evident in the fact that the Canadian government has rolled out palliative-care programmes in most of the states in Canada.[106] What is significant about the development of its national framework is the inclusivity with which they approach their long-term strategy. Besides improving access to palliative care through *inter alia* hospitals and residential hospices, home care through community involvement is very much part of the strategy. Here, palliative training-and-education needs focus not only on healthcare providers, but also on caregivers from within their communities.[107] It appears that Canadians have very much adopted a public-health approach to palliative care. It is an approach that originated in Australia and has since gained support on an international scale, including in Canada.[108] All Canadian states have adopted the theory of practice that mobilises palliative care as a public-health issue in compassionate communities. Their ethos is built around the strong belief that in a compassionate community "it is everyone's responsibility to care for each other during times of crisis and loss, and not simply the task of the health professionals". Their cities and towns have adopted a charter (the so-called Compassionate City Charter) that serves as a tool to build compassionate communities, including schools, faith groups, institutions and businesses, and to drive the idea of community involvement in caring for those dying, and for families who are assisted in their grief after the passing of their loved ones.[109] Many members of these communities are trained to assist in palliative care, especially in attending to the needs of people undergoing home care. Besides demystifying

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[102] See s 241.2(1)(*e*).

[103] S.C. (Statutes of Canada) 2017, c28; Health Canada https://www.canada.ca/content/dam/hc-sc/documents/services/health-care-system/reports-publications/palliative-care/framework-palliative-care-canada/framework-palliative-care-canada.pdf.

[104] Bill C-14 2016. This Bill intended to amend the Criminal Code to allow medical assistance to the dying.

[105] S 4(1) of the Framework on Palliative Care in Canada Act S.C. (Statutes of Canada) 2017, c. 28.

[106] Tompkins "Compassionate Communities in Canada: It Is Everyone's Responsibility" 2018 7(2) *Annals of Palliative Medicine* 2 apm.amegroups.com/article/view/19240/19358 (accessed 2018-07-08).

[107] S 2(1) of the Framework on Palliative Care in Canada Act S.C. (Statutes of Canada) 2017, c. 28 2017.

[108] Tompkins 2018 *Annals of Palliative Medicine*; Stoyles "It Takes a Village: Expert Calls for Community Involvement in Palliative Care" (18 August 2016) https:///www.australianageingagenda.com.au/2016/08/18/it-takes-a-village-expert-calls-for-community-involvement-in-palliative-care/.

[109] *Ibid.*

caregiving, death and dying, these trained individuals also provide moral support to those in crisis.[110] Given the strong bond between Canada and South Africa in the post-apartheid era, it is suggested that Canada's innovative steps in palliative care need to be considered for adoption by the South African government.[111]

6 THE PROPOSED WAY FORWARD FOR SOUTH AFRICA

6 1 General

Although the South African Law Commission (now the South African Law Reform Commission) has proposed legislation in its *Discussion Paper on Euthanasia and the Artificial Preservation of Life*[112] that would permit a medical practitioner to carry out a patient's request to die, the South African government has not reacted. The government also did not react to the Commission's End of Life Decisions Draft Bill 1999,, which provided for an increase in the allowable dosage of medication to a patient during palliative care, which increase may accelerate a patient's death.[113] Seventeen years later, the Supreme Court of Appeal, in the case of *Minister of Justice and Correctional Services v Estate Stransham-Ford,*[114] refused to develop the common-law position with regard to murder relating to physician-administered euthanasia and assisted suicide. At the same time, this particular case brought about more questions than answers.[115] In the context of palliative-care practice, the consequences of administering the so-called double-effect medication, remains completely unsolved. Although the court seems to recognise that palliative care is an acceptable practice for alleviating the suffering of people in the final stages of a terminal illness,[116] the court, did not give consideration to the acceleration of a person's death as result of administering double-effect medication.

The question therefore arises as to whether the current legal guidelines regulating palliative care in South Africa are not functioning as a proverbial straitjacket against the best interests of a palliative-care patient? On the one end of the spectrum is the patient's desire not to suffer for too long, while consenting to the increase in dosage of the medication has the effect of accelerating his or her death.

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110 *Ibid.*

111 On the profound impact the Canadian law and jurisprudence has had on the understanding and application of rights, see Klug "The Canadian Charter, South Africa and the Paths of Constitutional Influence" (2017) https://www.cambridge.org/core/books/canada-in-the-world/canadian-charter-south-africa-and-the-paths-of-constitutional-influence/155C24B5103C13E4ABBA00760068AA60 (accessed 2019-06-09).

112 South African Law Commission Discussion Paper 71.

113 S 4(2) of the End of Life Decisions Draft Bill 1999.

114 *Supra*.

115 Par 101 of the judgment; Davidson "The Case for the Right to Dignity" (4 October 2018) https://www.dailymaverick.co.za/opinionista/2018-1004-sean-davidson-the-case-for-the-right-to-die-with-dignity/.

116 Par 99 of the judgment.

On the other end of the spectrum, the increase in dosage does present the aspect of euthanasia, which amounts to murder in the form of *dolus eventualis* inasfar as the palliative caregiver is concerned.[117] This is the case despite the fact that an increase in dosage in order to relieve pain appears to be acceptable medical practice. However, is it fair to charge and convict a palliative caregiver with murder given the role that the patient plays in consenting to the caregiver's part in advancing death? However noble the palliative caregiver's conduct in these circumstances, his or her motive is clearly at odds with the South African common-law position.[118]

The influence of some of the rights enshrined in the Bill of Rights, *inter alia* those contained in sections 10,[119] 12[120] and 15,[121] begs the question whether it is morally and judicially fair that the common-law situation should continue to prevail. Here, the issue of morality, patient autonomy or self-determination are important factors to be considered. What is at stake are the competing values of, on the one hand, the autonomy and dignity of a competent adult patient who seeks the acceleration of his or her death as a response to a grievous and irremediable medical condition, while, on the other hand, there is the value that the Supreme Court of Appeal in the *Stransham-Ford* case[122] has placed on the right to life, which is rather unqualified.[123]

Patient autonomy is a well-known concept in South Africa, especially in cases involving medical treatment.[124] Despite this, the Supreme Court of Appeal, in the *Stransham-Ford* case, refused to recognise that a defence of consent to a charge of murder may legally be raised, because the law has not reached a stage where the common law could be developed.[125] The court held that the issue was not ventilated sufficiently in the court *a quo.*[126] However, it is submitted that, when applied to a case of palliative care, a patient should have the right to consent to the administration of medication by a palliative caregiver to provide physical comfort, although it may accelerate his or her death. Such recognition would amplify and accentuate the dignity of the patient.

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117 Saunders *Hospice and Palliative Care* 105; HPCA Position Paper on Euthanasia and Assisted Suicide 5.

118 For the common law position including mercy killing and active voluntary euthanasia see *S v Hartmann* 1975 (3) SA 532 (C); *S v De Bellocq* 1975 (3) SA 538 (T) 539D; *S v Marengo* 1991 (2) SACR 43 (W) 47A–B; *S v Smorenburg* 1992 (2) SACR 389 (C).

119 The right to human dignity.

120 The right to the freedom and security of person, including the right to bodily and psychological integrity.

121 The right to freedom of conscience, religion, thought, belief and opinion.

122 *Supra* par 62, 63.

123 S 11 of the Constitution provides for the right to life.

124 See *Minister of Justice and Correctional Services v Estate Stransham-Ford supra* with reference to *Stoffberg v Elliot* 1923 CPD 148 par 31.

125 *Minister of Justice and Correctional Services v Estate Stransham-Ford supra* par 68.

126 Par 74.

Allowing a person to decide whether or not he wants to die shows recognition for his dignity and autonomy.[127] It is accordingly submitted that, if a terminally ill patient cannot enjoy the quality of human life that he should, the law should provide for a palliative-care system that may keep the patient as comfortable as possible even though death is hastened. In this way, a patient is afforded the opportunity to die with dignity in the sense that his or her self-worth is not diminished.

Labuschagne submits that euthanasia and assisted suicide must be based on respect for human dignity and accompanying sympathy for other people who are suffering from an unbearable illness.[128] He further submits that the focus should be on the quality of life of the person who is enduring the suffering.[129] It is submitted that palliative-care medication with a life-shortening effect, of which both the palliative caregiver and the patient are aware and to which the patient has consented, should be viewed in the same way.

6 2 Passing of legislation

In our constitutional dispensation, one of the primary functions of the courts is to develop the common law in accordance with constitutional values.[130] However, there are instances where it is better for the legislature to pass legislative enactments; the circumstances under which individuals could lawfully be assisted to end their lives may be such an instance. That is a position that is gaining increased support internationally.[131]

It is suggested that those tasked with developing legislation to regulate palliative care should have regard to regulations implemented by those countries whose socio-economic circumstances are similar to those of South Africa. Canada's model could also be an appropriate choice in that it has adopted a community-based palliative-care system, which reduces unnecessary costs.[132] The Canadian system relies on compassionate communities to assist the national government in its quest to provide measurable high-quality palliative healthcare services to terminally ill

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127 Bhamjee "Is the Right To Die With Dignity Constitutionally Guaranteed? Baxter v Montana and Other Developments in Patient Autonomy and Physician Assisted Suicide" 2010 31(2) *Obiter* 333 352.

128 Labuschagne "Dekriminalisasie van Eutanasie" 1988 *THRHR* 167 191.

129 *Ibid.*

130 S 39(2) of the Constitution.

131 In the English decision, *The Queen on the Application of Mrs Jane Nicklinson (in her own right and as Administratrix of Mr Tony Nicklinson Deceased) and Mr Paul Lamb v Minister of Justice and Director of Public Prosecutions and Her Majesty's Attorney-General* (2013) EWCA Civ 961 (31 July 2013), the court stated at par 154–155: "if the law is to be changed, it must be changed by Parliament…. Parliament represents the conscience of the nation. Judges, however eminent, do not: our responsibility is to discover the relevant legal principles and apply the law as we find it." In the *Stransham-Ford* case *supra* par 73, the South African court expressed the view that because the issue of euthanasia raises complex questions of the public interest, the legislature was the "proper engine for legal development where regulations need to be created".

132 Tompkins apm.amegroups.com/article/view/19240/19356.

persons and their families.[133] As in Canada, the majority of people in South Africa value and care for infirm members within the family and broader community.[134] India has also shown that local communities can be empowered to assist chronically ill and terminally ill persons and their families, despite limited resources. These communities are governed by the Ghandhian spirit "for the people, by the people, with the people".[135] It is suggested that the South African government can also achieve this if it first, creates legislation that provides clarity, and avoids ambiguity, on the legal position of palliative care and euthanasia. Such legislation should respect constitutional values and be capable of being executed effectively and efficiently for the benefit of all who are affected by it.[136]

The mentioned values find expression in the Preamble and the Bill of Rights in the Constitution. The Preamble explicitly provides the constitutional imperative "to improve the quality of life for all citizens".[137] Section 7(1) of the Constitution affirms that the Bill of Rights is "a cornerstone of democracy in South Africa" and "affirms the democratic values of human dignity, equality and freedom". The Constitution also places an overarching set of obligations on the State to "[r]espect, protect, promote and fulfil the rights in the Bill of Rights".[138] One of those rights is the right of everyone to have access to healthcare services.[139] This obligation places a duty on national and provincial government to adopt legislation and other measures to ensure equal access to healthcare facilities and provide high-quality medical services. This should include a national health policy framework on how to realise those rights.[140] Home- and community-based care as a form of intervention in caring for the infirm and dying should rank highly when considering programmes to provide palliative care. This would include special training for health workers and volunteers who visit patients in their homes to provide appropriate care. Home- and community-based care would in turn free up hospital beds in instances where chronic-care patients have been hospitalised for lengthy periods.[141]

Section 27(2) of the Constitution also places an obligation on the State to "[t]ake reasonable legislative and other measures within its available resources, to achieve the progressive realisation of each of these rights". Accordingly, since 1994, this has received the attention of especially the Constitutional Court in the context of healthcare. The first case,

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133 *Ibid.*

134 *Minister of Justice and Correctional Services v Estate Stransham-Ford supra* par 99.

135 Stjernsward "Community Participation in Palliative Care" 2005 11(1) *IJPC* 22–27 www.jpalliativecare.com/article.asp?issn=0973-1075 (accessed 2019-03-06).

136 The values included could consist of human dignity and *Ubuntu*. See *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) par 35 on the application of human dignity; see further *S v Makwanyane* 1995 (3) SA 391 (CC) par 224.

137 See the Preamble to the Constitution of the Republic of South Africa, 1996.

138 S 7(2) of the Constitution of the Republic of South Africa, 1996.

139 S 27(1)(*a*) of the Constitution of the Republic of South Africa, 1996.

140 Heyns and Bekker "Introduction to the Rights Concerning Health Care in the South African Constitution" in Bekker (ed) *A Compendium of Essential Documents on the Right to Health, Economic and Social Rights Series* Vol 4.

141 *Ibid.*

Soobramoney v Minister of Health, KwaZulu-Natal,[142] concerned the issue whether and under what circumstances limited resources constitute a valid basis for limiting access to medical treatment. In this case, Soobramoney insisted that he was entitled to healthcare in the form of dialysis treatment. The hospital refused this, as he was not an emergency patient. The hospital, at that stage, also lacked the required resources to help all patients with chronic kidney problems. The court held that the obligations imposed on the State regarding access to healthcare are dependent upon the resources available, as stated in sections 27(1) and 27(2). Because of limited resources, the hospital had adopted a policy of admitting only those patients who could be cured within a short period and those with chronic renal failure who were eligible for a kidney transplant. The court held that Soobramoney's demands were not reasonable, given the hospital's limited resources measured against the socio-historical context of South Africa. The court's decision has deservedly been criticised for its failure to develop the normative content of healthcare rights allied to the constitutional rights to life, dignity and healthcare.

The second case, *Minister of Health v Treatment Action Campaign: In re Certain Amicus Curiae Applications,*[143] concerned the government's policy not to make available Nevirapine to HIV-and-AIDS-related treatment on a larger scale. The court found the policy to be unconstitutional and unreasonable as the government had failed to take reasonable measures to provide access to healthcare to those in need. The important principle that flows from this case with regard to the fulfilment of the constitutionally protected right to health is that there must be a comprehensive programme, which may include a national framework. Legislative measures need to be put in place to promote the right of access to health services. In addition, a health programme is required that is directed at the progressive realisation of the right within its available resources. The legislative measures must be supported by appropriate, well-directed policies and programmes, and the programmes must respond to the needs of the most desperate.[144]

In the case of *Minister of Health NO v New Clicks SA (Pty) Ltd (TAC Amici Curiae),*[145] the Constitutional Court dealt with the regulation of fees for the dispensing of medicines by public and private pharmacies and how the regulations affect the right of access to healthcare services in terms of section 27(1)(*a*) and (2) of the Constitution. The court held that the right to healthcare services includes the right of access to medicine that is affordable. The court considered the measures that the State can take within its available resources to achieve the progressive realisation of that right but held that the State has an obligation to promote access to medicines that are affordable.[146] The court subsequently held that a regulation of prices, to

142 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC).

143 2002 (5) SA 713 (CC); 2002 (10) BCLR 1023; [2002] ZACC 13.

144 Moyo "Realising the Right to Health Care in South Africa" (2016) fhr.org.za/files/7215/1247/1732/Health.Pdf.

145 2006 (2) SA 311 (CC); 2006 (1) BCLR 1; [2005] ZACC 14.

146 Par 514.

promote affordable medication, is wholly legitimate as a constitutional expression of its duties under section 27(2).[147]

However, the principle of the progressive realisation of a right does not imply that the State can defer efforts for the full realisation of the right indefinitely.[148] Healthcare, being one of the pillars of any concerned and caring society, deserves more. The advancement of this core entitlement to receive medical care, including palliative care, should be accelerated to comply with our commitment to international conventions "[t]o attain the highest standards of physical and mental health conducive to living a life of dignity".[149] This is in alignment with the National Health Act,[150] which, in its preamble, embraces socio-economic transformation in the healthcare system in order to improve the quality of life for all.[151]

The introduction of the proposed national health insurance legislation[152] is seen by many as a saviour that will provide more equitable access to healthcare services in South Africa in future. However, even if the Bill is passed and becomes legislation in South Africa, the reality is that sustaining the scheme economically will present many challenges in the long run. A serious impact may be that additional healthcare professionals will be required to take up positions in hospitals and other healthcare centres. What exacerbates the situation is that inadequate workforce planning in the public domain has already had a major impact on the healthcare system.[153]

Given the limited resources at both national and provincial level, perhaps rolling out community and homecare services for palliative care for the dying is a desirable option. There should be an intensified thrust towards using more community-health workers and training them adequately. Adopting a more progressive resource-allocation policy will certainly move towards more sustainable and affordable health services for those in need of palliative care, thus taking South Africa a step closer to realising its constitutional duty to provide healthcare.

Allied to the above-mentioned reform measures, there is a need for the extensive promotion of public awareness of palliative care, and of the need for compassion and community involvement in assisting the dying and the grieving when the situation arises. However, community involvement will

147 Par 659.

148 See International Commission of Jurists "The Limburg Principles on the implementation of the International Covenant of Economic, Social and Cultural Rights" in *Economic, Social and Cultural Rights: A Compilation of Essential Documents* (2005) 63 par 21.

149 See Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICISCAR) 1976.

150 61 of 2003.

151 The Preamble to the National Health Act 61 of 2003 recognises that we should "acknowledge the socio-economic injustices and inequalities of health services of the past, the need to establish a society based on social justice and foundational human rights, and the need to improve the quality of life for all in the country".

152 National Health Insurance Bill, 2019

153 Smith, Ranchod, Strugnell and Wishnia "Human Resources for Health Planning and National Health Insurance: The Urgency and the Opportunity (2018) *SAHR* 23 with reference to Veller "Public Health System in Dire Straits" (4 June 2018) https://www.pressreader.com/south-africa/cape-times/20180601/281861529185604.

only succeed if some kind of mandatory community service can be developed.

It is further recommended that palliative care, for a certain period of time, should be integrated into the already-existing community service for medical graduates undergoing a compulsory period of postgraduate vocational training with appropriate supervision. Apart from medical graduates, it is also proposed that learners who are leaving school and who do not embark on a course in medicine, but have an interest in caring for ill people, should also be trained in palliative care and should also undergo compulsory community service for a period of approximately three months. It could be beneficial to our healthcare sector, in that interested parties may well pursue a career in medicine thereafter and, in so doing, transfer their skills into the labour market. This constitutes a third category of people who are capable of rendering voluntary palliative caregiving as part of a compassionate community drive to care for each other in times of crisis and loss. Providing assistance is seen, as Socrates once described it, as "the purpose of human life founded in personal and spiritual growth in a lived experience".[154]

The provision of such assistance can however only be achieved by way of a mission-oriented drive by national government to engage in public service and supported by urgently needed legislation. Encouraging community involvement in palliative care also falls squarely within the constitutional obligation of treating people who are in their final hour of need with the utmost compassion and dignity. In that way, the age-old spirit of *Ubuntu*, which encourages every member of the community to act in solidarity with those who find themselves in the most vulnerable state, plays a very important role.

7 CONCLUSION

Death is a natural phenomenon and an inescapable fact of life. While euthanasia remains unlawful in South Africa, there is only one alternative to mitigate symptoms, make life tolerable and ease emotional stress for dying people and their families: the concept of palliative care. To this end, this type of care has always been regarded as an ethically, morally and legally sound medical practice.

This article identifies palliative care as the only means of responding to end-of-life suffering. Furthermore, even if euthanasia were to be legalised in South Africa, palliative care and euthanasia can exist side by side in caring for the dying. On the basis that palliative care not only includes service to a patient, but also to family, friends and even the community where the patient is living, it can be said that it is *Ubuntu*-orientated. *Ubuntu* is an African practice that embraces values such as compassion, survival, respect and dignity. Therefore, *Ubuntu* has often been referred to and applied as a constitutional value.

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[154] Prinsloo "The Underlying Motives of University Student Volunteers Participating in Community Service Activities in Custodial Settings in South Africa: A Philosophical Perspective" 2016 17(2) *Scielo* www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1561-40182016000200009.

This article hopes to further a greater understanding of the role communities can play in providing palliative care within neighbourhoods to serve the needs of terminally ill people at the end of life, as well as their families, suffering emotionally. It further strives to indicate how important it is for the South African government to adhere to the constitutional imperatives as stipulated in section 27 of the Bill of Rights. As already stated, society and local communities are caring entities and everything possible should be done in order to care for their members, ensuring *inter alia* that their healthcare needs are met. Anything else would be contrary to the true spirit of the Constitution. The adequate regulation of palliative care in South Africa by way of legislation is therefore of the utmost importance and should be a priority of government.

IMPLEMENTING A SOUTH AFRICAN E-DISPUTE RESOLUTION SYSTEM FOR CONSUMER DISPUTES

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SUMMARY

In the 1990s, online dispute resolution became more prevalent with the growth of the Internet and its accompanying issues. Yet despite the apparent advantages of online dispute resolution platforms, South Africa has lagged behind in using such a system for consumer disputes. It has become necessary to appeal for the use of an online system since courts are often too costly and backlogged with other disputes; and existing consumer mechanisms found in the Consumer Protection Act 68 of 2008 have proved to be ineffectual. With the expansion of artificial intelligence and South Africa now entering the Fourth Industrial Revolution, it is evident that reforms to consumer laws may be necessary to keep up with technological advances, as well as to expedite consumer disputes. The use of an online dispute resolution system powered by artificial intelligence may prove beneficial in South Africa. This article argues for the implementation of an e-dispute resolution system similar to eBay's online Resolution Center.

1 INTRODUCTION

The objective of this research is to argue for the implementation of an online dispute resolution system using artificial intelligence (AI) to assist and resolve consumer disputes. The need for this stems from the high cost and slow processes of litigation that burden many consumers. Courts have acknowledged that disputing parties should be encouraged to avoid litigation, rather than prematurely instituting action in court as a first option, as it is costly and often unnecessary.[1] Furthermore, there are instances where the claim brought by a consumer is small and the litigation costs exceed the relief claimed.[2] Authors have argued that online disputes between suppliers and consumers are primarily concerned with claims that are small in monetary value; but there is a high volume of such disputes, and

[1] *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes* (2012) 33 *ILJ* 629 (LC) par 22.

[2] OECD "Consumer Dispute Resolution and Redress in the Global Marketplace" 2006 https://www.oecd.org/sti/consumer/36456184.pdf (accessed 2020-03-02).

therefore a unique system of dispute resolution is required for these cases.[3] In reality, regardless of whether a transaction originated online or offline, consumer disputes may arise over small amounts of money. An online dispute resolution system would therefore be available to consumers who enter into both online and offline transactions and would require mediation to reach a simple resolution. The motivating factors for creating and using such a system appear to centre on money, efficiency and convenience.[4]

In this context, it should be noted that South Africa has introduced the Consumer Protection Act[5] (CPA). From the first few sentences of the Preamble, it is clear that it embraces a consistent legislative and enforcement framework relating to consumer transactions and agreements to ensure accessible, transparent and efficient redress for consumers who have been abused or exploited in the marketplace.[6] Although the CPA provides several relevant mechanisms and sets out the procedures for consumer redress, it is submitted that an online system is needed in the context of the technological era. This need is apparent in today's commercial world; the South African legal system can choose to rely on traditional dispute resolution methods that have been in existence for many years, or find a new system that is better suited to e-commerce.[7] Even where retailers provide online platforms or online customer services to resolve simple consumer issues, a formal online system may be implemented to ensure the satisfactory resolution of consumer disputes, as well as provide a uniform regulatory approach and ensure compliance with consumer laws. The advent of the Fourth Industrial Revolution and artificial intelligence technologies give countries opportunities to improve their economies through the use of digital technologies.[8] Online dispute resolution may be considered as one of these opportunities.

The issue here is whether establishing a South African online dispute mechanism would offer an efficient and effective system to resolve legal consumer disputes, especially for those claims that are not high in value. The idea would be to create an online dispute resolution (ODR) process, including an e-dispute system that could potentially expedite both offline and online consumer claims. The e-dispute system would enhance the current redress framework envisaged in the CPA by providing consumers with an online alternative to resolving disputes by mediation. The system would

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3 Stegner "Online Dispute Resolution: The Future of Consumer Dispute Resolution?" 2017 *Yearbook on International Arbitration* 347 348. The author submits that the average online consumer transaction is approximately 100 euros. In the South African context, if consumers spend a few hundred rands on a product, it would seem fruitless to attempt to institute an action in court to retrieve this amount. The cost outweighs the benefit and it is not worth pursuing such small transactions. As Stegner argues that these small disputes are common, a system needs to be established where consumers can bring their small claims without high litigation costs.

4 Condlin "Online Dispute Resolution: Stinky, Repugnant, or Drab" 2017 *Cardoza Journal of Conflict Resolution* 717 720–721.

5 68 of 2008.

6 See the title of the Act read with par (*b*) of the Preamble.

7 Cortes *Online Dispute Resolution for Consumers in the European Union* (2010) 2.

8 Pollitzer "Creating a Better Future: Four Scenarios for How Digital Technologies Could Change the World" 2019 *Journal of International Affairs* 75 76.

make use of AI algorithms to seek a fair resolution for the disputing parties. Although the system would be powered by AI, human intervention would also be required to ensure a fair and effective process for consumers. eBay has proved that an online dispute resolution centre controlled by artificial intelligence can be a simple and effective system to use for disputes; South Africa may learn from this type of model. Where such an e-dispute system fails to resolve the matter, it may then assist consumers by referring them to the other normal redress mechanisms as provided in the CPA.

2 THE EXISTING DISPUTE PROCESS IN THE CPA

It is necessary briefly to examine the existing redress mechanisms provided for consumers in terms of the CPA in order to assess their adequacy in resolving consumer disputes. Probably hundreds, if not thousands, of consumer complaints occur on a daily basis. According to Romualdi, high levels of civil litigation coupled with limited human resources can lead to excessive delays in resolving consumer disputes.[9] In this context, it is submitted that consumer complaints that are frivolous waste the courts' time and scarce resources. As already mentioned, some claims may be for small monetary amounts, and normal civil remedies and litigation costs may outweigh the claim sought. As a consequence of high costs and confusing or slow processes, consumers may be left with unresolved disputes. Du Plessis submits that unresolved disputes between consumers and suppliers undermine the maintenance of social order.[10] An effective redress mechanism is therefore imperative in any legal system to ensure that consumers obtain adequate redress for their legitimate complaints.

In terms of South African consumer law, if consumers wish to resolve their disputes, they should follow the procedures as set out in the CPA. The CPA aims to promote consumer empowerment through awareness and education, while at the same time also providing consumers with an efficient and accessible means of dispute resolution.[11] The Act sets out various avenues that consumers may pursue should they have a grievance against a supplier. The Act further empowers consumers to enforce their consumer rights using the available mechanisms as provided for in the CPA. Consumers therefore have at their disposal different procedures to enforce their consumer rights, depending on the relief sought. Chapter 3 of the CPA deals with the protection of consumer rights and the consumer's voice; Part A, in particular, focuses on the consumer's right to be heard and to obtain redress. This ensures that consumer disputes are brought in the correct forum to receive the correct relief.

The avenue that consumers should first pursue is that of alternate dispute resolution. Traditionally, disputes have involved litigation, which required parties to resolve their issues in court. However, alternative dispute

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9 Romualdi "Problem-Solving Justice and Alternative Dispute Resolution in the Italian Legal Context" 2018 *Utrecht Law Review* 52.

10 Du Plessis "Enforcement and Execution Shortcomings of Consumer Courts" 2010 *SA Merc LJ* 517 529.

11 S 3(*f*)–(*g*) CPA.

resolution seeks to resolve disputes without the need to go to court.[12] Bearing in mind that alternative dispute resolution may use mediation to resolve disputes between parties, the process intends finding an amicable agreement between the parties with the assistance of a neutral and impartial third party mediator.[13] Other than reaching an amicable solution, it may also offer a cheaper and quicker avenue than use of the courts. The idea behind alternative dispute resolution is therefore to provide a less expensive and less complicated means of redress for consumers than is provided by court procedures.[14] Alternative dispute resolution seeks to avoid the court process and its related constraints, such as costs, knowledge and time, which may even cause consumers to withdraw their claims and impede access to justice.[15] Furthermore, in terms of the CPA, if consumers approach the Commission or Tribunal directly, they will usually first be referred to an alternative dispute resolution agent to address their problem.[16] More importantly, the CPA also states that a consumer must first pursue and exhaust all other avenues as provided in the Act, before approaching a court with jurisdiction over the matter.[17] These provisions indicate that alternative dispute resolution is therefore the preferred mechanism for use in resolving consumer disputes.

The CPA specifically advocates for alternative dispute resolution in section 70, which provides that the consumer may refer his or her complaint to an ombud with jurisdiction, an industry-accredited ombud, a person or entity that provides conciliation, arbitration or mediation services, or a consumer court.[18] The Office of Consumer Goods and Services Ombud has been set up in terms of the CPA and is tasked with receiving and dealing with consumer goods and services complaints free of charge.[19] An advantage of the alternative dispute resolution process is that where it successfully resolves the consumer's complaint, the alternative dispute resolution agent may record the resolution in the form of an order and if the parties to the dispute consent to the order, it can be sent to the Tribunal or High Court to be made a consent order, which may include an award of damages in favour of the aggrieved consumer.[20]

If, however, the complaint cannot be resolved through one of the alternative dispute resolution agencies, the agent may file the consumer's complaint with the Commission.[21] The Commission is responsible for receiving complaints from consumers about alleged contraventions of the

12 Barnett and Treleaven "Algorithmic Dispute Resolution: The Automation of Professional Dispute Resolution Using AI and Blockchain Technologies" 2018 *The Computer Journal* 399 400–401.

13 Romualdi 2018 *Utrecht Law Review* 52 56.

14 Woker "Consumer Protection and Alternative Dispute Resolution" 2016 *SA Merc LJ* 21 26. Although dispute resolution may well provide an alternate form of redress, in certain instances consumers may still need to approach courts for appropriate relief.

15 Hanriot "Online Dispute Resolution (ODR) as a Solution to Cross Border Consumer Disputes: The Enforcement of Outcomes" 2015 *McGill Journal of Dispute Resolution* 1 5.

16 S 69 CPA.

17 S 69(*d*) CPA.

18 S 70(1)(*a*)–(*d*) CPA.

19 See Consumer Goods and Services Ombud http://www.cgso.org.za/19-08-2016.

20 S 70(3)(*a*)–(*b*) & (4) CPA.

21 S 70(2) CPA.

Act by businesses.[22] When the Commission receives a complaint, it may issue the consumer with a notice of non-referral if the complaint appears to be frivolous or vexatious, does not allege any facts that would grant any remedy in terms of the CPA, or the claim has prescribed.[23] After investigating the consumer's complaint, the Commission has other alternatives available, including referring the matter to the National Prosecuting Authority, and if the Commission believes a business has engaged in prohibited conduct, it can refer the matter to the Equality Court, propose a draft consent order, or issue a compliance notice in terms of the Act.[24] "Prohibited conduct" is broadly defined as an act or omission in contravention of the CPA.[25]

Should the Commission reasonably believe that the consumer's complaint involves prohibited conduct, it can issue a compliance notice against the business.[26] The compliance notice will inform the business, among other things, of the provision of the CPA that has not been complied with, the nature and extent of the non-compliance and the penalty that has been imposed.[27] If the business fails to comply with the notice issued, then the Commission can apply to the Tribunal for the imposition of an administrative fine.[28] Businesses should be wary of these fines as they are quite high but may not exceed the greater of 10 per cent of the respondent's annual turnover during the preceding financial year or R1 000 000.[29] The Commission can also refer the matter to the Tribunal or, if it has issued the consumer with a non-referral notice, the consumer can apply to the Tribunal with leave of the Tribunal.[30] An aggrieved consumer should only seek relief from court as a last resort when all other remedies available to the consumer as listed above have been exhausted.[31]

What the procedure in the CPA illustrates is that consumers have been given several avenues to pursue when enforcing their rights. The process, however, seems convoluted and time-consuming. A further critique of the existing framework in the CPA reveals several weaknesses of the Commission, which explain why it has failed as a mechanism to protect consumers. Some of the weaknesses identified include lack of clear processes, inaccessibility of the Commission by consumers, high work load, low work output, differing interpretations of the CPA by the Commission, and poor reputation owing to negative publicity.[32] Despite having several avenues to pursue their claims, consumers may not pursue these avenues because of the length of time or the costs involved in obtaining redress. Thus it has been argued that although the CPA has in theory provided

22 S 99(*b*) CPA.
23 S 72(1)(*a*)(i)–(iii) CPA.
24 S 73(*c*)(i)–(iv) CPA.
25 S 1 CPA.
26 S 100(1) CPA.
27 S 100(3) CPA.
28 S 100(6)(*a*) CPA.
29 S 112(2)(*a*)–(*b*) CPA.
30 S 73(2)(*b*) read with s 75(*b*) CPA.
31 S 69(*d*) CPA.
32 Magaqa "The NCC and the NCT Walk the Long Road to Consumer Protection" 2015 *SA Merc LJ* 32 46.

consumers with efficient redress mechanisms, these mechanisms in practice have not been successful. Several erroneous decisions made by the National Consumer Commission (owing to its failure to understand the Act) has had the effect of creating obstacles to the successful implementation of the Act.[33] Consumers may therefore not have confidence that their claims will be satisfied because the protective consumer bodies themselves do not adequately apply the provisions of the CPA. These weaknesses are attributed to the efficacy of the Commission; if these issues were resolved, the Commission could become a powerful and valuable protection body for consumers. According to a news report in the latter part of 2019, the Commission was reported to be understaffed and admitted that it lacked the necessary resources to investigate every single case and was of the view that it would be more beneficial for disputing parties to resolve their disputes in an amicable manner rather than using the Commission's limited resources.[34] This news report reveals that the Commission requires more resources and staffing. An amicable resolution of consumer disputes through an online dispute resolution system may help alleviate the Commission's burden of investigating consumer matters.

Consumers may generally rely on normal court processes should they wish to resolve consumer disputes. However, the CPA makes it highly problematic for consumers to approach courts directly. Section 69(*d*) states that consumers can only approach a court if they have exhausted all other remedies and avenues in terms of the CPA. This means that courts are a consumer's last resort and they may only gain relief after going through the whole dispute process step-by-step as mentioned above. This argument was confirmed in *Joyroy 4400 CC v Potgieter*,[35] in which the court stated that section 69(*d*) is clear and unambiguous: the legislature had specifically prescribed the redress for consumers and the courts could only be approached once other avenues for redress had been exhausted.[36] Naudé argues however, that it is questionable that consumers should be allowed to approach the ordinary courts in the alternative, especially where a claim for damages exists.[37] In cases that involve small amounts of money, it is unlikely that consumers would even consider bringing an action in court. This is also attributed to the fact that consumers would need to engage the services of attorneys to represent them in court actions and litigation will be an added cost. Mania has argued that the online mediation of disputes saves costs, considering that parties would not require a professional proxy to represent them and would further not require the issuing and serving of

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33 Maimela and Swanepoel "Legal Aspects With Regard to Plastic Surgeons in Context of Commercial Advertising" 2015 *SA Merc LJ* 128 142.

34 Omarjee "Consumer Watchdog Laments Understaffing as It Tackles Ford, Unsafe Meat, Timeshare Cases" Fin24 2019 https://www.fin24.com/Economy/consumer-watchdog-laments-understaffing-as-it-tackles-ford-unsafe-meat-timeshare-cases-20191023 (accessed 2020-03-02).

35 2016 (3) SA 465 (FB).

36 *Joyroy v Potgieter supra* par 8.

37 Naudé "Enforcement Procedures in Respect of the Consumer's Right to Fair, Reasonable and Just Contract Terms Under the Consumer Protection Act in Comparative Perspective" 2010 *SALJ* 515 526.

legal documents.[38] The mechanisms provided for in the CPA are therefore not beneficial to consumers who seek to claim small amounts. Even where the monetary value of a claim is high, consumers may not approach the courts directly.

The current framework is not efficient. Woker alludes to the delays that may occur in the different forums, and states that although it may be appealing to consumers to have different options to pursue their disputes, resolution of these disputes is far from quick.[39] As a result of these delays and monies spent to institute and pursue their claims, consumers may be deterred from pursuing their claims.[40] Naudé argues that consumer disputes are likely to be heard in the lower courts where decisions are sometimes unreported; and where matters do fall within the jurisdiction of the High Court, these usually involve disputes over small sums.[41] The dispute process in the CPA does not appear to be effective. Despite low-cost options to resolve a dispute, there is a need for a quicker and more efficient system. Although approaching a small claims court may also be a viable option to overcome some of these problems, it still requires parties to attend court physically and to follow the normal legal processes of sending a letter of demand and a summons to the wrongdoers; it also places a R20 000 limitation on claims.[42] The online dispute resolution system may potentially assist consumers in processing their disputes more quickly without the need to attend court physically.

3 RESOLVING DISPUTES ONLINE

Consumers have different avenues at their disposal should they require redress. According to the Intergovernmental Group of Experts on Consumer Law and Policy, there are four avenues for consumer redress.

1. Informal avenues: should consumers be aggrieved by certain conduct of a business, they should first seek an informal resolution by directly contacting that business.
2. Voluntary avenues: businesses themselves may have their own dispute resolution processes or platforms, such as eBay's Resolution Center.
3. Statutory avenues: legislation may specify what dispute resolution process to follow should consumers require redress.
4. Judicial avenues: consumers may pursue their claims using the normal court processes, including the small claims court or ordinary civil courts.[43]

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38 Mania "Online Dispute Resolution: The Future of Justice" 2015 *International Comparative Jurisprudence* 76 79.

39 Woker "Evaluating the Role of the National Consumer Commission in Ensuring That Consumers Have Access to Redress" 2017 *SA Merc LJ* 1 2.

40 Woker 2017 *SA Merc LJ* 14.

41 Naudé 2010 *SALJ* 515 527.

42 The Department of Justice and Constitutional Development "Small Claims Court" https://www.justice.gov.za/scc/scc.htm (accessed 2020-03-02).

43 Intergovernmental Group of Experts on Consumer Law and Policy "Agenda Item 3d. Dispute Resolution and Redress – Contribution 1" 2018 https://unctad.org/meetings/en/Contribution/cicplp3rd_c_ftc_drr_en1.pdf 1–2 (accessed 2020-03-02).

The above information proposes that consumers should seek first to resolve their grievances directly with businesses, and resort to dispute resolution where informal avenues fail to prove satisfactory for consumers. With the advancement in technology, South Africa has seen consumer transactions occurring through the Internet. Communications over the Internet using electronic devices have been termed "e-commerce". More specifically "m-commerce" applies to the use of mobile devices for commercial transactions.[44] A consequence of consumer transactions is that disputes may arise between consumers and suppliers. Consumers therefore seek to find the fastest and most effective means to resolve their claims, whether these transactions have originated online or offline and court process may not be the most favourable option. Apart from relying on court structures, customer services may take days or weeks to respond to consumer queries on claims, which can be frustrating and may lead to no formal outcome. An online system to resolve consumer disputes is therefore appealing if it will obtain a quicker legal remedy for everyday consumer disputes.

The Internet has become an acceptable commercial trading platform, and has resulted in the growth of e-commerce and the need for an online dispute resolution system.[45] In the last decade, online consumer transactions have become more common, evidenced by the activities of Takealot.com and eBay.com. As an illustration, eBay had 183 million active online buyers by the last quarter of 2019, which indicated a growth from previous years.[46] Furthermore, the same period reflected gross merchandise volume amounting to approximately 23.3 billion US dollars.[47] Takealot has also been hailed as a successful platform on which consumers may conduct their online shopping. In a study of online retailing in South Africa conducted by Goga, Paelo and Nyamwena, the authors argue that Takealot is one of the largest online platforms used by South African consumers because of the wide range of merchandise it offers. As a consequence, Takealot also had the largest market value and revenue of any online retailer.[48] This information leads one to believe that online transactions are becoming a more common, competitive and preferred method of transacting among consumers. The rapid increase in use of these online platforms has also led to problems of regulation. Stegner alludes to the fact that online trade has

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44 Snail and Papadopoulos *Cyberlaw @ SA 3: The Law of the Internet in South Africa* (2012) 63.

45 Duca, Rule and Loebl "Facilitating Expansion of Cross-Border E-Commerce: Developing a Global Online Dispute Resolution System (Lessons Derived From Existing ODR Systems: Work of the United Nations Commission on International Trade Law)" 2012 *Penn State Journal of Law & International Affairs* 59 61.

46 Clement "eBay: Total Active Buyers Worldwide 2010–2019 Number of eBay's Total Active Buyers From 1st Quarter 2010 to 4th Quarter 2019" (2020) https://0-www-statista-com.ujlink.uj.ac.za/statistics/242235/number-of-ebays-total-active-users/ (accessed 2020-03-02).

47 Clement Statista'eBay: Gross Merchandise Volume 2014–2019 (2020) https://0-www-statista-com.ujlink.uj.ac.za/statistics/242267/ebays-quarterly-gross-merchandise-volume-by-sales-format/ (accessed 2020-03-02).

48 Goga, Paelo and Nyamwena "Online Retailing in South Africa: An Overview" 2019 *CCRED Working Paper 2* https://ssrn.com/abstract=3386008 (accessed 2019-03-02). According to the research provided by these authors, in 2017, Takealot had a turnover of R2.3bn and processed 2.9 million transactions from one million consumers.

developed and progressed faster than ODR mechanisms.[49] As a result, Hanriot argues that seeking redress on the Internet in the form of ODR has emerged as a logical solution to resolve the large number of small-value disputes that occur on a daily basis.[50] It makes sense that if a consumer purchases an item online, a form of redress should be available through an online mechanism. However, the same benefits could be available for offline transactions, in that rather than consumers physically needing to go into retail stores to resolve disputes, they could opt to resolve their disputes using an online platform from the comfort of their homes.[51]

Research has proved that resolving consumer disputes through the Internet may be preferable to utilising the ordinary court processes. Hurter avers that although transacting on the Internet may pose unique and serious problems when deciding how, where, by whom, at what cost, and how effectively a dispute may be resolved, it is clear that the Internet is used because it offers convenience in overcoming the constraints of time and space.[52] Thompson submits that an ODR system may fill an implementation gap in the justice system by resolving disputes and the new system may also address access-to-justice challenges by using technology as an efficient solution to resolve disputes.[53] Schmitz highlights the reasons that an ODR system is the way forward, by arguing that consumers do not want to waste time and money on phone calls or the like when there is another fair solution through online dispute resolution, which should entail a simple-to-access, free service to consumers, and an easy-to-understand system.[54] Other arguments as to why consumers should avoid traditional court processes focus on transportation issues, confusion about the process, a fear of public speaking or anxiety.[55] All these arguments illustrate a strong case for an ODR system. Such an online system may be extremely important in South Africa, where many consumers fall within the vulnerable or disadvantaged consumer segment: it would allow them to access justice without proceeding to court. A consumer's financial means play a prominent role in his or her decision whether to pursue legal action in court, which often requires the expertise of a lawyer. The online system would therefore assist the consumers with a simple process to follow that eliminates the need to travel to the courts and alleviate an overflow of complaints being instituted in courts. The online system would be accessible to all consumers regardless

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49 Stegner 2017 *Yearbook on International Arbitration* 347 349.

50 Hanriot 2015 *McGill Journal of Dispute Resolution* 1 2.

51 Offline customers would arguably save time and costs by avoiding the need to wait in line at customer services in retail stores.

52 Hurter "An Analysis of a New State of the Art South African Online Dispute Resolution System" 2004 *SA Merc LJ* 779 780.

53 Thompson "Creating New Pathways to Justice Using Simple Artificial Intelligence and Online Dispute Resolution" 2015 *International Journal of Online Dispute Resolution* 4 5. Thompson argues for an online artificial system to regulate disputes known as the Justice Pathway Expert System (JPES). The system is intended to be used by non-experts who require an alternative and cheaper means to access justice.

54 Schmitz "A Blueprint For Online Dispute Resolution System Design" 2018 *Journal of Internet Law* 3 7.

55 Cartwright and Greiling "Court-Connected Online Dispute Resolution Outcomes From Family, Civil, and Traffic Cases in the United States" 2018 *International Journal on Online Dispute Resolution* 4 5.

of their financial means; all that is required is access to the Internet, which nevertheless may be problematic for consumers who live in rural areas.

It is necessary to analyse what an ODR system entails. ODR systems may be described as online Internet-based platforms that enable parties to resolve their disputes.[56] The notion behind ODR is to use and implement existing forms of alternative dispute resolution through the Internet to resolve disputes.[57] ODR uses technology to facilitate the resolution of disputes between parties using either negotiation, mediation or arbitration, or a combination of all three; it can be fully automated or involve human intervention.[58] Originally, ODR focused on resolving disputes that arose online. However, recently the focus has shifted to include non-financial disputes and disputes that did not originate online, but through normal and ordinary physical transactions.[59] ODR may be divided into two categories: the first category relates to the establishment of specific dispute resolution applications that may be used to resolve online and offline disputes; whereas the second category looks to the future of ODR, using tools that will provide a support system for mediation and arbitration.[60] This is further explained by Sela, who submits that there are two online dispute resolution systems that may be used.[61] The first system is an instrumental online dispute resolution system, which involves using an online space for the dispute resolution process, assisting parties with collecting and delivering information in a constructive manner, but the planning, interaction, and decision-making remain in control of the human parties who use the system.[62] The second system refers to a principal online dispute resolution mechanism that takes a proactive role in facilitating dispute resolution and is typically powered by artificial intelligence to give an automated response. Such an online system may still require natural persons to facilitate its operations or may rely on machines to automate the process.

ODR has become more appealing in the last few years because it represents a more promising solution to disputes than litigation does and may potentially offer a system that is free, simple, efficient, transparent, and fair.[63] Authors have argued for similar fundamental principles to apply to the online dispute resolution process, such as due process and accountability.[64] Wing opines that the manner in which an ODR system is designed and

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56 Sela "Can Computers Be Fair? How Automated and Human-Powered Online Dispute Resolution Affect Procedural Justice in Mediation and Arbitration" 2018 *Ohio State Journal on Dispute Resolution* 91 93.

57 Mania 2015 *International Comparative Jurisprudence* 76 78.

58 Barnett and Treleaven 2018 *The Computer Journal* 399 400.

59 Zeleznikow "Can Artificial Intelligence and Online Dispute Resolution Enhance Efficiency and Effectiveness in Courts" 2017 *International Journal for Court Administration* 30 35.

60 Rabinovich-Einy and Katsh "Lessons From Online Dispute Resolution for Dispute System Designs" in Wahab, Katsh and Rainey *Online Dispute Resolution: Theory and Practice a Treatise on Technology and Dispute Resolution* (2012) 39 40.

61 Sela 2018 *Ohio State Journal on Dispute Resolution* 91 99–100.

62 Sela therefore notes that this platform relies on a human third-party to operate it and to communicate with the disputants. Such an online system will still need to be overseen by humans.

63 Hanriot 2015 *McGill Journal of Dispute Resolution* 1 3.

64 Stegner 2017 *Yearbook on International Arbitration* 347 359.

created will determine whether it will magnify the risk of substantive and procedural injustice or create opportunities for access to justice.[65] In other words, the author suggests that an ODR system may in fact impede access to justice, depending on how it has been set up to manage disputes. Access to an ODR system for all consumers is imperative, especially those who do not have the financial means to pursue ordinary civil remedies. If a system is complicated and costly, it will impede access to justice and will not be a suitable mechanism to use to resolve consumer disputes. Regardless of what online system is used, an ODR system should be based on several key values. Vilalta proposes that an ODR system should be driven by a number of commonly accepted standards and principles, namely:

- private autonomy;
- confidentiality;
- impartiality;
- efficiency (effectiveness in speed and costs);
- transparency; and
- legality.[66]

These principles are further explained by Hurter, who argues that five essential elements or best practices should feature in any ODR system.[67]

1. Time and cost effectiveness: as litigation is often costly, ODR should be a viable alternative to the more traditional court process. Hurter submits that the system should be able to resolve a large number of disputes quickly and at low cost.[68]
2. Privacy and confidentiality: not only should certain information be kept private and confidential, but the whole process itself should also remain private and not be publicised.
3. Transparency: information should be made available to the parties so they understand the risks associated with using the online system and be able to make an informed decision. This also relates to what information will be used or processed when resolving a dispute.
4. Impartiality and independence: this ensures fairness towards both parties by using codes of conduct or other regulatory bodies that adhere to rules and procedures.
5. Effectiveness: this relates to the ease of use of the online system, as well as the success of enforcing its outcomes.

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65 Wing "Artificial Intelligence and Online Dispute Resolution Systems Design Lack of Access to Justice Magnified" 2017 *International Journal on Online Dispute Resolution* 16 17. Wing argues that the ODR system relies heavily on data and there may be risks in collecting and processing the data it receives.

66 Vilalta "ODR and E-Commerce" in Wahab, Katsh and Rainey *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (2012) 113 126–127.

67 Hurter 2004 *SA Merc LJ* 779 787–790.

68 Also see Sela 2018 *Ohio State Journal on Dispute Resolution* 91 93. Online mechanisms may therefore resolve a large number of cases operating in a wide array of legal domains, such as small claims, consumer and commercial disputes and traffic penalties.

In South African law, the Electronic Communications and Transactions Act[69] (ECTA) allows for regulations to be published in respect of alternative dispute resolution mechanisms. These regulations, however, only relate to the resolution of disputes in respect of the ".za" domain name space.[70] Despite this restriction, it is submitted that the principles contained in the alternative dispute resolution section of the Act may prove useful for regulating an e-dispute system. The following relevant provisions as extracted from ECTA are useful:

1. the role that the Authority must fulfil in administering the dispute resolution procedure;[71]
2. the appointment, role and function of dispute resolution adjudicators;[72]
3. the procedure and rules that must be followed in adjudicating disputes;[73]
4. the manner, costs of and time within which a determination must be made;[74]
5. the implementation of determinations made in terms of the dispute resolution procedure;[75] and
6. the enforcement and publication of determinations.[76]

These provisions are highly beneficial for establishing an e-dispute resolution system as they could provide clarity on how the system is to be regulated, especially regarding the costs and time involved in the process of resolving disputes, the legal implications of a decision and the enforcement of outcomes. Privacy also plays a prominent feature in these systems. In terms of South African law, the right to privacy is protected through the common law, legislation and the Constitution.[77] The right to privacy is protected in terms of the law of delict, the Protection of Information Act[78] and section 14 of the Constitution. These standards as argued by authors and as contained in ECTA will be discussed in the e-dispute resolution section below.

It is clear that an ODR system can be beneficial in resolving consumer disputes. However, Cortes argues that ODR systems should only be used for certain types of dispute, such as when parties do not suffer from a great disparity in power and where they wish to resolve the dispute but are unable to meet physically.[79] In consumer transactions, arguably the supplier has the greater bargaining power. It is submitted that the system should be used for simple disputes even where the parties can meet physically. The whole idea

69 25 of 2002.
70 S 69(1) ECTA.
71 S 69(3)(*b*) ECTA.
72 S 69(3)(*c*) ECTA.
73 S 69(3)(*d*) ECTA.
74 S 69(3)(*g*) ECTA.
75 S 69(3)(*h*) ECTA.
76 S 69(3)(*j*) ECTA.
77 The Constitution of the Republic of South Africa, 1996.
78 4 of 2013.
79 Cortes "Online Dispute Resolution for Consumers" in Wahab, Katsh and Rainey *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (2012) 139 151.

behind ODR is to provide a more convenient and quicker way to resolve disputes than one requiring consumers to travel to resolve the matter. As already mentioned, online disputes will only be registered where consumers fail to resolve their grievances after directly approaching businesses. As to concerns over a disparity in power between parties, the ODR system itself can assess this as a factor when determining a fair outcome for the parties and this may be achieved by programming artificial intelligence through specific algorithms.

4 ARTIFICIAL INTELLIGENCE AND ONLINE DISPUTE RESOLUTION

This section briefly examines AI and its applicability to ODR. Information technology and artificial intelligence have paved the way for previously impossible new process structures to exist.[80] Sourdin argues that AI and technology have reshaped the justice system in the form of three main types of new technology: first, supportive technology, which seeks to assist and advise those in the justice system; secondly, replacement technologies that replace the functions of humans; and finally, disruptive technologies, which focus on how technology may change existing roles.[81] This indicates that AI may operate with or without human intervention.

In terms of the law, Zeleznikow submits that AI may fulfil a support role in legal decision-making by representing and processing information and, in doing so, supplementing human knowledge management skills with computer-based means.[82] Barnett and Treleaven submit that there are two main branches of AI technology that have their own further subcategories: the first comprises knowledge-based systems, involving rule-based systems or case-based reasoning; and the second branch involves machine learning.[83] Knowledge-based systems are based on computers that are programmed to reason and make use of expert knowledge in their decision-making process, whereas machine-learning systems rely on programming that has the ability to learn without explicit programming, and that can change or learn when it receives new data.[84]

As these systems are based on data, they use information received from the Internet or uploaded onto their systems. Much will also depend on the coding of its algorithms. The processing of language and machine learning are therefore specific applications of artificial intelligence, which involve the process of examining words and phrases and enabling computers to learn to optimise certain tasks without the benefit of explicit rules-based programming.[85] Machine learning is dependent upon the data it receives and therefore will be more accurate over time once more data is processed by

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80 Sela 2018 *Ohio State Journal on Dispute Resolution* 91 94.

81 Sourdin "Judge v Robot? Artificial Intelligence and Judicial Decision-Making" 2018 *University of New South Wales Law Journal* 1114 1117.

82 Zeleznikow 2017 *International Journal for Court Administration* 30 35.

83 Barnett and Treleaven 2018 *The Computer Journal* 399 402.

84 *Ibid*.

85 Alarie, Niblett and Yoon "How Artificial Intelligence Will Affect the Practice of Law" 2018 *University of Toronto Law Journal* 106 115.

the system.[86] From this, it is clear that machines can perform the same role as certain adjudicators because they learn from their experiences, depending on the amount of data they receive in respect of particular matters.

From the above analysis, it is apparent that while ODR may use the Internet as a medium to resolve disputes, AI decision-making systems may also be used in conjunction with ODR by using expert systems programmed by experts in the field and which possess rule-based algorithms.[87] As AI has become more complex in problem-solving, machine-learning experts have developed tools that rely on data to identify certain patterns in a specific area by identifying the components that a system receives and by developing algorithms that maximise its predictive accuracy.[88]

Given the ease and effectiveness of online communications, it is imperative to address whether the South African legal system could benefit from AI and the establishment of an e-dispute system for consumers. Thompson submits that an ODR system controlled by AI may use expert knowledge and intelligent questionnaires to provide claimants with different functions and guidance specific to their individual circumstances.[89] This is a key facet of AI and ODR because, although AI relies on data from similar cases, it still needs to establish a unique resolution for each case based on the facts and issues. Various authors have argued that data and AI have demonstrated the ability to regulate disputes through data analysis and machine learning, which reduces risk, liability, cost and injustice, and allows for the possible handling of more complex disputes, in place of face-to-face alternative dispute resolution.[90]

One example of an ODR tool is automated negotiation, in which a human third-party negotiator is substituted by software-based decision making.[91] ODR is understood to take a less formal approach to resolving online disputes by using an independent entity rather than a party to a dispute to resolve the issue and this can be done through automated negotiation, online mediation or online arbitration.[92] While automated negotiation seeks to reach a settlement of a dispute by considering the proposals of both parties, online mediation uses a process where a neutral third party assists the parties to the dispute in an impartial manner to reach a voluntary agreement based on their issues but does not make any decision itself.[93] This would be a fair resolution because the parties themselves establish an outcome through agreement and AI merely facilitates the process; but may also propose resolutions where the parties cannot themselves decide on an outcome.

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86 Surden "Artificial Intelligence and the Law: An Overview" 2019 *Georgia State University Law Review* 1305 1314–1316. The quality and availability of this data is crucial in machine learning; where this is absent, the system cannot develop.

87 Sourdin 2018 *University of New South Wales Law Journal* 1114 1121.

88 Alarie, Niblett and Yoon 2018 *University of Toronto Law Journal* 106 116.

89 Thompson 2015 *International Journal of Online Dispute Resolution* 4 53.

90 Wing 2017 *International Journal on Online Dispute Resolution* 16 18.

91 Rabinovich-Einy and Katsh in Wahab, Katsh and Rainey *Online Dispute Resolution* 41.

92 Cortes in Wahab, Katsh and Rainey *Online Dispute Resolution* 139 143.

93 Vilalta in Wahab, Katsh and Rainey *Online Dispute Resolution* 116–117.

It has been established that AI may be used in conjunction with ODR and this could prove to be beneficial in resolving disputes without the need for human intervention. Sourdin, however, argues that although there exists opportunities for AI technology to support judges and potentially supplant them, it is likely that AI may be confined to lower-level decision-making.[94] Where disputes require complicated legal and moral judgments in the decision-making process, it is debatable whether algorithms can make the reasonableness determinations that are needed to make and justify such complex judgments.[95] Where decisions may be complex, human intervention may be necessary, thus requiring a hybrid system of computer and human decision-making in terms of which AI will defer complex decisions to humans.[96] Much will depend on how AI is coded to resolve online disputes. Algorithms that are carefully constructed and closely monitored have the power and potential to provide fast and fair online resolutions of consumer disputes:[97] AI would use data from other similar cases along with its coding to resolve existing disputes.[98] The intention should be to allow consumers and their suppliers to resolve standard or uncomplicated disputes through algorithms from the comfort of their homes and computers.[99]

ODR and AI can therefore work together to create an online platform for consumers to resolve their disputes. At the same time, human intervention will be necessary where matters require an in-depth analysis of legal principles or where the issues are too complex for the algorithm. Although in theory, ODR and AI appear to be a useful tool in consumer disputes, it is necessary to provide an example of a system that has been successfully used in practice. The example chosen for illustrative purposes is eBay's dispute Resolution Center.

5 EBAY DISPUTE RESOLUTION MODEL

eBay has created its own ODR system.[100] Sela describes this online dispute system as "a questionnaire-based algorithmic expert system that performs the role of a mediator."[101] eBay has studied the pattern of disputes and has developed a system that can handle a large volume of repetitive disputes at a low cost and thereafter also collect data through the process and prevent future issues and problems from recurring.[102]

eBay encourages consumers first to contact the supplier through the Resolution Center to try to resolve the problem. It lists various options that depend on what type of dispute is involved. If the problem relates to a bought item, there are different options to click, such as not yet having

94 Sourdin 2018 *University of New South Wales Law Journal* 1114 1118.
95 Condlin 2017 *Cardoza Journal of Conflict Resolution* 717 723.
96 Surden 2019 *Georgia State University Law Review* 1305 1320.
97 Schmitz 2018 *Journal of Internet Law* 3 7.
98 Condlin 2017 *Cardoza Journal of Conflict Resolution* 717 744.
99 Condlin 2017 *Cardoza Journal of Conflict Resolution* 732. This is where the algorithms need to be coded in an intelligent way to assist consumer complaints.
100 See https://resolutioncenter.ebay.com/ (20 August 2019).
101 Sela 2018 *Ohio State Journal on Dispute Resolution* 91 102.
102 Rabinovich-Einy and Katsh in Wahab, Katsh and Rainey *Online Dispute Resolution* 42.

received the item, or receiving an item that does not match the seller's description. The webpage also provides useful links to consumers that allow them to better understand the dispute resolution process, including:

- how eBay Buyer Protection works;
- what to do when a buyer doesn't pay;
- cancelling a transaction;
- what to do when you don't receive an item or it is not as described;
- resolving buying problems;
- resolving selling problems; and
- reporting a problem with a buyer.

There is also a link to click if the problem is not specifically listed, which takes the consumer to the eBay help page, where consumers may type out their problem.[103] The system uses mediation rather than arbitration as respondents have been unwilling to consent to the decision-making authority of an arbitrator; and arguably mediation was more likely to be acceptable to parties than arbitration.[104] The mediation process is simple, comprising the following steps:[105]

1. When a complaint is received, the mediator e-mails the other disputant, providing information about the process of mediation and the project, and soliciting basic information about the dispute. The mediator also inquires about the willingness to mediate.
2. Each party then has an opportunity to present their claims and what they wish the outcome to be.
3. The mediator attempts to resolve basic issues and problems of the dispute. This may require repeated communications with the parties, generally with the purpose of allowing the mediator to refine the stories and posit certain facts.
4. Most disputes that follow this process result in one party accepting a claim or result in a compromise. This comes about through the mediator's facilitation of discussion and responses, and his or her reformulation of the dispute and claims of each party.
5. In instances where there is no determinative resolution, the disputes are considered at an impasse and are largely left dormant (or to the devices of the parties themselves).

The system also relies on processing big data to assist the parties in identifying the problem, and thereafter to generate resolution options that both parties are likely to accept.[106] The data it receives from past disputes is

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[103] See https://www.ebay.com/help/home.

[104] Katsh, Rifkin and Gaitenby "E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of 'eBay Law'" 2000 *Ohio State Journal on Dispute Resolution* 705 709. The authors further explain that a single mediator is used to ensure consistency in decisions, and parties were separated by using email as a means of communicating information between the parties.

[105] Katsh, Rifkin and Gaitenby 2000 *Ohio State Journal on Dispute Resolution* 705 710.

[106] Sela 2018 *Ohio State Journal on Dispute Resolution* 91 103.

helpful in providing resolutions for future cases. The coding of its algorithms is also important in predicting what outcome the parties are trying to reach.

EBay's ODR system has been hailed as a success by many consumers and authors because of its simple feedback system.[107] Its success is attributed not only to speed and low cost in handling disputes, but also to the fact that it is able to resolve a large number of disputes, using an ODR system that recognises patterns from comparable disputes and matches them with effective proposed resolutions.[108] As a result of this system, consumers may post a negative review that allows for a response from a business in order to avoid negative "publicity".[109] The online system, therefore, has the effect of engaging businesses to respond to and resolve consumer complaints. Another reason eBay's success is that it handled over 60 million online disputes in a year with a 90 per cent success rate without human involvement.[110] This is a remarkable number of disputes; the ordinary courts certainly cannot cater for such a large number in such a short time. Ebay's ODR system therefore proves that AI and ODR can resolve consumer disputes; and the system itself can be very simple to regulate and use. South Africa could base its own legal e-dispute resolution system on the Ebay framework.

6 AN E-DISPUTE RESOLUTION SYSTEM FOR SOUTH AFRICA

Following on from the previous sections, this part of the article proposes the establishment of an e-dispute resolution system for South African consumers. In terms of section 69(*c*)(iii) of the CPA, referring a dispute to an ODR system could be interpreted as a referral to an alternative dispute resolution agent. As a consequence, and in light of section 70(*c*) of the CPA, an e-dispute resolution system falls within the definition of an alternative dispute resolution agent because it will be an entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes. As a starting point, consumers may follow a three-tier process to resolve their disputes:

1. The first step is to utilise the company's internal customer service channels.
2. The second step is to use an ODR system – either automated negotiation or online mediation.
3. The final step is to use an online arbitration system or other judicial process.[111]

The first step attempts to settle the matter without any legal interventions. This is the consumer's first course of action in trying to resolve the dispute. As mentioned above, eBay also encourages consumers to contact the

[107] Hanriot 2015 *McGill Journal of Dispute Resolution* 1 15. The system allows for positive, neutral or negative reviews and allows businesses to respond to consumer complaints.

[108] Cortes in Wahab, Katsh and Rainey *Online Dispute Resolution* 156–157.

[109] Hanriot 2015 *McGill Journal of Dispute Resolution* 1 15.

[110] Sela 2018 *Ohio State Journal on Dispute Resolution* 91 93–103.

[111] Cortes in Wahab, Katsh and Rainey *Online Dispute Resolution* 158.

company's customer service first in order to resolve any consumer issues. Where customer services cannot resolve the issue, the consumer may use the e-dispute resolution system. This also ensures that consumers have complied with the CPA, which requires a consumer first to exhaust all other available avenues in terms of national legislation, including the option of using an alternative dispute resolution agent, before approaching the courts.

The e-dispute resolution system could be made available on the Commission's website.[112] A quick link can be made to appear on the website, which would then direct the user to the e-dispute resolution system. Consumers would need to create a profile on the system if it were the first time they are using it. Basic, accurate and updated information should be included in a consumer's profile so that the system can properly communicate to the parties throughout the dispute. The terms and conditions should also be made available to consumers, who must accept the terms of use. These terms will indicate that consumers agree to be bound to the provisions of ECTA and the CPA. Once the registration process has been completed, consumers should be able to login with their credentials. Once logged in, the e-dispute resolution system will ask various questions to determine the nature of the dispute and direct the consumer to the correct channel in order to resolve the dispute. It will be the responsibility of the disputing parties to upload the necessary information to process the dispute, such as a summary of the facts with key dates and the sum involved. An upload button should be made available for consumers to upload proof of transactions and communications between themselves and suppliers, as well as details such as names, contact information, nature of the dispute and the relief sought. The system would then communicate with the parties during the process as to what stage the dispute is at.

Scholars have argued that a successful online e-commerce cross-border dispute resolution system should include a number of structures.[113]

1. A set of standardised codes: in the South African context, this would be ECTA and the CPA. ECTA assists with determining when electronic agreements have come into existence and this will indicate when consumers may claim performance or institute action.[114]
2. An e-commerce redress structure: redress is provided for in the CPA in terms of refunds, repairs or replacement of goods and services.
3. Structures for common cases: goods sold but not delivered or orders not complied with. Here AI technologies may easily resolve common cases based on the facts provided by the parties.
4. Efficient and effective enforcement functions: the Commission and Tribunal will be central to consumer disputes if the online process cannot resolve the dispute.

Based on the above, a South African e-dispute resolution system would be similar to the eBay structure. It would be a website available to South African consumers who are able to use it to resolve consumer disputes. The system would make use of and be powered by AI technologies, but would also

[112] See http://www.thencc.gov.za/.
[113] Duca, Rule and Loebl 2012 *Penn State Journal of Law & International Affairs* 59 76–77.
[114] See s 22 of ECTA.

require human intervention where disputes are more complicated. It would therefore involve a process of mediation, which fulfils the requirement that ODR systems should be impartial towards the disputing parties. Consumers could upload their complaints and proof thereof onto this platform and the online system would identify the type of complaint and redress sought by the consumer by using the necessary algorithms. The system would thereafter attempt to mediate the dispute and provide the parties with a resolution. Mania submits that ODR systems may use different technological systems to mediate disputes, such as providing electronic chats, live video conferencing or communication via email.[115] It is submitted that both technological systems could be used for the South African model. Where parties have difficulty understanding the dispute resolution process or have questions about the system, live AI chat bots could be used to answer these questions. The email system should be used to inform parties about updates or outcomes of the dispute.

An important consideration is whether these resolutions are binding on the disputing parties. Schmitz acknowledges that the question of whether ODR system decisions should be binding on the parties has caused great debate in the area of consumer redress.[116] Online mediation seeks to resolve disputes between the parties in a consensual manner, but such resolution is often non-binding.[117] Although it has been submitted that an e-dispute resolution system would involve mediation, the predicament of binding resolutions could be bypassed by relying on the existing provisions of the CPA relating to alternative dispute resolution. Similar to section 70(3)(*a*)–(*b*) and section 70(4), in terms of which the system successfully resolves the consumer's dispute, the system may record the resolution in the form of an order and, if the parties to the dispute consent to the order, it can be sent to the Tribunal or High Court to be made a consent order, which may include an award of damages in favour of the aggrieved consumer. The Act also mentions an accredited industry ombud or consumer courts and these also have potential to offer assistance in the future. Their role would have the effect of causing the resolutions to be legally binding on the parties. In terms of enforcement then, the consumer would be allowed to enforce this order in the Tribunal or courts if the other party fails to comply.

As a consequence, parties should be allowed to appeal or review the resolution. Again, the CPA may come to the assistance of consumers or suppliers by allowing them to appeal or review the outcome by using the Tribunal or consumer courts. Of course, this means that costs will be higher and the time to resolve the dispute may be longer. The main idea is to provide parties with a form of appeal or review process to ensure fairness is maintained.

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115 Mania 2015 *International Comparative Jurisprudence* 76 79.

116 Schmitz 2018 *Journal of Internet Law* 3 5. The author argues that parties are assured to gain access to remedies where decisions are made as a final determination between the parties, but in terms of arbitration, these decisions should be left to industry ombuds or consumer courts. This will be crucial to consumers because they may pursue an action where they know the outcome will be made as a final determination. Industry ombuds and the consumer courts as stated in the CPA could therefore strengthen an e-dispute resolution system by assisting with the outcomes of these disputes.

117 Mania 2015 *International Comparative Jurisprudence* 76 79.

If a dispute appears to be too complicated or cannot be resolved using the information uploaded by the parties, the e-dispute resolution system would allow consumers to direct the complaint to the correct redress mechanism in the form of the Commission, industry-accredited ombud, consumer court or Tribunal. This is also in line with section 70(2) of the CPA, which states that if there is no reasonable probability of the parties resolving their dispute, the alternative dispute resolution agent may terminate the process by notice to the parties, and the party who referred the matter to the agent may file a complaint with the Commission. This would ensure that the parties still have recourse to redress, although the process would now take longer depending on which protective body was used.

A key consideration is that the e-dispute resolution system must ensure access to justice for all consumers. As stated earlier, ODR is supposed to be cheaper and faster than traditional court action. In this case, the services should be free for anyone to use. However, perhaps a small and reasonable service fee could be charged to assist with maintenance of the system. All that should be required is access to the Internet. An impediment to access to justice would be that many disadvantaged consumers do not have access to computers or the Internet. To resolve this issue, the e-dispute resolution system could use mobile devices connected to wireless networks or that have data loaded onto sim cards. This would allow consumers to log onto the e-dispute resolution website from their phones and access the system to lodge their disputes. Arguably, not all consumers have cellular devices that can access the Internet. The final proposal would be to establish computer systems in some major retail stores that require consumers to go in store and use these facilities to complete the online process. This would then allow consumers without Internet devices to access e-dispute resolution in certain retail stores. This then fulfils the requirement that ODR systems be effective in ensuring that the system is accessible and easy to use.

A final consideration to ensure smooth functioning of the system is to create online guides that inform consumers about their rights, evidentiary obligations, procedural steps, and likely outcomes of the complaints process, so that they know what they are getting into when they use the system.[118] This fulfils the transparency requirement under the general standards of ODR systems as argued by authors. Once consumers have all the relevant information at their disposal, they can make an informed decision on whether to use the e-dispute resolution system. This is particularly useful for consumers who are not prone to using online services, but who would like to use the system to resolve their disputes.

Other factors discussed in the general principles or standards for ODR systems pertain to time and privacy. Depending on the complexity of a dispute, the AI should be able to predict an expected timeline of the dispute. At all times, the system should keep the parties updated and the predicted time of resolving the dispute. Since ODR is supposed to be quicker than the court system, it should aim to resolve disputes in a matter of days. Of course, this depends on the assistance of both parties and the information and evidence uploaded by them. In terms of privacy, their information and

[118] Schmitz 2018 *Journal of Internet Law* 3 7.

claims should be kept confidential, unless they have consented to their information being publicised. The e-dispute resolution system therefore meets the standards of ODR systems because it is premised on the fundamental principles of ODR.

7 CHALLENGES AND POSSIBLE LEGISLATIVE SOLUTIONS

Proposing an ODR system is easy in theory but several challenges may exist in implementation. Besides financial and practical obstacles, there are often significant legal barriers to resorting to courts in disputes resulting from cross-border or online interactions, especially in identifying which court has jurisdiction to hear a case and which law should be applied.[119] This is an important statement because consumers who purchase goods online prefer an online process for achieving redress rather than pursuing litigation with the seller, who may be based in another country.[120] Scholars have argued that, by building resolutions directly into websites, as opposed to having them imposed by a judicial authority, ODR can be an efficient and flexible mechanism for handling e-commerce disputes, both at the domestic level and across borders because it works as the Internet does.[121]

Fortunately, ECTA may help address certain online issues pertaining to ODR. The ECTA has several objectives, including promoting legal certainty in respect of electronic communications and transactions;[122] promoting technology neutrality in the application of legislation to electronic communications and transactions;[123] and developing a safe, secure and effective environment for consumers and businesses to conduct and use electronic transactions.[124] Section 90 provides for the jurisdiction of the courts. It states:

> "A court in the Republic trying an offence in terms of this Act has jurisdiction where–
> (*a*) the offence was committed in the Republic;
> (*b*) any act of preparation towards the offence or any part of the offence was committed in the Republic, or where any result of the offence has had an effect in the Republic;
> (*c*) the offence was committed by a South African citizen or a person with permanent residence in the Republic or by a person carrying on business in the Republic; or
> (*d*) the offence was committed on board any ship or aircraft registered in the Republic or on a voyage or flight to or from the Republic at the time that the offence was committed."

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119 OECD https://www.oecd.org/sti/consumer/36456184.pdf 8. The OECD highlights the costs and practical difficulties associated with filing cross-border claims, and that court procedures are beyond the financial means of most consumers with low-value disputes.

120 Zeleznikow "The Challenges of Using Online Dispute Resolution for Self-Represented Litigants" 2020 *Journal of Internet Law* 3 6.

121 Duca, Rule and Loebl 2012 *Penn State Journal of Law & International Affairs* 59 63.

122 S 2(1)(*e*) ECTA.

123 S 2(1)(*f*) ECTA.

124 S 2(1)(*j*) ECTA.

One may apply this section to ODR where the parties have a dispute and the consumer is a South African citizen or the dispute arose in South Africa. Cross-border transactions will therefore be catered for by ECTA, but the ODR system should also stipulate in its terms and conditions of use that parties agree to be bound by the provisions of ECTA. This would also allow other enforcement agencies to have jurisdiction should the matter not be resolved through dispute resolution and then be referred to the Tribunal or courts. Scholars have indicated that ODR is also cross-jurisdictional and does not rely on any single set of laws or regulations. ODR thus resolves issues regarding the global nature of the Internet and is beneficial to both parties when they are aware of the fair and quick resolution process.[125]

Once the issue of jurisdiction has been resolved, the next issue relates to enforceability – that is, the ability to enforce a decision that has been made in favour of the consumer.[126] Jurisdiction and enforceability would be facilitated if suppliers were to subscribe to and be bound by the e-dispute resolution system. This would entail suppliers registering as members of the system and therefore agreeing to be bound by the provisions of the CPA and ECTA. For example, the more common online providers of goods and services, such as Takealot, NetFlorist, Superbalist and OneDayOnly, could join the system and consumers would have a centralised mechanism to resolve their disputes. It must also be remembered that other retailers could also register, even if they do not offer online goods or services, because it allows consumers to resolve their disputes more quickly and efficiently. ECTA may also assist consumers and suppliers with clear enforcement rules. If the AI ODR system were to abide by ECTA, certain information needs to be disclosed by suppliers. This information includes, but is not limited to:

- physical address (including the address where legal documents may be served);
- email address;
- the return, exchange and refund policy of the supplier; and
- any alternative dispute resolution code to which that supplier subscribes and how the code may be accessed electronically by the consumer.[127]

This information is needed when trying to enforce a judgment or ruling against a supplier. Furthermore, ECTA states that a supplier must use a payment system that is sufficiently secure with reference to accepted technological standards at the time of the transaction and the type of transaction concerned.[128] Although this payment provision addresses the payment method consumers would use to buy goods online, suppliers could use the same system to pay any damages or other payment to consumers who have suffered a loss.

When analysing the practicalities of an ODR system, a big concern relates to procedural fairness and whether the process remains neutral, impartial

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125 Duca, Rule and Loebl 2012 *Penn State Journal of Law & International Affairs* 59 63.
126 OECD https://www.oecd.org/sti/consumer/36456184.pdf 29.
127 See the full list of required information s 43(1)(*a*)–(*r*) ECTA.
128 S 43(5) ECTA.

and consistent in its decision making.[129] On these issues, it is submitted that decisions made by AI software will largely depend on the data it receives. The disputing parties are therefore tasked with providing as much accurate information as possible in order for AI to make consistent and fair decisions. Importantly, the data that AI receives should also be processed and used in a fair manner. In other words, the data should not be used in a discriminatory manner, such as allowing a decision to be influenced by the financial means or age of the parties, unless this has a crucial impact on the case. The system should also ensure that it collects and processes information relating to both sides of the dispute in order to remain neutral and impartial.

Another challenge linked to procedural fairness may relate to the public access of courts as provided for in section 34 of the Constitution. Section 34 provides that "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum". The challenge here is whether an ODR system can be operated without compromising the essential characteristics of courts in terms of independence, openness, fairness and accountability.[130] It is clear that the Constitution does allow other forums to resolve disputes as long as they adjudicate on matters in a fair and independent manner. If the AI ODR system were to be regulated through the CPA and ECTA, this would ensure that the system would be independent and impartial because it would have to abide by these laws.

Mania has raised an important issue regarding the lack of physical meeting between the parties. The author submits that a lack of direct contact between disputing parties may cause a reduction in personal dynamics in the process; and a lack of mental connection between the parties may result in the dispute not being settled amicably.[131] In other words, the absence of physical contact may make the parties less inhibited and they may say things they would not ordinarily say if they were in each other's presence because they can hide behind the safety of their computer. This is a difficult issue to resolve but it is proposed that if resolutions are binding on the parties, this would inform the parties that the process is to be taken seriously and that all information provided should be truthful – similar to providing information under oath in court. A clause would have to be provided in the terms and conditions of the AI ODR system to indicate that parties agree to provide accurate and truthful information, failing which a penalty may be imposed on the party in breach.

A final issue to consider is whether the parties to a dispute would have sufficient understanding of the legal nature and consequences of the dispute pertaining to legislation, cases and the ability to represent themselves without lawyers or a court's assistance.[132] This is a crucial issue because

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[129] Abedi, Zeleznikow and Brien "Universal Standards for the Concept of Fairness in Online Dispute Resolution in B2C E-Disputes" 2019 *Ohio State Journal on Dispute Resolution* 357 367–370.

[130] Zeleznikow 2020 *Journal of Internet Law* 3 4.

[131] Mania 2015 *International Comparative Jurisprudence* 76 79.

[132] Zeleznikow 2020 *Journal of Internet Law* 3 7.

lawyers often have the expertise to represent consumers in their disputes. To bypass this challenge, one could always have an AI-assisted legal advice system embedded in the ODR process. Consumers who face complex legal issues or who would like legal advice may click on a "legal advice" link that would then offer legal support. It must be remembered that an ODR system should be used with the support of human intervention; more complex cases should always allow human involvement where AI cannot resolve the dispute. This is also referred to as a decision support tool in that AI may be used to provide advice or AI may refer the matter for human intervention.[133] In terms of the CPA, the matter may be referred to the Tribunal in order to be resolved.

A final consideration is the issue of expertise and resources. As already discussed, both the courts and consumer bodies lack the resources to process every consumer dispute. It is unclear what resources will be required to create and maintain an AI ODR system, but a certain amount of expertise will certainly be required to get the system up and running. Whether South Africa possesses the ability to create such a system with software experts or engineers is also unclear. As argued earlier, scholars have stated that it is crucial that AI ODR systems be created in a proper manner to ensure that they honour the core principles of fairness, impartiality and transparency.

As can be seen from the challenges above, and although many scholars have championed ODR, it does also create certain legal barriers. These challenges, however, could be overcome if the AI ODR system were created and regulated under the CPA and ECTA. A cross-border AI ODR system would work where resources are made available in terms of government agencies, online dispute resolution service providers and mechanisms for enforcing judgments.[134] This would ensure that jurisdictional issues are resolved, as well as establish an authoritative body in the form of the Tribunal to adjudicate on matters that cannot be resolved through the online process. The normal provisions of the CPA would also apply to these online disputes so that disputing parties should be aware of what laws apply to refunds, replacements or repairs of goods and services.

8 CONCLUSION

Consumers are given various avenues to pursue redress in their disputes. However, consumers will only be successful if these avenues operate effectively.[135] Where these avenues fail, consumers become disgruntled as they do not obtain redress as envisaged in the CPA. There are provisions that apply to online e-disputes that can fit under the alternative dispute resolution section of the CPA in respect of recording an order and enforcement. Both the CPA and ECTA could be crucial in regulating a South African e-dispute resolution system for consumers. It is submitted that ODR would prove beneficial for simple consumer disputes of any monetary value in that it would allow for a quicker and easier process to resolve such

[133] Zeleznikow *Journal of Internet Law* 3 12.
[134] Duca, Rule and Loebl 2012 *Penn State Journal of Law & International Affairs* 59 63.
[135] Woker 2016 *SA Merc LJ* 28.

disputes. Authors have argued that a system enabling consumers and suppliers to resolve disputes using the Internet (which they have used to purchase or sell goods and services) is a logical solution and extension of e-commerce.[136]

AI can have a profound effect on how commercial transactions are conducted and regulated. It is possible to rely on machine learning to process claims and help address consumer disputes. Although financial constraints may have been a major factor for consumers in deciding to pursue their claims, AI may now be used in such a way that it can enhance South African consumer laws and provide access to justice. A cost effective and simple approach is needed for the vast majority of consumer disputes to ensure access to justice for all.

[136] Mania 2015 *International Comparative Jurisprudence* 76 82.

APPLICATION OF THE ISLAMIC LAW OF SUCCESSION IN SOUTH AFRICA

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SUMMARY

Muslims have been living in South Africa for over 300 years. There are over 750 000 Muslims living in South Africa today. These persons constitute a minority religious group in a non-Muslim country. Muslims are required in terms of their religion to follow Islamic law. There has (to date) been no legislation enacted by the South African parliament that gives effect to Islamic law. South African Muslims can however make use of existing South African law provisions in order to apply certain Islamic laws within the South African context. This article looks at the practical application of the Islamic law of succession and administration of estates within the South African context by way of a fictitious scenario. It highlights some of the problem areas when a Muslim testator or testatrix bequeaths his or her estate in terms of Islamic law by means of a will (Islamic will).

1 INTRODUCTION

Muslims have been living in South Africa for over 300 years.[1] There are currently approximately over 750 000 Muslims living in South Africa.[2] They are a minority religious group in a non-Muslim country. Muslims are required in terms of their religion to follow Islamic law. There has (to date) been no legislation enacted by the South African parliament that gives effect to Islamic law. South African Muslims can make use of existing South African law provisions in order to apply certain Islamic laws within the South African context. This article looks at the practical application of the Islamic law of succession and administration of estates within the South African context by way of a fictitious scenario. It highlights some of the problem areas when a Muslim testator or testatrix bequeaths his or her estate in terms of Islamic law by means of a will (Islamic will). Four aspects are looked at in this regard, namely the Islamic will, the Islamic distribution certificate,

1 The first recorded Muslim arrived in South Africa in 1654. See Mahida *History of Muslims in South Africa: A Chronology* (1993) 1.

2 Statistics South Africa "Census 2001 Primary Tables South Africa 96 and 2001 Compared" http://www.statssa.gov.za/census01/html/RSAPrimary.pdf (accessed 2015-01-03). It should be noted that religion has not formed part of the published censuses since 2001.

interpretation of the Islamic will and the Islamic distribution certificate, and possible constitutional challenges to provisions found in the Islamic law of intestate succession. The scenario that is looked at in this article is where a person (X) dies on 30 August 2017 at 10:00 PM at the age of 45 due to a gunshot wound that caused his death. He died six hours after being shot. He was shot at 4:00 PM. The time of his death was confirmed by a registered medical doctor. X resided in the Western Cape for all his life. He was a Black African Muslim who practiced aspects of African customary law. He was also one of the cultural leaders in the African community. He left behind a gross estate to the value of R2 200 000.00.

X executed a written will on 30 August 2016. The will satisfied the conditions required for it to be valid in terms of South African law. It was also valid and enforceable in terms of Islamic law. This type of will is referred to hereafter as an "Islamic will". X appointed his wife (C) as the executrix of his estate. The will stated that the liabilities first needed to be deducted from the gross estate before settling the testate and intestate succession claims. The will further stated that the appointed executrix should ascertain whether there were any legal and/or religious liabilities against the estate. The will expressly made mention of any deferred dower, arrear maintenance, and/or contractual debts as examples of legal liabilities in this regard. It also expressly made mention of an unperformed pilgrimage to Makkah (ḥajj) as an example of a religious liability.

X made several bequests in his will. He bequeathed 1/6 of his net estate to his divorced wife (E). He bequeathed another 1/6 of his net estate to his daughter (J) who was conceived out of wedlock. The will stated that the remainder of his estate should be distributed in terms of the Islamic law of intestate succession. The will further stated that the executrix of the estate must acquire an "Islamic distribution certificate" from a qualified Islamic law expert with a degree in Islamic law in this regard. The certificate must provide the names of his intestate succession beneficiaries at the time of his death in terms of Islamic law. The will did not state the school of law (school) that should be used in this regard. The divorced wife (E) killed X. The daughter who was conceived out of wedlock (J) renounced the 1/6 bequest X made to her. The renouncement was made after X had died.

The liabilities against the estate were R232 000.00 in total. These included administration costs; funeral costs; an unpaid dower that was due nine years before; an arrear maintenance that was due eight years before; an unperformed pilgrimage owing to God Almighty; and a debt owed to a creditor that was due six years before. There were no other liability claims against the estate. The executrix (C) approached an Islamic law expert for an Islamic distribution certificate as required in terms of the will. She was instructed to depose a next of kin affidavit for the Islamic law expert to draft and issue the Islamic distribution certificate. All supporting documentation, including a certified copy of the death certificate, copy of the last will and testament, marriage certificates, divorce certificates, birth certificates, and any other relevant documents, were required to be submitted with the affidavit. It is interesting to note that similar documents are required by the

Muslim Judicial Council (SA) before issuing an Islamic distribution certificate to an executor or executrix.[3]

The relatives of X who were stated in the next of kin affidavit were his parents, four spouses whom he had married, a number of descendants, and a number of siblings. The affidavit stated that X left behind both parents and he was conceived in wedlock. His mother is (A) and his father is (B). His father converted to Christianity two years before X died. X married four women during his lifetime. All these marriages were in terms of Islamic law only. The first wife is C. She is also the executrix of the estate. Her marriage to X was intact at the time of his demise. The second wife is (D). D successfully obtained a judicial divorce in the form of a faskh nine months prior to X having died. They subsequently reconciled one month later but did not remarry. The third wife is (E). She is a practising Jewess. E is also the person who killed X. The fourth wife is (F). X issued F with an irrevocable divorce one hour prior to dying. His intention was to disinherit her.

X also leaves behind a number of children. They are an adopted daughter (G); a non-biological accepted son in terms of African custom (H); a biological daughter who was conceived out of wedlock by artificial fertilisation (I), a biological daughter who was conceived out of wedlock (J); a cognate grandson (K) whose mother had predeceased X; a legal daughter (L) who was conceived in wedlock but as a result of an adulterous act between the wife of X and another man; and an agnate granddaughter (M). X further left behind a number of siblings, including a full brother who converted to Christianity (N); a full sister (O); and a consanguine brother (P). All the persons mentioned above are Muslim except for his father B (Christian), his divorced wife E (Jewess), and his full brother N (Christian).

The liquidation and distribution of the estate is now discussed in terms of the abovementioned facts. The issues that will be looked at include the conditions to be complied with before administering an estate, estate liability claims, testate succession claims, and intestate succession claims. Minor comparisons are made between the laws of the two legal systems where deemed relevant.

2 CONDITIONS TO BE MET BEFORE ADMINISTERING AN ESTATE

The conditions that must be met before the estate of a person may be deemed a deceased estate is that he must have died or been declared dead by a court of law. X died on 30 August 2017 at 10:00 PM. This was confirmed by a registered medical doctor. His estate fell open at that moment in time. This is also referred to as delatio. It should be noted that the rights of the testate and intestate beneficiaries vest at this time.

[3] See Dante "Distribution Certificates (Estates)" (2016) http://mjc.org.za/2016/06/14/distribution-certificates-estates/ (accessed 2017-10-20).

3 CLAIMS AGAINST THE GROSS ESTATE

The value of the assets in the estate prior to any deductions was R2 200 000.00. This is also referred to as the gross estate. The first claims against the amount would be the liabilities, followed by the testate succession claims, followed by the intestate succession claims. All three claims are present in the scenario.

4 LIABILITY CLAIMS

A number of liabilities are referred to in the scenario. The total amount of liabilities totalled R232 000.00. This included the funeral costs, the administration costs, the unpaid dower, the unpaid maintenance claim, the contractual claim, and the unperformed pilgrimage. The estate would be considered solvent as the assets exceeded the liabilities by R1 968 000.00.

4 1 Administration costs

Administration costs include funeral costs, estate duty, bank charges, transfer fees, executor's fees, and Master's fees, which are all claims against the estate that are required to be settled in order to successfully liquidate the estate within the South African context.[4] These claims are not expressly stated in the classical texts governing the laws of succession and administration of estates in terms of the Shaafi'ee and Ḥanafee schools. They are, however, incidental costs as they are required to be settled in order to successfully liquidate and distribute an estate in terms of South African law.

The funeral costs include all expenses that were directly related to the burial of a deceased Muslim. This claim would be allowed in terms of South African law even if there was no will stating that these costs must be paid. It is interesting to note that the current funeral costs for burying a deceased ranges from R2 500.00 to R5 000.00.[5] There is a legal maxim in Islamic law which states that any act needed to fulfil an obligation is in itself an obligation.[6] These payments must be made to ensure that the creditors as well as the testate and intestate succession beneficiaries receive what is rightfully theirs. There are currently Islamic institutions in South Africa that offer the services of an executor and claim the executor's fees. This has been accepted as standard practice for services rendered. These institutions include Absa Islamic and Albaraka banks.[7]

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4 De Waal and Schoeman-Malan *Law of Succession* 5ed (2015) 244.

5 Compare Guru "Funerals in South Africa and what they Cost – Muslim Burial Culture" http://compareguru.co.za/news/funeral-customs-in-sa-and-what-they-cost/ (accessed 2017-01-03). See Hartley "The Cost of Death" (2016) http://www.vocfm.co.za/the-cost-of-death/ (accessed 2017-10-20).

6 Ibn Qudaamah *Rawḍah Al NaaDhir Wa Jannah Al ManaaDhir Fee Usool Al Fiqh 'Alaa Madh hab Al Imaam Ahmad* (1998) vol 1 118–120.

7 Absa Bank "Have Peace of Mind with an Islamic Will" https://www.absa.co.za/personal/bank/islamic-banking/islamic-wills/ (accessed 2017-10-20). See also Albaraka Bank "Administration of Estates and Wills"

4 2 Debt

The other possible liabilities in this scenario include both legal and religious claims against the estate. The arrears dower claim, arrears maintenance claim, and contractual debt claim are the legal claims mentioned in this scenario. These claims are all older than three years and have therefore been prescribed in terms of South African law. Prescription was also applied in the Western Cape High Court in *Ryland v Edros* where a divorced spouse claimed arrears maintenance.[8] The divorced spouse claimed for approximately 20 years of arrears maintenance from her former husband to whom she was married in terms of Islamic law. Her claim was based on Islamic law principles. Her claim for maintenance was successful. She could only claim maintenance for up to three years from the date that her claim was served on her former husband, however.[9] This was due the application of the Prescription Act 68 of 1969.[10] It is quite interesting to note that the current version of the Muslim Marriages Bill includes a clause that excludes the application of the Prescription Act from Islamic law marriages concluded in terms of the Bill.[11] The Bill has not yet been enacted and would have no impact on the scenario.

The executrix could argue that these claims have prescribed and are therefore not enforceable and that the creditors should therefore not be paid. The claims have not prescribed in terms of Islamic law and must therefore be paid. X made provision for these claims by empowering his executrix with the authority to settle them. These claims must therefore be settled by the executrix in terms of the provisions in the will. It could be argued that the right to freedom of testation should override the prescription rule.

The unperformed pilgrimage claim is the only religious claim in this scenario. This claim is not automatically enforceable as a liability in terms of South African law. X has, however, made provision for this payment in terms of the will. The religious liability is enforceable in terms of the Shaafi'ee school but not in terms of the Ḥanafee school. The will does, however, make

http://www.albaraka.co.za/ProductsandServices/Administrationofestatesandwills.aspx #Estate (accessed 2017-10-20).

8 The South African law position has been confirmed in *Ryland v Edros* 1997 (2) SA 690 (C). In this case, the Court recognised some of the consequences that flow from marriages entered into in terms of Islamic law. One of the consequences was a claim for arrears maintenance in terms of the law of contract. It should be noted that the facts in *Ryland v Edros supra* involved a claim for arrears maintenance subsequent to a divorce. The scenario at hand deals with a claim for arrears maintenance subsequent to death. It should be noted that *Ryland v Edros supra* is a High Court decision and is binding only in the Western Cape.

9 *Ryland v Edros supra* 718–719.

10 See s 10(1)(*a*) of the *Prescription Act* 68 of 1969 where it states that "(1) [s]ubject to the provisions of this chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt."

11 See s 11(5) of the 2010 MMB www.gov.za/sites/www.gov.za/files/33946_gen37.pdf (accessed 2017-10-26) where it states that "[a]ny unpaid arrear maintenance, either mutually agreed to or in terms of a court order, which is due and payable to a wife may not be extinguished by prescription, notwithstanding the provisions of the Prescription Act, 1969 (Act No. 68 of 1969), or any other law".

express reference to the unperformed pilgrimage. It can therefore be assumed that the testator wanted the Shaafi'ee school to apply in this regard. The executrix must therefore settle this claim as per the will by instructing a person to perform the pilgrimage on behalf of X. The average package cost for a pilgrimage is approximately R32 650.00.[12]

5 TESTATE SUCCESSION CLAIMS

The remainder of the gross estate in this scenario, after the liabilities have been deducted, is R1 968 000.00. This amount is also referred to as the net estate.

5 1 Law of wills

X executed a Sharee'ah compliant will that satisfied all the South African law requirements for validity. Absa Islamic Bank offers the service of drafting and executing a Sharee'ah compliant will. They charge a nominal fee of R342.00 for the drafting and execution of these wills.[13] The Muslim Judicial Council, based in the Western Cape, offers this service of drafting and executing a Sharee'ah compliant will.

An Islamic will normally include a clause stating that the residue of the estate must devolve in terms of the Islamic law of succession. An Islamic institution or an Islamic law expert would then be appointed in the will to issue an Islamic distribution certificate. The facts of the scenario did not state who drafted the will. It did, however, state that the Islamic distribution certificate needed to be issued by an Islamic legal expert. This raises the question of delegation of testamentary powers, which is generally not allowed in terms of South African law. There are limited exceptions. The Islamic law expert would not have the authority to draft the Islamic distribution certificate as he or she pleases. He or she must identify the beneficiaries in terms of Islamic law. This type of certificate was accepted by the Master of the High Court in *Moosa NO v Harnaker* on 14 September 2017.[14] The Court noted that the will stated that the estate should devolve in terms of Islamic law and that an Islamic distribution certificate from the Muslim Judicial Council shall be binding in this regard. The Islamic distribution certificate was executed by the Muslim Judicial Council in terms of the will.[15] It is interesting to note that the validity of the certificate was not disputed by the Master of the High Court and the Registrar of Deeds. The Court also did not comment on it.[16]

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12 Al Anwar Express "Swissotel Al Maqam Package 2017" http://alanwarexpress.co.za/tours/swissotel-al-maqam-package/ (accessed 2017-10-20).

13 Absa Bank https://www.absa.co.za/personal/bank/islamic-banking/islamic-wills/. See also Albaraka Bank http://www.albaraka.co.za/ProductsandServices/Administrationofestatesandwills.aspx#Estate.

14 *Moosa NO v Harnaker* 2017 (6) SA 425 (WCC) par 7.

15 *Ibid*.

16 *Moosa NO v Harnaker* (ZAWHC) unreported case no 400/17 (14 September 2017).

It should be noted that, as a holder of an Islamic law degree, the author has also issued a few Islamic distribution certificates. The certificates that he has issued in the Western Cape were accepted by the Master of the High Court and the estates have since been finalised. It is interesting to note that the Muslim Judicial Council (SA) currently charges a fee of R300.00 for issuing an Islamic distribution certificate and that it takes approximately seven days for them to issue the certificate.[17] It could therefore be said that these certificates are generally accepted by the Master of the High Court. It should be noted that the validity of a clause in an Islamic will that requires an Islamic law expert to issue an Islamic distribution certificate has (to date) not been considered by the courts in light of the rule that prohibits delegation of testamentary powers. The rule is also not applied by the Master's Office in this regard as stated above. There is, however, no obvious reason for ignoring the rule. It could be argued that in the case of Islamic wills, the common law has been developed through custom as envisaged in *Breda v Jacobs*.[18]

5 2 Testate succession disqualifications and substitution

X bequeathed 1/6 of his net estate to his Jewish wife (E). She is disqualified from inheriting as an intestate beneficiary due to her following a different religion from that of X. This raises the question of discrimination based on religion.[19] E is, however, eligible to inherit as a testate beneficiary as she is not an inheriting intestate beneficiary.[20] E is, however, also the person who unlawfully killed X. E is therefore disqualified from inheriting the 1/6 in terms of South African law. E is also disqualified from inheriting the 1/6 in terms of the Ḥanafee school. The majority opinion within the Shaafi'ee school states that a murderer would be eligible to inherit as a testate beneficiary but not as an intestate beneficiary. The minority opinion within the Shaafi'ee school

17 Dante http://mjc.org.za/2016/06/14/distribution-certificates-estates/.

18 See *Breda v Jacobs* 1921 AD 330. The court held that the requirements for proving a custom are that the custom must have been in existence for a long period, the relevant community must generally observe the custom, the custom must be reasonable, and the content of the custom must be certain and clear. See also Himonga and Nhlapo (eds) *African Customary Law in South Africa – Post Apartheid and Living Law Perspectives* (2015) 30, See also Bennet *Customary Law in South Africa* (2004) 11 where it states that "a local custom may be deemed obligatory, and thus part of the legal code, once witnesses attested to the existence of a repeated practice that was reasonable, certain, uniform and well established".

19 See s 9(3) of the Constitution of the Republic of South Africa, 1996 where it states that "[t]he 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".

20 A person who inherits as an intestate beneficiary cannot inherit as a testate beneficiary unless the remaining intestate beneficiaries consent thereto after the deceased has passed on. E is disqualified from inheriting as an intestate beneficiary due to her religion. Difference of religion does not disqualify a person from inheriting as a testate beneficiary. Murder is different as it is a disqualification in terms of law of testate succession as well as the law of intestate succession in terms of the Ḥanafee school. Murder is not a testate succession disqualification in terms of the Shaafi'ee school.

states that a murderer would be disqualified from inheriting as an intestate beneficiary. It could be argued that Islamic law should take preference over the South law as the will is based on Islamic law principles. It is, however, not certain whether Islamic law would override the South African law principle in this regard. The question then arises as to which law should apply in the scenario. This is, in the final analysis, left up to the Islamic law expert to decide. For the purposes of this discussion, it will be assumed that the Islamic law expert applied the minority opinion found within the Shaafi'ee school, which states that a murderer is disqualified from inheriting as a testate beneficiary.

5 3 Testate succession exclusions

X bequeathed 1/6 of his net estate to his daughter (J) who was conceived out of wedlock. X also leaves behind a totally excluded cognate grandson (K). J would inherit the 1/6 in terms of both the Shaafi'ee and Ḥanafee schools. However, K could totally exclude J from inheriting in terms of the compulsory bequest rule that is applied in Syria. K would then inherit the share of his predeceased mother, which is 1/3. He would inherit the 1/3 as a compulsory bequest. The 1/3 would take precedence over the 1/6 bequest to J.

The question as to whether the compulsory bequest rule would apply in this scenario is solely dependent on whether or not the Islamic law expert would include K as the recipient of the 1/3 in terms of the Islamic law reform as applied in Syria and Egypt. These two countries also have followers of the Shaafi'ee school. It could be argued that the practice in these two countries has not been incorporated into the Islamic law applied by Muslims in South Africa. This type of argument was also made in *Ryland v Edros* with regards to the application of the Malaysian custom of harta sepencarian to South African Muslims.[21] Bequests should not exceed 1/3 of the net estate. The Islamic law expert cannot change the bequest made to J as he has not been empowered to do so. The Islamic law expert could, however, include K as a compulsory beneficiary of 1/6 only. The bequest would be within the 1/3 limitation. It would be 1/6 as an optional bequest in terms of the will, and 1/6 as a compulsory bequest. This would then be a reformed version of the compulsory bequest within the South African context. It should be noted that there is nothing in this scenario that prevents the Islamic law expert from applying the compulsory bequest rule regarding the Islamic distribution certificate. This scenario is, therefore, different to the situation found in *Ryland v Edros*.[22] It will, however, be assumed for purposes of the discussion, that K was not included in the Islamic distribution certificate.

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[21] The South African law position has been confirmed in *Ryland v Edros supra* 717 where the court held that the "evidence falls far short of proving that a custom similar to the Malay adat relating to harta sepencarian prevails among the Islamic community in the Western Cape".

[22] *Ryland v Edros supra*.

5 4 Testate succession limitations

X bequeathed the remainder of his net estate in terms of the Islamic law of intestate succession. He was empowered to do this is in terms of the principle of freedom of testation. The principle is restricted in terms of the South African Constitution which prohibits unfair discrimination.[23] Possible constitutional violations found within Islamic law of intestate succession are highlighted in 6.1 and 6.2 of this article.

5 5 Testate succession adiation, repudiation, substitution and collation

Adiation is when an appointed testate beneficiary accepts the benefit in terms of a will. X bequeathed 1/6 of the net estate (1/6 x R1 968 000.00 = R328 000.00) to his divorced wife (E). He also bequeathed 1/6 thereof (1/6 x R1 968 000.00 = R328 000.00) to his biological daughter (J), who was conceived out of wedlock. E was disqualified due to having unlawfully killed X. Her benefit would be redirected into the net estate.

The daughter (J) conceived out of wedlock repudiated the benefit. The repudiated benefit would be inherited by the surviving spouses of X in terms of South African law. The 1/6 of the net estate (1/6 x R1 968 000.00 = R328 000.00) must be redirected back into the net estate in terms of Islamic law. Nothing prevents J from accepting the benefit and then gifting it in favour of the surviving spouses. The distribution would then be correct in terms of both Islamic law and South African law.

It could be argued that X accepted the South African law position regarding representation as he has not made provision for a different mode of substitution. It could also be argued that X was unaware that J would repudiate the benefit. A solution to this type of situation would be for a testator or testatrix to expressly state in his or her will that all matters concerning interpretation should be handled strictly in terms of Islamic law and that a qualified Islamic law expert should issue a ruling in this regard.

6 INTESTATE SUCCESSION CLAIMS

The remainder of the net estate, after the value of all bequests have been deducted, constitutes the intestate estate. The intestate inheritance in this scenario is R1 968 000.00. This part of the estate must be distributed to the intestate beneficiaries as provided for in the Islamic distribution certificate. The following sections discuss the provisions that govern how the intestate beneficiaries as provided for in the Islamic distribution certificate are determined from the surviving relatives. The possible constitutional challenges to the Islamic law provisions are highlighted where relevant. The discussion is based on the distribution in terms of the Ḥanafee and Shaafi'ee schools. Other schools are mentioned where deemed fit.

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[23] See s 9(4) of the Constitution where it states that "[n]o person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)".

6 1 Intestate succession ties

The intestate succession ties looked at in this section are those in terms of Islamic law. The three relevant ties in this scenario are consanguinity ties, affinity ties, and quasi-consanguinity ties. X was conceived in wedlock. Both his parents (A and B) are related to him through blood. X has also concluded affinity ties with four women (C, D, E, and F). X further has consanguinity ties with his biological children (I and J), his biological grandchildren (K and M) and his siblings (N, O, and P). X also has a quasi-consanguinity tie with his son (L) who was born as a result of an adulterous act by one of his wives.

The adopted daughter (G) and the accepted son (H) do not have intestate ties with X. G is regarded as the child of X for all legal purposes in terms of South African law. G is not regarded as the daughter of X for any legal purposes in terms of Islamic law. Her rights and duties remain with her biological parents in terms of Islamic law. G could possibly challenge the constitutionality of the Islamic law position based on discrimination.[24]

The situation of the non-biological accepted son (H) is quite interesting. It could be argued that this child is the son of X as he satisfies the requirements in terms of the Reform of the Customary Law of Succession and Regulation of Related Matters Act. X was a cultural leader who practised aspects of African culture. He (H) is, however, not deemed a son of X in terms of Islamic law as there is no consanguinity tie present. He will not be listed as one of the intestate beneficiaries in the Islamic distribution certificate. This raises the question of discrimination based on birth.[25]

6 2 Intestate succession disqualifications and substitution

The parents, children, grandchildren, and spouses of X have intestate succession ties. These persons would inherit only if they are neither disqualified nor totally excluded from inheriting. The father (B) is disqualified from inheriting due to him following a different religion from that of X. This raises the question of discrimination based on religion.[26] The revocably divorced Jewish wife (E) would not inherit as she is disqualified from inheriting as a surviving spouse as she is of a different religion to X. She has also been disqualified from inheriting the testate benefit due to her having murdered X. It is interesting to note that she is eligible to inherit 1/6 of the net estate (1/6 x R1968 000.00 = R328 000.00) in terms of the Shaafi'ee school but not in terms of the Ḥanafee school. There would be no issue with

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[24] See s 9 of the Constitution of the Republic of South Africa, 1996 where it states that "(3) [t]he 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)".

[25] *Ibid*.

[26] *Ibid*.

a legal expert using the Ḥanafee school in this regard as the will does not require him to follow a specific school. It will be assumed for purposes of this scenario that the Ḥanafee school opinion was applied. The intestate succession disqualification of B and E raises the question of discrimination based on religion.[27] Discrimination based on religion is automatically deemed unfair in terms of s 9(3) of the Constitution.[28]

X married four wives during his lifetime. They included three Muslim women (C, D, and F) and one Jewish woman (E). C was the only wife who was not subject to a divorce. D obtained a judicial divorce in the form of a faskh nine months before X died. The faskh brought the marriage to an end irrevocably even though the couple reconciled during the waiting period. A new marriage was required if they wanted to live as husband and wife. D is disqualified from inheriting in her capacity as a surviving spouse in terms of Islamic law as they did not remarry. It is interesting to note that the Western Cape High Court incorrectly stated in the *Ḥassam v Jacobs* case that a faskh is revocable during the waiting period.[29] D's name would therefore not appear on the Islamic distribution certificate as she would have been disqualified from inheriting as a surviving spouse.

X issued F with an irrevocable divorce one hour prior to dying. The facts of the scenario state that his intention was to disinherit her. The divorce is disregarded due to his unlawful intention. This is an opinion within the Ḥanafee school. F would not inherit in terms of the Shaafi'ee school as the divorce was irrevocable. The context of the will seems to indicate that the Shaafi'ee school was intended as it referred to deduction of religious liabilities claims against the estate. This is an opinion within the Shaafi'ee school. There is, however, no direct instruction in this regard that the Shaafi'ee school should apply. There is also nothing preventing the legal expert drafting the Islamic distribution certificate from using the opinion within the Ḥanafee school in this regard. For the purposes of this discussion, It will be assumed that the Shaafi'ee school opinion was used.

The biological daughter (I) who was conceived out of wedlock and by artificial insemination is disqualified from inheriting. The biological daughter (J) who was conceived out of wedlock is also disqualified from inheriting. This raises the question of discrimination based on birth. Discrimination based on these grounds is automatically deemed unfair in terms of s 9(3) of

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27 *Ibid*.

28 See s 9(5) of the Constitution of the Republic of South Africa, 1996 where it states that "[d]iscrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair".

29 Moosa and Abduroaf "Faskh (Divorce) and Intestate Succession in Islamic and South African Law: Impact of the Watershed Judgment in *Hassam v Jacobs* and the Muslim Marriages Bill" in De Waal and Paleker *South African Law of Succession and Trusts – The Past Meeting the Present and Thoughts for the Future* (2014) 162 where it states that "[t]his article contends that the decision of the Cape Provincial Division of the High Court (now the Western Cape High Court) in that case may be criticised for misapplying the Islamic law (Shari'a) which regulates matters of MPL, particularly its provisions pertaining to the form of judicial divorce known as 'faskh'".

the Constitution.[30] The full brother (N) is disqualified from inheriting due to him following a different religion from that of X. This disqualification raises the constitutional question of discrimination based on religion.

6 3 Intestate succession exclusions

The remaining intestate beneficiaries who have not been disqualified are the mother (A), the first wife (C), the fourth wife (F), the cognate grandson (K), the daughter (L) who was conceived in wedlock as a result of adultery between the wife of X and another person, the agnate granddaughter (M), the full sister (O), and the consanguine brother (P). The provisions found in the law of exclusion could still apply to any of these persons.

The cognate grandson (K) is totally excluded from inheriting as an intestate beneficiary by the mother (A), by the daughter (L) who was conceived in wedlock but as a result of an adulterous act between the wife of X and another person, by the agnate granddaughter (M), by the full sister (O), and by the consanguine brother (P). The cognate grandson (K) is a distant kindred beneficiary and would inherit only in the event where there are no residuary beneficiaries and no return beneficiaries present. The intestate beneficiaries in this scenario include both return beneficiaries as well as one residuary beneficiary. It should be noted that residuary beneficiaries take priority over return beneficiaries.

The consanguine brother (P) is totally excluded by the full sister (O). This is quite interesting to note as a female is totally excluding a male from inheriting. It is also interesting to note that the Islamic law position is more favourable towards the female sibling in this regard. It should, however, be noted that the full sister has a stronger intestate tie to the deceased than the consanguine brother. It could be argued that the full sister (female) inherits more favourably in this scenario because she has a stronger intestate succession tie to the deceased. The consanguine brother inherits less favourably because he has a weaker intestate succession tie to the deceased.

There is only one intestate beneficiary who is partially excluded in this scenario. The mother is partially excluded from inheriting 1/3 of the intestate inheritance (1/3 x R1 968 000.00 = R656 000.00) as a sharer beneficiary by the daughter (L). She now inherits 1/6 of the intestate inheritance (1/6 x R1 968 000.00 = R328 000.00) as a sharer beneficiary.[31] It should be noted that a mother is one of the primary beneficiaries that is never subject to total exclusion.

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[30] See s 9(3) of the Constitution of the Republic of South Africa, 1996 where it states that "[t]he 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)."

[31] See Khan *The Noble Qur'an – English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that "[f]or parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth …"

6 4 Intestate succession limitations

There are no direct limitations that apply in the Islamic law of intestate succession. There is, however, one indirect limitation. The law of intestate succession would apply only where the liabilities have not depleted the gross estate. The liabilities in this scenario have not depleted the gross estate. The remainder in this scenario is R1 968 000.00.

The remaining intestate beneficiaries, who are neither disqualified nor totally excluded from inheriting as intestate beneficiaries, are his mother (A), the first wife (C), the fourth wife (F), the cognate grandson (K), the biological daughter (L) who was conceived in wedlock but as a result of an adulterous act between the wife of X and another man, his agnate granddaughter (M), and his full sister (O).

6 5 Intestate succession adiation, repudiation, substitution and collation

Adiation is not required in terms of the Islamic law of intestate succession. Repudiation is also not possible. None of the intestate succession beneficiaries in this example have repudiated. It should be noted that the doctrine of collation does not find application in Islamic law.

6 6 Categories of intestate succession beneficiaries and their shares

The remaining intestate beneficiaries who are neither disqualified, nor totally excluded from inheriting as intestate beneficiaries, are the mother (A), the first wife (C), the fourth wife (F), the daughter (L) who was conceived in wedlock but as a result of an adulterous between the wife of X and another man, his agnate granddaughter (M), and the full sister (O).

The two classes of intestate beneficiaries in this scenario are sharer beneficiaries and a residuary beneficiary. The mother (A), first wife (C), fourth wife (F), daughter (L) who was conceived as a result of adultery between the wife of X and another man, and his agnate granddaughter (M) are sharer beneficiaries. The full sister is the only residuary beneficiary.

The mother would inherit 1/6 = 8/48,[32] the first wife would inherit 1/16 = 3/48,[33] the fourth wife would inherit 1/16 = 3/48,[34] the daughter would inherit 1/2 = 24/48,[35] the agnate granddaughter would inherit 1/6 = 8/48, and the full sister would inherit the remaining 2/48.

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32 *Ibid*.

33 See Khan *The Noble Qur'an – English Translation of the Meanings and Commentary* 1404H (4) 12 where it states that "[i]n that which you leave, their (your wives) share is a fourth if you leave no child; but if you leave a child, they get an eighth of that which you leave after payment of legacies that you may have bequeathed or debts …"

34 *Ibid*.

35 See Khan *The Noble Qur'an – English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that 'Allah commands you as regards your children's

The mother would inherit 8/48 x R1 968 000.00 = R328 0000.00, the first wife would inherit 3/48 x R1 968 000.00 = R123 000.00, the fourth wife would inherit 3/48 x R1 968 000.00 = R123 000.00, the daughter would inherit 24/48 x R1 968 000.00 = R984 000.00, the agnate granddaughter would inherit 8/48 x R1 968 000.00 = R328 000.00, and the full sister would inherit the remainder which is 2/48 x R1 968 000.00 = R82 000.00.

6 7 Position of females in this example

The scenario that was looked at in this article was where X died and left a number of relatives behind. They are five males and 11 females. None of the five males inherited in this example, whereas six of the 11 females inherited.

The relatives in this example were subject to the law concerning inheritance ties, disqualifications, as well as exclusions. Both the adopted daughter (G) as well as the non-biological accepted son (H) did not inherit due to there being no intestate succession tie present. The father (B) and the Jewish wife (E) were both disqualified from inheriting due to being of a different religion from that of X. The mother (A) was the only intestate beneficiary who was partially excluded. It can clearly be seen that the Islamic law of succession favoured the females in this scenario.

7 CONCLUSION

This article has looked at the application of the Islamic law of succession within the South African context by means of a will. The findings have shown that the application is possible. It is generally argued that the Islamic law of succession discriminates against females. The article has shown that this is not necessarily the case. This scenario has shown that the females in this scenario would inherit the complete estate even though there are two males present who were not disqualified. It could therefore be argued that the grounds for the discrimination would be based on the strength of the intestate succession tie between the deceased and the intestate beneficiary. It is for this reason that the full sister inherited the residue to the exclusion of the full brother. It is also for this reason that the cognate granddaughter inherited to the exclusion of the agnate grandson. It must, however, be noted that male intestate beneficiaries would inherit more favourably than females based on a different scenario. The article has shown that a general clause in a will stating that the Islamic law of succession must apply to the will is problematic in instances where there are differences of opinion within Islamic law. This was specifically seen in the irrevocable divorce during death illness.

(inheritance); to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half …"

NOTES / AANTEKENINGE

THE IAAF RULES ON TESTOSTERONE LEVELS AND THE RIGHT TO HEALTH

1 Introduction

The International Association of Athletics Federation (IAAF) regulates the participation of athletes, both male and female, at an international level (see IAAF website https://www.iaaf.org/home). Therefore, it has the mandate to develop criteria for the administration of athletic competitions. In pursuance of this role, in 2018, the IAAF rolled out the Eligibility Regulations for Female Classifications – Athletes with Differences in Sex Development (2018). The IAAF states that the Rules are intended to ensure that females are given the same opportunities in terms of competing in races (International Association of Athletics Federations, 2018 Eligibility Regulations for Female Classification – Athletes with Differences in Sexual Development for events from 400 metres to the mile, including 400 metres, hurdles races, 800 metres, 1500 metres, one mile races and combined events over the same distances, 26 April 2018 - the 2018 Regulations). According to these Regulations, for Relevant Athletes to be eligible to compete internationally in the 400 metres, 800 metres, and 1500 metres races, their testosterone levels have to be under 5 nanomoles (nml) per litre. Importantly, "Relevant Athletes" who are females and belong to a specific list of DSD conditions all happen to be XY. These athletes are to reduce their testosterone levels to 5 nml/L for at least six months and thereafter to maintain it at that level for as long as they wish to participate in these races (the 2018 Regulations). They are therefore being asked to lower their testosterone levels to help ensure a level playing ground based on the debatable assumption that testosterone levels impact on athletic performance. These rules were rolled out against the backdrop of existing standards on human rights demanding, among other things, that the rights of all people are respected. That would include athletes. One such right is the right to health.

The right to health falls within the ambit of socio-economic rights. States ought to protect this right which arises from both international human rights law and national law. In 2015, South Africa ratified the International Covenant on Economic, Social and Cultural Rights, for example. By virtue of ratifying this treaty, South Africa is under obligation to implement the rights guaranteed under this treaty, which include the right to health, in good faith (Vienna Convention on the Law of Treaties, article 26). The International Covenant on Economic, Social and Cultural Rights places an obligation on State Parties to this covenant by providing that "states must recognise the right to enjoy the highest attainable standard of physical and mental health" (International Covenant on Economic, Social and Cultural Rights 1966,

Article 2). This implies that the right to health is an international human rights obligation. It is important to note that this right is also embodied in various national constitutions. For instance, section 27 of the Constitution of the Republic of South Africa (1996) provides that "everyone has the right to health". This implies that at a national level, states have a duty to ensure that the right to health is protected. Indeed, it is unquestionable that the IAAF has the mandate to enact rules for the administration of athletic competitions. The issue that remains unresolved, though, is whether the recently enacted 2018 IAAF Rules would be in accord with the right to health as understood under international human rights law and national human rights law. This issue is resolved in this note and in resolving it, the scholarly contribution that this research makes is first discussed. Subsequently, the 2018 IAAF Rules are discussed in detail. These rules are then measured against the international human rights framework on the right to health and South African national laws on the right to health.

2 Getting to grips with the scholarly gap in the literature

Much has been written about the right to health. Scholarly writings also exist on the IAAF Rules generally. It is essential to briefly engage with such literature with a view to mapping out the contribution that this research makes to the existing body of knowledge on this subject. Kinney's research, for example, paid much attention to access to health care services of any kind for all persons (Kinney "The International Human Right to Health: What Does This Mean for our Nation and World" 2001 *Indiana Law Review* 1475). The writer examines the right to health and what it means for states that are parties to international human rights treaties. He assesses whether the right to health as guaranteed under international human rights law matches what is being provided by different states at the national level. Whereas this writer's research informs the current research in terms of international human rights standards on the right to health, the current research takes the discussion further by assessing the implications of the 2018 IAAF Rules on the right to health. This research, therefore, differs from Kinney's paper. He focused on the right to health generally and did not measure the right against rules and regulations affecting athletes.

As for Rubenson, his research aimed to illustrate the importance of the right to health (Rubenson "Health and Human Rights" 2002 *Health Division Document* 12). According to Rubenson, the fact that all states are bound by international human rights obligations implies that they have a duty to guard against human rights violations. Rubenson underscores the importance of protecting human rights and ensuring that each state fulfils this duty. This writer's research is different from this research, which is concerned with the right to health *viz-a-viz* female athletes of a different sexual development. The work of Fick and his colleagues focused on the relationship between health and human rights (Fick, London and Coomans *Toolkit on the Right to Health* (2011)). The authors formulated a criterion to be utilised in assessing whether the right to health is being fulfilled. They also stressed that the government has the duty to realise the right to health. While human rights protection forms the basis of the analysis in this note, these authors' work

differs from the analysis in this article because the current discussion measures the 2018 IAAF Rules against the human right to health.

The right to health in South Africa is entrenched in the Constitution and as is consistently being alluded to, it ought to be protected. As regards this right in the context of South Africa's Constitution, Moyo wrote about the realisation of socio-economic rights in South Africa (Moyo "Realising the Right to Health in South Africa" 2016 *Foundation for Human Rights* 21). He highlighted the gap between access to health care services in the public and private sector. He argued that the apartheid system has in one way or the other contributed to the way the health care system is operating. Related to Moyo's research, this research will also turn to South African law in considering the right to health. However, it differs from Moyo's research because it narrows the discussion down to an analysis of how the right to health would be infringed upon should athletic associations and medical practitioners at the national level consider breathing life into the 2018 IAAF rules. Bermon and Garnier's research of 2017, which has since been challenged by various scholars, focused on how testosterone contributes to the performance during competitions of athletes with different sexual development (Bermon and Garnier "Serum Androgen Levels and their Relation to Performance in Track and Field: Mass Spectrometry Results From 2127 Observations in Male and Female Elite Athletes" 2017 *British Journal of Sports Medicine* 1309–1314). These writers' focused on the connection between testosterone levels and athletic performance, which though mentioned in passing here, is not the crux of the argument in the present discussion.

Pielke's research directly confronts the IAAF Rules and the scientific justification behind these rules (Pielke, Tucker and Boye "Scientific Integrity and the IAAF Testosterone Regulations" 2019 *International Sports Law Journal* 1–9). The writers critique the scientific research that was conducted by the IAAF as a justification for the IAAF Rules as rolled out in 2018. They question the scientific integrity of the rules and argue that they pose a threat to, and could potentially violate the rights of, female athletes. The writers, however, emphasised the scientific motivation of the IAAF Rules in relation to the rights of females in athletics. Therefore, the argument in this note takes the debate further by weighing the IAAF Rules against human rights standards the right to health. Karkazis and her colleagues, in two separate publications of 2012 and 2018, also confronted the IAAF Rules head-on (Karkazis, Jordan-Young, Davis and Caporesi "Out of Bounds? A Critique of the New Policies on Hyperandrogenism in Elite Female Athletes" 2012 *The American Journal of Bioethics* 3–16; Karkazis and Carpenter "Impossible 'Choices': The Inherent Harms of Regulating Women's Testosterone in Sport" 2018 *Journal of Bioethical Inquiry* 579–587). In the analysis, the writers focused on the implication of the IAAF Rules on the right to dignity and privacy. The writers underscore that even though the IAAF avers that no athlete is under obligation to undergo treatment, the fact that female athletes who refuse to undergo such treatment can't compete in international races itself constitutes a violation of human rights. Taking the discussion further, the argument in this note demonstrates how the health of female athletes with different sexual development will be affected. The difference one can point out compared to Karkazis ***et al's*** research is that the argument in this

note concentrates on the right to health, while Karkazis's research outlined how the IAAF Rules affect human rights in general.

The Court of Arbitration for Sport (CAS) pronounced itself on the 2018 IAAF Rules in which the CAS took a decision to uphold them on 1 May 2019. This decision was appealed in the Swiss Federal Supreme Court. In September 2020, this Court upheld the decision of the CAS. The implication of this is that the 2018 Rules are now the international norm on this subject. Despite this being the position, a question that still warrants resolution is whether these rules- now constituting the international norm, are in accord with the international and national human rights standards on the right to health. This issue is resolved in the negative, thus, demonstrating these Rules' continued controversial nature despite the decisions of the CAS and the Swiss Federal Court.

3 The 2018 IAAF Rules

3 1 Understanding the 2018 IAAF Regulations

The IAAF recognises that males and females develop differently, especially after puberty. Hence, athletic competitions are divided into two categories, namely males and females. The IAAF deems it unfair to expect females to complete with males. According to the IAAF, "No female would have serum levels of natural testosterone at 5 nanomoles per litre or above unless they have DSD or a tumour" (IAAF Eligibility Regulations for Female Classification 2018). The IAAF believes that male athletes have a high testosterone level that makes them more advanced when compared with female athletes (IAAF Eligibility Regulations for Female Classification 2018). In addition to the two categories mentioned above, the IAAF also recognises that there are certain individuals who have congenital conditions that bring about typical development of their chromosomal, gonadal and anatomic sex which is known as the difference of sexual development or intersex. Therefore, female athletes with different sexual development are not recognised by the IAAF as being female or male, because they have traits of both male and female. For a female athlete with Difference of Sexual Development (DSD) – "that means her levels of circulating testosterone (in serum) are five nanomoles per litre or above and who is androgen-sensitive", certain criteria need to be adhered to in respect of selected races in competitions at an international level (IAAF Eligibility Regulations for Female Classification 2018).

The IAAF proceeds on the premise that relevant athletes with different sexual development have a high testosterone level compared to a female with lower testosterone levels (IAAF Eligibility Regulations for Female Classification 2018). Therefore, the assumption is that such athletes have an unfair advantage when competing with other females and stand a greater chance of winning (IAAF Eligibility Regulations for Female Classification 2018). It is against this backdrop that the IAAF enacted rules that regulate the eligibility of these athletes. This implies that relevant athletes will only participate in the identified competitions internationally if they meet the eligibility criterion (IAAF Eligibility Regulations for Female Classification 2018). In developing these rules, the IAAF has noted categorically that it is

keen on respecting the dignity and privacy of intersex athletes and does not seek to redefine athletes' gender (IAAF Eligibility Regulations for Female Classification 2018). According to the regulations, if athletes want to participate in 400, 800 and 1500 metre races at an international level, they have to undergo an assessment and treatment to ensure that their testosterone levels are within the range of 5 nanomoles per litre. The IAAF's feels that "The regulations exist solely to ensure fair and meaningful competition within the female classification, for the benefit of the broad class of female athletes" (IAAF Eligibility Regulations for Female Classification 2018). An athlete will therefore not be eligible to compete if she refuses to lower her testosterone levels to the acceptable level in terms of the Regulations (IAAF Eligibility Regulations for Female Classification 2018).

On the face of it, the requirement to have testosterone lowered seems optional. But refusing to submit to treatment would essentially mean the end of an athlete's career. She will not be allowed to compete under the female classification. The relevant athletes are to be assessed so that the IAAF can determine whether the intersex athlete has had their testosterone levels lowered so that they can then compete in the female category. This assessment is to be conducted by a specialised medical investigator (IAAF Eligibility Regulations for Female Classification 2018). Therefore, the IAAF would call upon athletes who in their opinion meet the eligibility criteria to identify themselves for investigation by the IAAF Medical Manager (IAAF Eligibility Regulations for Female Classification 2018). Furthermore, the Medical Manager is also vested with the authority to investigate any woman who appears suspicious. This implies that if the Medical Manager is of the opinion that an athlete under the female category seems to have both male and female traits, such athlete will be subjected to the assessment (IAAF Eligibility Regulations for Female Classification 2018). With this set-up, it could be argued that the IAAF rules are violating the right to privacy and dignity of intersex athletes because the latitude that the Medical Manager has in investigating female athletes seems too wide and unreasonable (Karkazis *et al* 2012 *The American Journal of Bioethics* 3–16; Karkazis and Carpenter 2018 *Journal of Bioethical Inquiry* 579–587).

The 2018 IAAF Rules state that the IAAF respects the dignity of all individuals, as well as individuals with a different sexual development (IAAF Eligibility Regulations for Female Classification 2018). This seems to imply that relevant athletes are afforded the same rights as any other individual. The IAAF further states that it aims to put measures in place for the relevant athletes to ensure fair and meaningful competition (IAAF Eligibility Regulations for Female Classification 2018). These regulations will be imposed on females with a different sexual development. This is because the IAAF claims that such athletes have a higher natural testosterone level, which gives them an unfair competitive advantage over any normal female (IAAF Eligibility Regulations for Female Classification 2018). The testosterone levels of female athletes with a difference of sexual development must therefore be regulated.

Furthermore, the IAAF has noted that there is scientific consensus and evidence from the field that intersex athletes have a higher level of testosterone, which enhances their performance (International Association of Athletics Federations "IAAF Publishes Briefing Notes and Q&A on Female

Eligibility Regulations" (2019-05-07) *Press Release*; Bermon and Garnier 2017 *British Journal of Sports Medicine* 1309–1314; Handelsman, Hirschberg and Bermon "Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance" 2018 *Endocrine Reviews* 803–829). Some research holds a contrary view, however (Pielke *et al* 2019 *International Sports Law Journal* 1–9; Pielke "Caster Semenya Ruling: Sports Federation is Flouting Ethics Rules" 2019 *International Journal of Science* doi:10.1038/d41586-019-01606-8); Sönksen, Bavington, Boehning, Cowan, Guha, Holt, Karkazis, Ferguson-Smith, Mircetic and Böhning "Hyperandrogenism Controversy in Elite Women's Sport: An Examination and Critique of Recent Evidence" 2018 *British Journal of Sports Medicine* 1481–1482; Sönksen, Holt, Böhning, Guha, Cowan, Bartlett and Böhning "Why Do Endocrine Profiles in Elite Athletes Differ Between Sports?" 2018 *Clinical Diabetes and Endocrinology* 1540).

The IAAF Rules only allows those female athletes who meet the prescribed criteria to compete in the selected races (IAAF Eligibility Regulations for Female Classification 2018). This implies that the IAAF is determined to ensure that relevant athletes with a different sexual development compete only if they meet the eligibility conditions. The IAAF Rules further stipulate that the eligibility conditions only apply to participation by a relevant athlete in the female classification (IAAF Eligibility Regulations for Female Classification 2018). Therefore, these conditions may not be imposed on any other competition except for a competition on an international level and only for the races of 400 metres, 800 metres and 1500 metres. In terms of the IAAF Rules, females with a different sexual development must comply with the regulations to be eligible to compete with their peers. According to the Rules, for a Relevant Athlete to be eligible to compete she must meet several conditions (IAAF Eligibility Regulations for Female Classification 2018). Firstly, she must be recognised as a female or intersex. Secondly, she must reduce her blood testosterone level to a level below 5 nanomoles per litre for at least six months. Lastly, her blood testosterone level must continuously remain at 5 nanomoles for as long as she wants to compete.

3 2 The Court of Arbitration for Sport and selected cases brought to the CAS against the IAAF Rules

The Court of Arbitration for Sport (CAS) is an international court that deals with disputes related to sports (Reilly "Introduction to the Court of Arbitration for Sport (CAS) & The Role of National Courts in International Sports Dispute: A Symposium" 2012 *Journal of Dispute Resolution* 63). The court was formed in 1984 and since then, it has exercised its power to rule on disputes arising in international sport. The Court deals with these disputes in a specialised way by considering both rights and obligations of athletes and sports bodies (Reilly 2012 *Journal of Dispute Resolution* 63). Moreover, the CAS usually deals with procedural rules and regulation and has been found to succeed in matters of this nature (Reilly 2012 *Journal of Dispute Resolution* 63). The jurisdiction of the CAS is triggered "whenever the parties have agreed to refer a sports-related dispute to CAS" (Code of Sports-related Arbitration 2019) and it is on this basis that athletes, including Caster

Semenya, approached the CAS. With this set-up, athletes who object to the IAAF rules are given the opportunity to oppose the rules and seek relief from the CAS.

A number of cases have been brought to the CAS in relation to disputes that have arisen in international sports or competitions. For the purposes of this discussion, however, the focus is on cases that concern the IAAF Rules, or rather cases that challenged the IAAF Rules. In the case of *Dutee Chand v Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF)* (CAS 2014/A/3759), the appellant was challenging the validity of the IAAF rules governing the eligibility of females with a high level of testosterone to participate in international competitions. The rules that were challenged were the "Regulations Governing Eligibility of Females with Hyperandrogenism to compete in Women's Competitions" (2011 IAAF Regulations). The athlete was challenging the IAAF rules on a number of grounds. Firstly, they felt that the rules unlawfully discriminated against female athletes having different characteristics. Secondly, they were of the opinion that the rules were based on factual assumptions about the relationship between testosterone and athletic performance (see summary or case in Branch "Dutee Chand, Female Sprinter With High Testosterone Level, Wins Right to Compete" (2015-07-27) *New York Times*). Thirdly, the appellant contended that they were not based on any legitimate objectives, and fourthly, they were not an authorised form of doping control. The IAAF was the second respondent in the matter and it vehemently rejected these grounds.

It should be noted that the appellant, Ms. Dutee Chand, is an athlete from India and she had participated in international competitions for quite some time before the 2011 IAAF Regulations were rolled out. However, due to her physical appearance and complaints lodged by other athletes, the IAAF instructed the Athletics Federation of India to investigate with a view to determining her gender. The appellant was subjected to a medical examination without her consent and the reasons behind conducting such examinations were not disclosed to her (*Dutee Chand v Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF) supra*). The Athletics Federation of India submitted a report to the IAAF stating that they were not sure of her gender and that she had a high level of testosterone. Upon receiving the report, the IAAF notified Dutee that due to her condition of having a high level of testosterone, she would not be eligible to compete under the female category (*Dutee Chand v Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF) supra*). This decision was informed by the 2011 IAAF Regulations. In terms of the 2011 IAAF Regulations, the acceptable level of testosterone for females who desired to compete in female races was 10 nanomoles per litre in the blood or less. Dutee did not meet this criterion. The 2011 Regulations, like the 2018 Regulations, were based on the debatable premise that there is a nexus between levels of testosterone and athletic performance.

The CAS considered the facts of the case and held that the IAAF failed to establish that the 2011 Regulations were necessary for purposes of organising female competitions which are fair and meaningful (*Dutee Chand v Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF) supra*). Furthermore, according to the CAS, the

IAAF failed to provide sufficient scientific evidence about the relationship between a high testosterone level and improved performance by intersex athletes (*Dutee Chand v Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF) supra*). This implies that the IAAF did not prove that female athletes with a high level of testosterone have an advantage over other females. To the CAS, this made it unwarranted to exclude them from competing in the female category. The court held that it could not uphold the IAAF regulations (*Dutee Chand v Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF) supra*). The CAS gave the IAAF the opportunity to submit further evidence concerning intersex female athletes (*Dutee Chand v Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF) supra*). It is in trying to comply with the order of the CAS that the IAAF developed research on the nexus between athletic performance and testosterone (Bermon and Garnier 2017 *British Journal of Sports Medicine* 1309–1314) and ultimately compiled new rules applicable to intersex athletes. These rules came into force in April 2018 (the 2018 IAAF Rules).

Caster Semenya, a female South African athlete, lodged a complaint against the IAAF rules before they came into force in 2018 (International Association of Athletics Federations (2019-05-07) *Press Release*). She argued that the rules of the IAAF of 2018 are discriminatory in that they eliminate intersex athletes from participating in international competitions (International Association of Athletics Federations (2019-05-07) *Press Release*). She also stressed that intersex individuals have naturally occurring testosterone levels, thus, making it improper to unfairly discriminate against them based on the fact that they have higher testosterone levels than other females. Confronted with this complaint, this time around things turned out differently and the CAS upheld the 2018 IAAF Rules. On 1 May 2019, the Court held that the IAAF had adduced sufficient scientific evidence proving that female athletes with high levels of testosterone have an unfair advantage, especially when competing with other female athletes with lower levels of testosterone (International Association of Athletics Federations (2019-05-07) *Press Release*). Therefore, such athletes are not eligible to compete unless they reduce their testosterone level to a certain level and maintain it for as long as they want to be deemed competent or eligible to compete. It must be reiterated, however, that in recent times, research has displaced conclusions that a nexus exists between athletic performance and high levels of testosterone (Pielke *et al* 2019 *International Sports Law Journal* 1–9; Pielke 2019 *International Journal of Science*; Sőnksen *et al* 2018 *British Journal of Sports Medicine* 1481–1482; Sönksen *et al* 2018 *Clinical Diabetes and Endocrinology* 1540.

The CAS decision was appealed by Semenya and Athletics South Africa before the Federal Supreme Court of Switzerland. The Swiss Federal Supreme Court ruled, among others, that it cannot subject the CAS decision to any form of legal control (Press Release of the Swiss Federal Supreme Court "DSD Regulations: Caster Semenya's appeal against the decision of the Court of Arbitration for Sport dismissed" 8 September 2020). By ruling as such, the Court seemed to suggest that the CAS decision would not

subjected to any form of legal scrutiny or any applicable legal principles. The Swiss Court ruled that if the CAS decision violated fundamental and widely recognised principles of public order, it would revisit it. The Court, however, found that no such violation was established (Press Release of the Swiss Federal Supreme Court 2020). It added that the CAS decision could not be challenged in light of expert opinion in demonstration of the fact that testosterone levels impacted on athletic performance. The need to ensure fair competition in sports, the Court noted, was a justifiable reason to uphold the IAAF Rules. The Court reasoned that in these circumstances, a violation of the right to dignity and freedom from discrimination does not arise (Press Release of the Swiss Federal Supreme Court 2020). This note demonstrates that despite the decision of both the CAS and Swiss Court, the IAAF Rules impact on a number of fundamental rights including the right to health and this of itself leaves debates pertaining to these Rules far from settled.

4 The IAAF Rules through the lens of the international and national human rights standards on the right to health

We now live in an era where it is expected that human rights inform every decision taken by states, individuals, persons, or organisations. Not surprisingly, there are various international instruments that entrench fundamental rights at the international, regional, and national levels. Notable among those at the international level is the International Covenant on Social, Economic and Cultural Rights (1966). It must be noted that often, when rules are made at an international level, states replicate these rules at the national level. (In terms of the IAAF regulations, it is averred as follows: "Female athletes who do not wish to lower their testosterone levels will still be eligible to compete in the female classification at competitions that are not International Competitions: in all Track Events, Field Events, and Combined Events, including the Restricted Events." Often, before athletes are considered for competitions at the international level, they have to first compete nationally. This makes this rule counterproductive in the sense that the absence of the prospect of going all the way to international competitions may influence national competitions to invoke international rules with a view of setting the pace for national athletes to compete internationally. On this disclaimer by the IAAF, see International Association of Athletics Federations, 2018. Eligibility Regulations for Female Classification (Athlete with Differences of Sexual Development) for events from 400 metres to the mile, including 400 metres, hurdles races, 800 metres, 1500 metres, one-mile races, and combined events over the same distances, 26 April 2018. https://www.iaaf.org/news/press-release/eligibility-regulations-for-female-classifica (accessed 2019-10-17). (IAAF Eligibility Regulations for Female Classification 2018)). Therefore, in assessing the IAAF Rules through the human rights lens, human rights standards or the right to health at the national level will also be considered. At the national level, focus will be placed on South Africa simply because the rules profoundly placed South Africa in the limelight on account of Caster Semenya being a South African athlete who felt targeted by the 2018 IAAF Rules.

4 1 The importance of the right to health

The right to health is not limited to access to health care. It also encompasses a duty on the part of the government to make sure that citizens live in a healthy environment (Committee on Economic, Social and Cultural Rights General Comment No. 14: The Right to the Highest Attainable Standard of Health, Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000). The right to health should not only be upheld by the state but also be respected in sectors such as the workplace (General Comment No. 14, 2000). Moreover, in order to achieve the highest possible standard of health, the state should maintain conditions which enable individuals to enjoy health without any prejudice or discrimination (General Comment No. 14, 2000). Furthermore, the right to health forms part of the international standard of human rights and cannot be separated from other rights. The right to health includes freedoms and entitlements which include the right of an individual to be in control of his or her health and body and to be free from non-consensual medical treatment (General Comment No. 14, 2000). The entitlements include the right to a health system that affords everyone an equal chance to enjoy the right to health. Therefore, all individuals must be given similar opportunities to attain the uppermost level of health (General Comment No. 14, 2000).

While states are the ones that sign up to the international human rights treaties from which human rights standards are derived, in recent times, there have been persuasive arguments to the effect that businesses and international organisations such as the IAAF should bear the responsibility of ensuring that their dealings accord due regard to human rights (Office of the High Commissioner for Human Rights "Guiding Principles on Business and Human rights" 2011). What then are the human rights standards on the right to health? And do the IAAF Rules stand human rights scrutiny? The next subsections attempt to answer this question.

4 2 The right to health under international human rights law

4 2 1 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was adopted in 1948 by the General Assembly. It is the first international instrument of human rights to be codified. The UDHR has acknowledged a number of human rights such as the right to be equal before the law and the right to health care (UDHR 1948, articles 1 & 7). However, it must be noted that because it is a resolution by the United Nations General Assembly, the UDHR is not binding on any State. This notwithstanding, arguments have been advanced to the effect that the instrument could have attained the status of customary international law (Govindjee, Holness, Goosen, Van der Walt, Crouse, Olivier, Shaik-Peremanov, Kruger, Holness and Fesha *Introduction to Human Rights Law* (2016) 8). Therefore, the main purpose of the UDHR was to reach a common understanding of the human rights and the essential freedoms contained in the United Nations Charter (Crouse *et al Introduction*

to Human Rights Law 8). Article 25 of the UDHR provides that "everyone has the right to a standard of living adequate for the health and well-being of himself including food, clothing, housing, and medical care and social service." This implies that the right to health is a broad concept as it includes all the prerequisites for one to lead a healthy lifestyle and not be subjected to unhealthy conditions that may lead to harm.

Female athletes with different sexual development are protected by the UDHR which entrenches the right to health in very strong terms. A conclusion can therefore be drawn to the effect that the IAAF rules are transgressing the UDHR. Such an argument would rest on the view that these rules do not protect intersex athletes but rather, seek to indirectly expose them to medical treatments that may have a negative impact on their health. Research has established that treatment requiring female athletes to lower their testosterone levels could have dire consequences, including depression, compromised bone and muscle strength, fatigue, excessive thirst, and disruptions to carbohydrate metabolism (see e.g., Jordan-Young, Sönksen and Karkazis "Sex Health and Athletes" 2014 *British Medical Journal* (doi: https://doi.org/10.1136/bmj.g2926). These athletes' right to an adequate standard of living will therefore likely be infringed upon, as the rules have dire health consequences. As noted, intersex athletes also have naturally occurring testosterone, which makes it problematic to subject them to treatment that has dire health consequences.

4 2 2 The International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted in 1966 but came into force in 1967 upon ratification by State Parties. This treaty is dedicated to the second generation of rights which include *inter alia* economic, social and cultural rights. Furthermore, most countries have expressly accepted that the right to health is also considered to be a human right (see national constitutions generally). Therefore, countries that have ratified this Covenant are obliged to carry out the object and purpose of this Covenant (Vienna Convention on the Law of Treaties 1969, article 26). The international human rights standards not only oblige states to uphold the right to health care, but also to take positive action in ensuring that all individuals maintain a healthy standard and utilise the available resources to make sure that the right is upheld (Committee on Economic, Social and Cultural Rights General Comment No. 14).

The ICESCR requires State Parties to take reasonable steps within their available resources to progressively realise these rights (article 2). (In addition, the right to health is guaranteed under several other international human rights instruments, including article 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, article 11.1(f) and article 12 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979, article 24 of the Convention on the Rights of the Child of 1989. At the regional level, notable amongst the instruments is article 11 of the revised European Social Charter of 1961, article16 of the African Charter on Human and Peoples' Rights of 1981, and article 10 of the Additional Protocol to the American Convention

on Human Rights in the Area of Economic, Social and Cultural Rights of 1988). This implies that State Parties may not always be expected to act immediately when implementing such rights. Rather states are given reasonable time to give effect to these rights (Committee on Economic, Social and Cultural Rights General Comment No. 3: The Nature of States Parties' Obligations – Article 2, par. 1, of the Covenant, adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990). Notably, State Parties are not always expected to give immediate effect to socio-economic rights because these rights place a heavy burden on State Parties (Committee on Economic, Social and Cultural Rights General Comment No. 3). Therefore, the enjoyment of these rights may not always be fully guaranteed as it requires economic and practical resources, and planning. However, the Committee on Economic, Social and Cultural Rights has observed that "while the Covenant provides for progressive realisation and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect" (Committee on Economic, Social and Cultural Rights General Comment No. 3).The Committee also implores states to take action, including steps to enact relevant legislation to enforce the right to health (Committee on Economic, Social and Cultural Rights General Comment No. 3). In terms of article 12 of the ICESCR, "everyone has the right to the enjoyment of the highest attainable standard of physical and mental health conducive to living a dignified life." This means that states must provide health care services and ensure that no one is denied access to health. One cannot be in a position to live a dignified life if this right is neglected.

Requiring female athletes with naturally higher levels of testosterone and who want to participate in international sports to undergo treatment will have an impact on their health, and begs the question – is this justifiable in today's free and democratic society? It does appear that the IAAF is concerned about allegedly leveling the playing ground for female athletes with little to no regard to the side effects on health. There is no doubt that such an approach would infringe on the right to health of these athletes as guaranteed under article 12 of the ICESCR. Moreover, requiring that athletes with naturally occurring testosterone reduce their testosterone level goes against the notion of dignity as envisaged in article 12 of the ICESCR. At an international level, the Human Rights Council, through its Resolution of 2019, has added voice to the values contained in international human rights treaties. The Human Rights Council has accordingly urged states to see to it that sporting bodies and associations not enforce the IAAF regulations given how they threaten human rights, including the right to health (Human Rights Council Resolution "Elimination of Discrimination against Women and Girls in Sport" 2019).

4 2 3 The African Charter on Human Rights and Peoples Rights

The African Charter on Human Rights and Peoples Rights (Banjul Charter) adopted in 1986 falls within the category of regional mechanisms that protect human rights in Africa. The treaty recognises a number of rights including civil, political, economic, social and cultural rights. The African Commission

on Human and Peoples' Rights (the Commission) states that states must avoid unnecessarily *restricting* rights and uphold the rights protected by various international human rights instruments. Human rights violations weaken the public's confidence in the rule of law (African Commission on the Human and People's Rights General Comments No. 2. on Article 14.1(a), (b), (c) and (f) and Article 14.2(a) and (c) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2014). The Commission has further emphasised that Africa is facing a unique situation and that environmental, economic, and social rights are the core elements of human rights in Africa (African Commission on the Human and People's Rights General Comments No. 2). This Commission has also underscored that the right to health entails effective access to health-related education and information on sexual and reproductive health (African Commission on the Human and People's Rights General Comments No. 2). Buttressing this right under this Charter, this right has been interpreted to encompass freedoms including the freedom to control one's body, health, and sexual and reproductive organs (African Commission on the Human and People's Rights General Comments No. 2). Moreover, the right to health entails freedom from any unlawful interference such as non-consensual medical treatment, experiments, forced sterilisation, and inhuman and degrading treatment (African Commission on the Human and People's Rights General Comments No. 2).

Article 16 of the African Charter on Human and Peoples' Rights states that "everyone has the right to enjoy the best attainable state of physical and mental health". This implies that it is important that everyone be afforded the right to health, be it physical or mental so that they can lead a dignified life. It is also critical to note that although the right to health is recognised by international law as forming part of human rights, there is need to implement and enforce the right at the national level. The Commission has emphasised that the right to health does not necessarily entail the right to be healthy, but refers to health care and other factors relevant to living a healthy life (African Commission on the Human and People's Rights General Comments No. 2). It has further stated that it includes *inter alia* access to safe water, adequate sanitation, the supply of safe food, nutrition, housing, and healthy occupational and environmental conditions (African Commission on the Human and People's Rights General Comments No. 2). The Commission has also underscored that it is aware of the fact that many people in Africa do not enjoy the right to health to its full extent because poverty is a problem in African countries. This makes it impossible to assure full enjoyment of this right (African Commission on the Human and People's Rights General Comments No. 2). The issue of poverty as noted by the Commission brings the fairness of the IAAF Rules sharply into focus. If treatment is to be administered and it negatively affects the health of African athletes, this would mean that African countries will be burdened, because such athletes will seek treatment to reverse the effects of unwarranted treatment. Moreover, African athletes would have to approach health facilities and medical practitioners in African states to receive treatment. In administering such treatment, these facilities and practitioners would indirectly play a role in undermining the right to health as guaranteed under the African Charter on Human and Peoples' Rights, since as already noted, the treatment envisaged has negative effects on health.

4 2 4 Protocol to the African Charter on Human and People's Rights on the Right of Women in Africa

The Protocol to the African Charter on Human and People's Rights on the Right of Women in Africa is also called the Maputo Protocol. It was adopted in 2003 and came into force in 2005 (Protocol to the African Charter on Human and People's Rights of Women in Africa 2005). It is recognised as the first international treaty that paid much attention to women's human rights especially those specific to the African context, such as women in armed conflict. Moreover, it complements the African Charter as it focuses more on women's rights in Africa. The African Commission has emphasised that African women must be afforded the right to the highest attainable standard of health which includes *inter alia* sexual and productive rights (African Commission on the Human and People's Rights General Comments No. 2). It has further stressed that State Parties have a duty of guaranteeing that women have access to education that is related to health (African Commission on the Human and People's Rights General Comments No. 2). This implies that states must create a platform that will enable women to have access to information relating to health. Article 14(1) of the Maputo Protocol provides that "State Parties shall ensure that the right to health of women including sexual and productive health is respected and promoted." This means that states are under a duty to provide a health system that will cater for the needs of women as well. Furthermore, Article 14(2) of the Maputo Protocol stipulates that "State Parties shall take appropriate measures to provide for health systems that are accessible and affordable."

The main purpose of the abovementioned Protocol is to uphold the interest of women due to the fact that they were previously disadvantaged and have over the years suffered discrimination. It would, however, appear that the IAAF rules violate the objectives of this Protocol in that women who have naturally occurring testosterone are being discriminated against in the area of athletic competitions. The IAAF submits that women with a high level of testosterone may not participate with other female athletes unless they reduce their testosterone level (IAAF Eligibility Regulations for Female Classification 2018). By doing this, these rules are discouraging women from participating in sport because of the fear of being subjected to unnecessary examinations. Furthermore, intersex athletes are at risk because the treatment may affect their health. This means that the IAAF rules are infringing upon the right to health.

4 2 5 The United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

It is of importance to understand the nature and origin of the United National Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Special Rapporteurs are experts appointed by the Human Rights Council to scrutinise and provide feedback about a country's condition or a special human rights theme (United Nations Commission on Human Rights United Nations Special

Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, 2006). It must be noted that it is an honorary position, meaning that the experts do not receive any remuneration. One of the objectives of the Special Rapporteur is to gather information from all significant sources that pertain or rather deal with the realisation of the right to the enjoyment of the highest attainable standard of the physical and mental health (United Nations Commission on Human Rights United Nations Special Rapporteur). Therefore, the Special Rapporteur may measure the IAAF rules against the aforesaid right and can achieve this through research. They also have the duty to report on the status of the realisation of the right to health all over the world (United Nations Commission on Human Rights United Nations Special Rapporteur).

The Special Rapporteur must also ensure that a country conforms to laws, policies and good practices that are beneficial to one's enjoyment of the uppermost standard of mental and physical health (United Nations Commission on Human Rights United Nations Special Rapporteur). This means that countries must engage in activities that do not infringe upon the right of everyone to enjoy the highest attainable standard of mental and physical health (United Nations Commission on Human Rights United Nations Special Rapporteur). Therefore, if the IAAF rules infringe upon the aforementioned right, the Special Rapporteur may advocate for the revision of controversial rules, in this case, the IAAF rules, to ensure that they are beneficial to the athletes' enjoyment of the highest standard of mental and physical health. Moreover, the Special Rapporteur must identify, through investigations, the obstacles encountered nationally and internationally regarding the implementation of the aforesaid right (United Nations Commission on Human Rights United Nations Special Rapporteur). The Special Rapporteur is obliged to determine whether the IAAF rules facilitate or hinder the implementation of the right mentioned above (United Nations Commission on Human Rights United Nations Special Rapporteur).

Furthermore, it is the responsibility of the Special Rapporteur to make recommendations on the measures necessary for the realisation of the right to enjoy the highest attainable standard of mental and physical health (United Nations Commission on Human Rights United Nations Special Rapporteur). The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has observed that the IAAF Rules are inappropriate because they undermine the right to health. The Special Rapporteur has therefore made recommendations to the IAAF, calling on it to abandon these rules (see the combined report to the IAAF by the United National Special Rapporteur on the Right of everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Working Group on the issue of discrimination against women in law and in practice, 2018). These calls have fallen on deaf ears, however.

4 3 The right to health under South African law

Although the IAAF Rules apply to international competitions, in some cases, their applications extend to national competitions. In this regard, national

athletics associations, in a bid to align their practice with international practice, on their own accord or as a requirement by the IAAF, may adopt the same rules as those in international competitions. If this is the case, the issue that would need to be resolved is whether the application of rules similar to the IAAF Rules would be in accord with South Africa's national laws. In addition, medical practitioners in South Africa may be approached by female athletes to have their testosterone levels lowered so as to conform to the 2018 IAAF Regulations. What implications would this scenario have for the right to health? This section engages with these issues.

4 3 1 The Constitution of the Republic of South Africa 1996

Prior to democracy in South Africa, the right to health was not recognised as forming part of human rights (Moyo 2016 *Foundation for Human Rights* 21). Furthermore, access to health care was based on race. Therefore, access to health care was a major challenge for black individuals (Moyo 2016 *Foundation for Human Rights* 21). The black race was not afforded proper health care services and was also denied access to information concerning health. This despite the fact that it was the most indigent race in South Africa at the time (Moyo 2016 *Foundation for Human Rights* 21). There was a turn of events in 1994 when a new political dispensation came about in South Africa. The new constitution was adopted and came into force in 1997, along with the Bill of Rights. Section 1 of the Constitution provides that "the Republic of South Africa's values are human dignity, equality, and advancement of human rights and freedoms." Therefore, among other things, the constitution seeks to redress the injustices that existed prior to democracy. Everyone is deemed to be equal before the law. No race is deemed superior to the other in the current constitutional dispensation.

Section 7 of the Constitution states that "the government has a duty to respect, promote, protect and fulfil people's rights." This means that the government must uphold the rights of all individuals when taking a decision that might affect human rights and to act positively in realising such rights. Moreover, as a sign that the right to health is important, the Bill of Rights includes section 27 of the constitution which provides that "everyone has the right to have access to health care services." Section 27(2) of the Constitution also provides that "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights." The right to health is listed as one of the justiciable rights meaning it is legally enforceable. Therefore, if an individual's right to health has been infringed upon, he or she can approach the court for redress. It must also be noted that in terms of section 8 of the Constitution of South Africa, "the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right." This means that the constitution has implications for the 2018 IAAF Rules in that, should medical practitioners in South Africa administer treatment geared towards lowering testosterone levels and making athletes eligible to compete in international or national competitions, they could be infringing on the constitution, since the Bill of Rights applies to natural persons also.

The World Medical Association has therefore called upon all medical practitioners to steer clear of implementing the IAAF Rules and administering treatment to female athletes for the purpose of making them eligible to compete in sports. The World Medical Association is a global federation that consists of the National Medical Association that deals with medical issues worldwide (World Medical Association "WMA Urges Physicians Not to Implement IAAF Rules on Classifying Women Athletes" 2019). The World Medical Association seeks to ensure that the highest standard of physical and mental health is accomplished by means of promoting good practice, medical ethics, and medical accountability internationally (World Medical Association). The World Medical Association operates on the premise that implementing the IAAF Rules interferes with the right to health. Thus, if medical practitioners in South Africa are to implement the 2018 IAAF Rules, challenges could arise in terms of their compliance with the right to health under South Africa's Constitution as well as international human rights law on the right to health.

4 3 2 National Health Act (an example of legislation)

States that have ratified and accepted to be bound by treaties providing for the right to health ought to give effect to such rights, and states must go a step further by ensuring that the right to health is incorporated into their domestic laws. Section 231(4) of the Constitution provides that "any international agreement becomes law in the Republic when it is enacted into law by national legislation." Therefore, the treaties mentioned above may be regarded as law in South Africa as they have been signed into law and national legislation. Moreover, South Africa has national legislation that gives effect to the right to health as provided for by the international treaties. The constitution requires the legislature to enact legislation giving effect to the right to health care. Hence the National Health Act was enacted by the legislature (National Health Act 61 of 2003). The National Health Act provides for a uniform health system that considers the right to health as envisaged by the constitution and other laws.

The National Health Act recognises the socio-economic imbalances and inequities of the health services of the past. The objectives of the aforesaid Act are to regulate national health, and provide uniformity in respect of health services across the nation, while respecting, promoting and fulfilling the rights of the people in the Republic. The National Health Act further ensures an environment that is not harmful to people's health or well-being. This shows that South Africa has given effect to the right to health as provided for in international treaties and the constitution. As already alluded to, the objectives of the National Health Act are to promote, respect the health rights of everyone including athletes. This means that the rights of female athletes must be respected. One important question that would then stand to be resolved is whether, medical practitioners, in giving effect to the IAAF Rules, would be advancing the spirit and purpose of the National Health Act. Arguably they would not.

In addition, as already noted, the National Health Act recognises the socio-economic imbalances and inequities of the past and seeks to address these imbalances. Not all athletes may be financially stable and able to

afford the treatment required for them to meet the requirements of the IAAF Rules. These athletes, therefore, automatically, do not have a chance. Critical issues arise here again as regards whether enforcing the IAAF Rules would advance the spirit and purpose of the National Health Act, which includes addressing the injustices and socio-economic inequalities of the past. If addressing the injustices of the past is to be at center of the health care system, then discrimination against minorities such as athletes with different sexual development does not help in achieving that goal.

4 3 3 Case law (a selection)

The right to health is a justiciable right, and cases have been brought to courts where the aggrieved parties sought relief. Against this backdrop, if rules similar to the IAAF rules are applied in the context of South Africa, they may very well be challenged through reliance on the right to health, which as consistently noted, is justiciable. In the case of *Soobramoney v Minister of Health KwaZulu-Natal* (1998 (1) SA 765 (CC)), the Constitutional Court determined whether Mr. Soobramoney had to receive dialysis treatment in accordance with section 27 of the Constitution. The court considered the fact that that the government has a constitutional obligation to provide health care. The Court stated that the constitution stipulates that everyone is equal before the law. This implies that if the treatment was to be provided to Mr. Soobramoney it would mean that all individuals in his position must receive the same treatment. Therefore, it was reasonable to deny such treatment because if it was administered twice a week to a patient it would cost R60 000 per year. The court held that "if the government was to provide for such treatment the health budget would be severely affected as the treatment is expensive." It further stated that the "state's failure to provide for such treatment did not constitute a breach of the constitutional obligation as it lacks resources that would enable it to act positively." This case shows that although the government has the duty to uphold the aforesaid right, it is limited to act within its available resources. However, the fact that aggrieved parties can access the Court for redress suggests that there is room for the IAAF rules to be challenged. Thus, since intersex athletes are at risk of subjecting themselves to unwanted treatment aimed at reducing their testosterone level, such treatment may have a negative impact on the health of such athletes. This could constitute grounds for challenging any rules of such a nature in the context of South Africa as the health rights of athletes have to be respected.

In the case of *Minister of Health v Treatment Action Campaign* (2002 (5) SA 721 (CC)), the Constitutional Court stated that "the state must act reasonably to provide access to socio-economic rights and that this right does not entitle anyone to demand service to be rendered immediately." The court held that the government policy failed to uphold the right to health as it excluded individuals who should be included to prevent the mother-to-child transmission of HIV. In this case, the court held that "the government was in breach of the right to health by failing to provide for a treatment that would prevent the mother-to-child transmission of HIV." This is because the court found that the state had the necessary resources to provide for such treatment. These two cases discussed in this section illustrate two situations

in which the right to health can be judicially enforced. The first one deals with an individual in need of treatment which is deemed to be beyond the means of the state. In such a case, denying such treatment will be justified. The second case deals with a situation where the state has the necessary resources to provide for such treatment but fails to provide for such treatment. Such failure will amount to a breach of a constitutional obligation and the state may be ordered to act positively by providing for such treatment. In the aforesaid case, it was mentioned that the state must give effect to the right to health if it has available resources. The effects of treatment which intersex athletes will be subject to could be dire. This in itself constitutes a ground for challenging such rules were they to have effect in the South African context. Overall, therefore, implementing the IAAF Rules in South Africa could have the effect of opening the door to complaints before courts based on the right to health which, as has been consistently noted, is justiciable.

5 Conclusion

When the 2018 IAAF Rules were rolled out, there were mixed reactions from all corners, with the IAAF keen on defending these rules, while organs such as the Human Rights Council could not hold back their disappointment in the IAAF's developments. These rules continue to be the subject of profound debate and have even been challenged before the CAS which Court has had them upheld. The CAS decision was appealed in the Federal Supreme Court of Switzerland. This Court too upheld these Rules in September 2020. The September 2020 decision appears to lay debates on these Rules to rest. However, an understanding of the human rights implications of the IAAF Rules does suggest that this debate is far from being settled. The discussion in this note set out to answer this question with regard to the right to health. In the discussion, it has been demonstrated that the IAAF Rules are inconsistent with human rights standards at both the international and national level. The process of reducing the testosterone level of intersex athletes risks endangering the lives of athletes who decide to subject themselves to treatment for the sake of competing in international sports. While both the CAS and Swiss Court have upheld the IAAF Rules, the said rules rest on shaky ground when viewed from the perspective of fundamental rights such as the right to health.

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CASES / VONNISSE

LEGAL PITFALLS OF INCOMPATIBILITY IN THE WORKPLACE: AN EXAMINATION OF THE LANDMARK RULING ON RACISM IN

Rustenburg Platinum Mine v SAEWA obo Meyer Bester 2018 (5) SA 78 (CC)

1 Introduction

In South African labour law, as is the position in other international jurisdictions, the contract of employment is founded on an employment relationship between employer and employee. This case note discusses the nature and scope of the implied term of trust and confidence in the relationship in relation to managerial employees, with particular emphasis on breach of fiduciary obligations as well as incompatibility (MacGregor "Racial Harassment in the Workplace: Context as Indicata SA Transport and Allied Workers Union obo Dlamini & Transnet Freight Rail" 2009 *Industrial Law Journal* 650). This obligation of mutual trust and confidence cuts both ways (*Western Platinum Refinery Ltd v Hlebela* (2015) 36 ILJ 2280) and means that the employer must not behave arbitrarily or unreasonably, or so as to destroy the necessary basis of mutual confidence (*Malik v BCCI* [1998] AC 20 35 and *Woods v WM Car Services (Peterborough) Ltd* 1981 IRLR 347).

Since the dawn of democracy in 1994 and influenced by constitutional changes in government, South African labour law has been drastically transformed. The new government, led by the African National Congress, had to come up with a legislative framework to deal with racism. Although the Labour Relations Act 66 of 1995 (LRA) does not explicitly deal with the question of racism at work, the importance of forging harmonious employment relationships is covered in the misconduct and incapacity in Schedule 8 of the LRA (Code of Good Practice: Dismissal). To this day, racism at the workplace remains a scourge and for this reason this case note examines the *Rustenburg Platinum Mine v SAEWA obo Bester* 2018 (5) SA 78 (CC)) case as its focal point. The effect of racism requires that a balance be struck between an employer's interest in managing its business as it sees fit and the employee's interest in not being unfairly and improperly exploited.

2 Methodology

The case note is the product of desktop analysis and further adopts a qualitative research methodology whereby case law, scholarly books and

legislative frameworks are examined and analysed. However, greater emphasis is placed on the 2018 case of *Rustenburg Platinum Mine v SAEWA obo Meyer Bester* as the focal point of the research study.

3 Background and issues

On 17 May 2018, the Constitutional Court made a landmark ruling on the thorny issue of racism at the workplace in South Africa. The facts of the case are that on 28 May 2013, Rustenburg Platinum Mine (employer) dismissed Mr Meyer Bester (employee) on grounds of insubordination and the making of racial remarks following parking bay allocations. The employer provided specified parking bays to certain employees and the person responsible for these allocations was the chief safety officer, Mr Ben Sedumedi. The employee was allocated an adjacent parking bay to Mr Solly Tlhomelang.

Sometime in April of 2013, the employee found a large 4x4 vehicle, similar in size to his own vehicle, parked in the adjacent parking bay. Though parking in the limited space was possible, it was difficult to reverse and he was concerned that the vehicles may be damaged in the process. The employee decided to take the matter up with Mr Sedumedi in an effort to arrange for the other vehicle to be parked elsewhere. The employee made repeated efforts to raise the issue with Mr Sedumedi, including phoning and emailing him, but without success.

On 24 April 2013, Mr Sedumedi was holding a safety meeting with other employees in attendance. The employee stormed into the meeting while it was in progress and pointed his finger at Mr Sedumedi, saying loudly and in an aggressive manner that Mr Sedumedi must "*verwyder daardie swart man se voertuig*" (loosely translated to mean "*remove that black man's vehicle*)." However, the employee alleged that it was in fact Mr Sedumedi who said "*jy wil nie langs 'n swart man stop nie ... dit is jou probleem*" ("*you do not want to park next to a black man ... this is your problem*"). The employee further alleges that he cautioned Mr Sedumedi not to turn the matter into a racial issue and that he intended taking the matter up with senior management. On 25 April 2013, the employer suspended the employee pending the outcome of a formal disciplinary enquiry. The employee was subsequently charged with two acts of misconduct and on 21 May 2013 was found guilty on both charges. The chairperson of the disciplinary hearing recommended the sanction of dismissal and on 28 May 2013, the employee was ultimately dismissed.

The employee referred an alleged unfair dismissal dispute to the CCMA. The commissioner held that the dismissal of Mr Bester was both substantively and procedurally unfair. The employer was not happy with the CCMA ruling and launched an application in the Labour Court to review and set aside the award. The Labour Court held that the employee had committed an act of serious misconduct that warranted his dismissal and concluded that, on that ground alone, the award stood to be reviewed and set aside. The Labour Appeal Court held that the Labour Court had erred in reviewing and setting aside the award of the commissioner. It confirmed the conclusion of the commissioner that the dismissal of Mr Bester was both substantively and procedurally unfair.

In light of the above factual background, the Constitutional Court had to determine two issues. The first issue to be determined was whether referring to a fellow employee as a "*swart man*" (black man) was racist and derogatory. The second issue was whether it was unreasonable for a CCMA commissioner to arrive at the conclusion that the use of the term was racially innocuous. This case note seeks to determine whether the sanction imposed by the employer was appropriate.

4 Overview of incompatibility as a ground for dismissal

In South African labour law, there are three main forms of dismissal – namely, misconduct, incapacity and dismissal on the basis of operational requirements. However, an employee may also be dismissed for other reasons related to incompatibility at the behest of a third party, and lastly as a result of a breakdown of trust and confidence. For purposes of this case note, dismissal on the basis of incompatibility takes centre stage owing to its overlapping relationship with racism in the workplace.

Grogan defines incompatibility as the "inability [on the part of an employee] to work in harmony either within the 'corporate culture' of the business or with fellow employees" (Grogan *Workplace Law* 11ed (2014)). It is common knowledge that personality clashes between employer and employee in the workplace can result in a breakdown of the employment relationship. More often than not, such a breakdown precipitates a dismissal based on the employee's incompatibility with fellow employees. Courts and other labour dispute forums have generally conceded that incompatibility forms a ground for a fair dismissal (Benjamin "The Italian Job: Eccentric Behaviour as Grounds for Dismissal" 1993 *Employment Law* 105). All cases should be decided based on the merits upon which they are founded (*Van Reenen v Rhodes University* (1989) 10 ILJ 926 (IC)). In other words, an employee who conducts himself or herself in a manner that gives rise to disharmony in the workplace may be found guilty of misconduct arising out of incompatibility. A classic example of this assertion can be found in the case of *Wright v St Mary's Hospital* ((1992) 13 ILJ 987 (IC)). In this case, the Industrial Court held:

> "[T]he employee must be advised what conduct allegedly causes disharmony; who has been upset by the conduct; what remedial action is suggested to remove the incompatibility; that the employee be given a fair opportunity to consider the allegations and prepare his reply thereto; that he be given a proper opportunity of putting his version; and where it is found that he was responsible for the disharmony, he must be given a fair opportunity to remove the cause for disharmony."(*Wright v St Mary's Hospital* (1992) 13 ILJ 987 (IC)1004H)

It is evident from the above judgment that the Industrial Court provided a test for incompatibility in the workplace. Furthermore, it has become accepted that in the absence of elements of misconduct, incompatibility in the subjective relationship between the employee and others in the organisation is best dealt with as a form of incapacity (Du Toit, Conradie, Giles, Godfrey, Cooper, Cohen and Steenkamp *Labour Relations Law: A Comprehensive Guide* 6ed (2015) 376–377).

Perhaps the most important term in a contract of employment is the implied term of mutual duty and confidence. This term was confirmed in the case of *Council for Scientific & Industrial Research v Fijen* ((1996) 17 ILJ 18 (A)), where Harms JA held that the relationship between employer and employee is in essence one of trust and confidence and that at common law conduct clearly inconsistent therewith entitles the "innocent party" to cancel the agreement (par 26).

The main point of this judgment is to illustrate that the employee should guard against any breach of the implied term of trust and confidence, as well as desist from causing disharmony in the workplace. Therefore, it is significant to note that disharmony manifests itself in many forms and confrontations as in *Rustenburg Platinum Mine v SAEWA obo Meyer Bester*, which may serve as a classic example of the breakdown of an employment relationship. The implied term is also justifiable at common law where it is expected that the employee should act in good faith and, of course, in the interest of the employer (*Impala Platinum Ltd v Jansen* (2017) ILJ 896 (LAC)). A breakdown of the employment relationship may ultimately result in a valid termination of the employment contract between employee and employer, provided that both substantive and procedural requirements are followed (Fergus and Collier "Race and Gender Equality at Work: The Role of the Judiciary in Prompting Workplace Transformation" 2014 *South African Journal on Human Rights* 384–485).

Having outlined instances where it is the employee who caused the incompatibility by breaching the implied term of good faith, the case note now seeks to explore and examine the conduct of the manager or employer in this regard. It is common knowledge that racial undertones may trigger the clashing of individual disagreements or differences on the basis of incompatibility in the workplace. The case of *Gorfin v Distressed* ((1973) IRLR 290) provides a better examination of an employee who caused disharmony in the employment relationship. In this case, the employee who was described as a "determined and forceful lady", worked as a domestic servant at a geriatric home and was dismissed after other staff members complained that she had sowed dissension in the home. The Industrial Tribunal held:

> "[b]efore any dismissal arising from personality difference will be considered fair, the employer must show that not only is there a breakdown in the working relationship but it is irremediable. So every step short of dismissal should first be investigated in order to seek an improvement in the relationship." (Harvey *Industrial Relations & Employment Law* 1998 1(102) par 1046)

In the end, incompatibility may render employment intolerable and this ultimately means that dismissal would be a justifiable sanction for incapacity.

5 Link between racism and incompatibility in the employment relationship

More often than not, racism goes to the heart of a breach of the implied term of good faith in the employment relationship; it has been a scourge in South African society for many years. For this reason, soon after the attainment of democratic rule in 1994, the new government felt the need to redress the

imbalances of the past through enacting legislation to root out racism both in society and in the workplace. The courts also developed a jurisprudence that was more progressive and further fostered anti-racism.

It is common knowledge that racism at the workplace thrives in a disharmonious climate and this was evident in the case of *Erasmus v BB Bread Ltd* ((1987) 8 ILJ 537 (IC)). In this case, a white employee, who was also a distributing manager, uttered derogatory words to the effect that black employees stink and they should consider taking a shower before coming to work. The employee uttered these words on more than two occasions and his conduct was found to foment disharmony in the workplace. The employee was subsequently suspended, disciplined, and dismissed on charges related to incompatibility.

Another classic case linking racism and incompatibility is that of *Lebowa Platinum Mines Ltd v Hill* ((1998) 19 ILJ 112 (LAC)), where a white supervisor referred to a fellow black subordinate as a "*bobbejaan*" (loosely translates to mean a "baboon"). A complaint was lodged with the employer and the white supervisor was given a final written warning for the misconduct. This decision was met with resistance from the union, which argued that a final written warning was too lenient and did not comprehend the gravity of the misconduct committed. The union further demanded that the white employee be dismissed, failing which industrial action would be taken. The employer resumed negotiations with the employee and eventually decided that the employee should take a transfer to another mine. The employee refused and maintained that he would remain in the employment of *Lebowa Platinum Mine*. After negotiations had deadlocked, the employer was compelled to dismiss the employee on the basis of operational requirements. Kroon JA held that the employee, in unreasonably refusing the transfer, left the door open for his discharge.

In the above decisions, acts of racism were directed at another fellow employee, but what happens when such conduct is not directed at the person of another? This was illustrated in the case of *Cronje v Toyota Manufacturing* ((2001) 22 ILJ 735 (CCMA)), where a managerial employee of the company was dismissed, *inter alia*, for distributing racist or inflammatory material (via e-mail and in hard copy), and for violating the company's internal internet and e-mail use code.

This led to the employee being suspended and facing disciplinary action. At the CCMA, the commissioner very carefully considered the nature of the material at issue (a picture of a gorilla with former President of Zimbabwe Robert Mugabe's head on it). The commissioner found that the employee's conduct in distributing this material was not only derogatory and offensive, but also racially stereotyping (*Cronje v Toyota Manufacturing supra* 745H–I). The commissioner held that distributing the material to a factory with 3 500 black employees negatively impacted on the efforts to build good relationships between labour and management in South Africa (*Cronje v Toyota Manufacturing supra* 739–740).

In a nutshell, it is significant to note that even employees at management level ought to conduct themselves in a manner that is compatible with the implied term of trust and confidence.

6 Lessons from *Rustenburg Platinum Mine v SAEWA obo Meyer Bester*

As with other cases relating to racism, the Constitutional Court in the *Rustenburg Platinum Mine* case began by acknowledging that the mining industry is a racially charged working environment for both races. This is attributed to the racial structure of the economic set-up engineered by the former apartheid system. It is common knowledge that the South African economy is reliant, among other factors, on mining. Therefore, the apartheid structure was designed to assign white employees to positions of responsibility over their black counterparts.

The court further interrogated whether, objectively, the words "black man" were reasonably capable of conveying to the reasonably hearer that the phrase had a racist intent. In an analysis of the employee's conduct, it is significant to highlight that his utterances had the potential of causing disharmony and tension in the workplace, which would point to incompatibility. Racism cannot be tolerated in the workplace; at a minimum, it goes against the values and spirit of the Constitution of the Republic of South Africa, 1996 (Constitution). The Constitution is founded on values of human dignity that seek to achieve equality and advancement of human rights and freedom (s 1(*a*) of the Constitution). Most importantly, the Constitution is also founded on non-racialism and non-sexism (s 1(*b*) of the Constitution). Furthermore, the Constitution gave birth to the Employment Equity Act 55 of 1998 (EEA), which aims to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination. Section 6(1) of the EEA provides that "no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, colour." All employees and employers of all colours are expected to carry out their duty of implied trust and confidence along the lines of the provisions of the Constitution and EEA respectively, with a view to ensuring harmonious employment relationships. The court focused on the fact that the employee did not demonstrate remorse for the derogatory words used towards black employees. This further illustrates the lack of accountability and responsibility on the part of perpetrators of racism and racial prejudices.

To sum up the test for incompatibility in relation to the *Rustenburg Platinum Mine* case, this case note remarks that the employee's conduct of calling a fellow black employee a black man caused disharmony, and further had the potential of deepening tensions among employees. In other words, the employee's action was irremediable considering the volatility of racial tensions in the workplace. The case note further seeks to highlight that the tension was as a result of the employee's action and this had an adverse effect on the employer's business. Having noted and examined the above test, this case note concludes by acknowledging that the dismissal of the employee was the only reasonable way to address the issue of racism at the workplace.

7 Conclusion and recommendations

The case note began with an examination of the common-law contract of employment and the impact of the implied term of trust and confidence on the employment relationship. Race relations in the workplace were also briefly examined. The *Rustenburg Platinum Mine* case provided a detailed account of deep personality differences in an employment relationship that triggered the Constitutional Court to intervene and provide guidance on racism at the workplace. It is significant to note that this case started in the CCMA and made it all the way up to the Constitutional Court.

The case note also gave an overview of incompatibility and what constitutes a dismissal for incompatibility. Several cases on the elements of incompatibility were examined and analysed. The impact of racism and incompatibility in the employment relationship was investigated and several cases dealing with racism were analysed and discussed. In the end, the case note records the legal pitfalls of incompatibility at the workplace.

Insofar as addressing the issues of racism at the workplace is concerned, the case note recommends the following:

- An effective labour policy framework should be developed with the aim of blacklisting perpetrators of racism at the workplace. This would have a deterrent effect on would-be perpetrators.
- Both government and other stakeholders, such as employers, should consider overhauling the current demographic imbalance in the workplace. To achieve equity at the workplace, transformation should therefore be the main objective as a precursor to addressing equality.
- Employers should also foster social interaction platforms among employees of all races outside of formal working relations.

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IS THE SANCTITY OF CONTRACT CAST IN STONE? AN EVALUATION OF

AB v Pridwin Preparatory School (1134/2017) [2018] ZASCA 150; [2019] 1 All SA 1 (SCA); 2019 (1) SA 327 (SCA) (1 November 2018)

1 Introduction

This matter involves an appeal by AB (father) and CB (mother) (parents of DB and EB) against a decision of the South Gauteng High Court. The High Court found that the decision of the first respondent (Pridwin Preparatory School) to terminate a contract that had been concluded between it and the appellants was constitutional and acceptable, and thus found in favour of the respondents. This meant that the two children had to find another school to attend. The school based its action on a termination clause in paragraph 9.3 of the contract that had been concluded between the parties.

The appellants (AB and CB) failed to gain direct access to the Constitutional Court[1] and were granted leave to approach the Supreme Court of Appeal (*AB v Pridwin Preparatory School* (1134/2017) [2018] ZASCA 150; [2019] 1 All SA 1 (SCA); 2019 (1) SA 327 (SCA) (1 November 2018). This discussion focuses on the Supreme Court of Appeal judgment. The appeal was dismissed with costs, four of the five judges concurring, and one judge, Mocumie JA, offering a dissenting judgment.

Five respondents were cited in this appeal: Pridwin Preparatory School, its principal (Mr Marx), the school's board, the Gauteng Education Department, and the Independent Schools Association of Southern Africa.

The appellants based their appeal on various grounds. Their fundamental argument rested on the claim that the termination clause that the school relied on was unconstitutional for various reasons, which meant that the school had no right to exclude the two children from attending the said school.

[1] Subsequently the matter reached the Constitutional Court (AB v Pridwin Preparatory School (CCT294/18) [2020] ZACC 12 (17 June 2020) where the Court found in favour of the Applicants (AB and CB) and in their judgment echoed many of the sentiments expressed in this article. In paragraph 248 of the ConCourt judgment it was specifically stated that Pridwin's decision to expel DB and EB was, based on constitutional, international and legislative instruments, unacceptable since Pridwin Preparatory School did not fulfil its negative obligation not to interfere with the basic right to education of DB and EB without a fair process, and additionally omitted to give them the opportunity of being heard and expressing their views in this matter.

The appellants argued that: the school had a constitutional obligation to act reasonably and afford the appellants a hearing before cancelling the contracts; the school did not adhere to the Promotion of Administrative Justice Act (3 of 2000 (PAJA)); and the contract (specifically the termination clause invoked by the school) was unconstitutional based on public policy (par 2 of the judgment).

2 Majority judgment

Cachalia JA's majority judgment provides a thorough discussion of all the elements of the case, and Mocumie JA, in the dissenting judgment, rightly refers to this judgment of Cachalia JA as a "well-crafted judgment" (par 83). Cachalia JA deals extensively with section 28 of the Constitution of the Republic of South Africa (1996, the Constitution) (best interests of the child) and with section 29 (right to basic education), as well as with the application of PAJA in this matter and the application of public policy with regard to the interpretation of contracts. This discussion focuses on the latter – namely, the application of public policy when interpreting contracts.

The appellants and the school entered into a contract (the relevant sections being highlighted in clauses 5–8 of the agreement), which contained the heading: "Parent ... Declaration and Contract of Enrolment". It was followed by this statement:

> "[T]he rights and obligations contained in this Contract are binding ... and must be carried out in order for the Child to be successfully enrolled and retained at the School." (par 5 of the judgment)

The contract also contained a paragraph headed "Important notice", which specifically stated:

> "By ... entering into this Contract you agree to the conditions contained in this document as well as any terms and conditions contained in the Policies of the School, which forms part of this Contract. It is important that you read and understand these Policies as they have important legal consequences for you. If there is any provision in this Contract that you do not fully understand, please ask for an explanation before signing." (par 6 of the judgment)

The agreement specifically highlighted certain clauses, and sections of clauses as indicated in this text.

> "Policies" were defined as: "*The rules and principles adopted by the School, as published by the School from time to time, which are used to regulate the day-to-day running of the School. These Policies may include (but need not be limited to) the School rules; Schedule of Fees; Debtor's Policy; Terms and Conditions of the School; as well as the Code of Conduct and the School's Cautionary and Grievance Procedures for Parents and are available on request free of charge, or on the School's website.*" (emphasis added).

There are also other sections that are particularly highlighted and to which the parties' attention is drawn. These include "General Obligations of the School", "Parent's General Obligations" and "Termination and Notice Requirements" (par 7). Under "General Obligations", it is especially important to note that the "Head" (principal of the school) "may at his/her

sole discretion, cancel enrolment in accordance with the rules" (par 7 of the judgment; clause 2.1 of the agreement) and that the agreement:

> "regulates the enrolment and admission of your child to the school and also regulates the relationship between the School, your Child, yourself and/or a Third party once your child is admitted and enrolled with the School." (par 7 of the judgment; clause 2.2 of the agreement)

At clause 4.2, the parents' obligations were highlighted:

> "[Y]ou are required to: fulfil your own obligations under these terms and conditions; ... maintain a courteous and constructive relationship with School staff". (par 7 of the judgment)

Clause 4.3 endowed the Head with discretion to:

> "remove or … suspend or expel your child if your behaviour is in the reasonable opinion of the Head so unreasonable as to affect or likely to affect the progress of your child or another child (or other children) at the School or the well-being of the School Staff or to bring the School into disrepute." (par 7 of the judgment)

The "Termination and Notice Requirements" indicate that parents can cancel the agreement "at any time and for any reason, provided that you give the School a term's notice". Clause 9.3 (the clause the school invoked to cancel the agreement and thus bar DB and EB from further attendance at the school) stated:

> "The School also has the right to cancel this Contract at any time, for any reason, provided that it gives you a full term's notice, in writing, of its decision to terminate this Contract. At the end of the term in question, you will be required to withdraw the Child from the School, and the School will refund to you the amount of any fees pre-paid for a period after the end of the term less anything owing to the School by you." (par 7 of the judgment)

In terms of clause 9.4 of the agreement, the school retained the right (without prejudice to other remedies) to:

> "cancel this Contract immediately and has no obligation to return any Deposit or pre-paid fees to you if you are in material breach of any of your obligations and have not (in the case of a breach which is capable of remedy) remedied the material breach within twenty (20) business days of a notice from the School requiring you to remedy the breach." (par 7 of the judgment)

At clause 9.5, the contract explained what was seen as a material breach, which included (among other things) failure to "uphold the Policies and/or Rules of the School." (par 7 of the judgment; clause 9.5.1 of the agreement)

For purposes of this case, clause 9.5.5 was also of importance. It continued the explanation of material breach and stated that a material breach also occured when a parent or the parents:

> "act in such a way that you or the Child become seriously and unreasonably uncooperative with the School and in the opinion of the Head, your or your Child's behaviour negatively affects your Child's or other children's progress at the School, the well-being of School staff, or brings the School into disrepute." (par 7 of the judgment)

The school invoked clause 9.3 specifically in order to cancel the agreement, but accepted that such termination was also subject to constitutional scrutiny and maintained that they did indeed adhere to constitutional values (par 8 of the judgment).

The events that led to the cancellation of the agreement are detailed in paragraphs 9–22 of the judgment and centre on what was considered to be abusive, uncooperative and unacceptable behaviour by the appellants (especially the father AB) in dealings with the school (par 9–22). Eventually, the school, together with the second respondent, Mr Marx as the principal of the school, had had enough and cancelled the contract based on clauses 4.3 and 9.5 read together and in terms of clause 9.3 (termination and notice provision) (par 22 of the judgment). The school believed that a material breach had been committed by the appellants (in fact various breaches, stretched over an extended period and which were clearly listed by the school) and that the appellants had acted in such a manner that they had become "seriously and unreasonably uncooperative with the School and in the opinion of the Head, your behaviour negatively affects your child's or other children's progress at the School, the well-being of School staff, or brings the School into disrepute" (par 22 of the judgment).

The court also pointed out that the appellants were well aware of the content of the contract and that if there were any provisions or clauses they did not understand, they had been offered the option of having these uncertainties explained to them, an opportunity they had not used. They were also well aware that they had to adhere to a certain standard of conduct and that there was no recourse to a hearing or lesser sanctions imposed by the school. Additionally, it is important to note that the appellants had twice signed the contract within the space of four years (par 23–24). This had happened each time the parents had enrolled a child at the school. The court pointed out that despite this, the appellants persisted with their claims.

As mentioned, the focus of this discussion is the application of public policy with regard to the interpretation of a contract. In paragraphs 26 and 27 of the judgment, Cachalia JA refers to the appellants' argument that:

> "the termination clause (clause 9.3) be declared unconstitutional, contrary to public policy and unenforceable 'to the extent that it purports to allow Pridwin to cancel the parent contracts without following a fair procedure and/or without taking a reasonable decision'". (par 26)

In paragraph 27, the majority judgment outlines the main aspects to be considered when applying public policy to the interpretation of a contract, the most salient points being that a contract "that is *prima facie* inimical to a constitutional value or principle, or otherwise contrary to public policy" (*Barkhuizen v Napier* 2007 (5) SA 323 (CC) par 28; *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) par 46 and 47) will be declared invalid. Where a contract is "not *prima facie* contrary to public policy if its enforcement in particular circumstances is, a court will not enforce it" (*Bredenkamp v Standard Bank of South Africa Ltd supra* par 47). Another consideration was that a court must use this power sparingly, and

only in the "clearest of cases in which harm to the public is substantially incontestable" and this judgment should not "depend on the idiosyncratic inferences of a few judicial minds" (*Bredenkamp v Standard Bank of South Africa Ltd supra* par 47). The court also referred to the fact that direct reliance on "abstract values of fairness and reasonableness in order to escape the consequences of a contract because there are not substantive rules that may be used for this purpose will not be entertained by a court" (*Potgieter v Potgieter NO* 2012 (1) SA 637 (SCA) par 32–34). Importantly, it was also added that the appellants did "not attack the enforcement of the contracts by relying directly upon the School's failure to act fairly and reasonably. What they do, instead, is attempt to import this duty through sections 28(2) and 29(1)(*a*) of the Constitution" (par 28 of the judgment).

At paragraphs 75–80, Cachalia JA reverts to the public policy challenge and finds that there are no grounds for "importing a duty to act fairly or reasonably into the termination clause from section 28(2) and section 29(1) of the Constitution, or from PAJA" (par 76).

Cachalia JA adds that fairness and reasonableness cannot be utilised as "free standing grounds to impugn the terms of a contract in an attempt to invalidate the terms of the contract" and such an argument would have no merit (par 76). According to Cachalia JA, the clause does not at face value, or intrinsically, offend any constitutional value or principle; nor is it contrary to public policy. Furthermore, the appellants had offered no facts to suggest the contrary (par 76). Cachalia JA also states that this is an example of a common feature of commercial contracts and offers nothing untoward (par 77).

Cachalia JA deals with the appellants' argument that the enforcement of the contract is contrary to public policy since the legal convictions place a duty on Pridwin Primary (first respondent) to afford the appellants an opportunity to be heard and also obligate the first respondent to act reasonably towards the appellants. (They offered a document signed by the Department of Education and the National Association of Independent Schools (NAISA) (of which ISASA is a part) styled the "Rights and Responsibilities of Independent Schools" in support of their argument.) This was dismissed since it was only seen as a communications report and not a policy document for independent schools that are affiliated to ISASA to be obliged to follow and therefore formed no basis for public policy.

Additionally Cachalia JA points out that the appellants' attempt to rely on Regulation 6(1)(i) (PAJA Regulations 6(1)(i) and 6(2) of the Gauteng Regulations. Registration and Subsidy of Independent Schools, GN 2919 in *GG* 308 of 2013-10-25) in order to support a right to a hearing under PAJA, "contains no injunction for independent schools to apply a fair procedure before terminating a parent contract" (par 78). He adds that no other facts were offered by the appellants to indicate that enforcement of the termination clauses indeed offends public policy (par 79). Indeed, he praises Mr Marx, the principal, for his exemplary conduct in this matter. He adds that the parents were fully aware of what the contract entailed (see par 80). The application was dismissed with costs, including the costs of the two counsel, with four of the five judges concurring.

Cachalia JA thus seems to highlight two aspects when dealing with the appellants' claim that public policy has been offended in this matter. Dealing first with the claim that the enforcement of the contract offends public policy since it does not allow for a hearing before expulsion, Cachalia JA finds that this action of enforcement was not contrary to public policy; this was a commercial contract – the appellants were fully aware of its content and the consequences of breach, and concluded it freely and autonomously (see par 80). Furthermore, the contract was not one sided or unduly onerous on one of the parties (par 80). Cachalia JA also finds that to try and import this duty (to afford the parents a hearing), via sections 28 and 29 of the Constitution and regulation 6 under PAJA, would be intolerable and unacceptable.

Secondly, on the face of it or even intrinsically, the clause (9.3) contained nothing unconstitutional or contrary to public policy (par 76). So the clause itself does not offend public policy, according to Cachalia JA. However, it gives the school the right to cancel the contract for any reason, at any time (as long as it gives a full term's notice) and then at the end of the said term, the child must be withdrawn from the school since the contract has been cancelled (clause 9.3 of the contract), which is clearly not constitutional or in line with public policy.

3 Minority judgment

Mocumie JA, in her minority judgment, offers a dissenting judgment. She is of the view that the school did not consider the best interests of the child, as required by section 28 (see par 96–107) and is also of the opinion that the SA Schools Act and the Constitution impose "a negative obligation on independent schools not to diminish the right to basic education" (par 95). She does not find it necessary to address the appellants' claim that PAJA should be applied in the matter, since she finds the clause to be unconstitutional in light of the application of sections 28 and 29. She also holds that it was unconstitutional with regard to the application of public policy (par 108–119). Mocumie JA spends a significant time explaining the need to reconsider the decision in *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* (1984 (4) SA 874 (A)), where it was decided that "an agreement operated in an unfair or unreasonable manner would not ordinarily constitute a ground on which to challenge such an agreement" (paragraph 109 of the judgment). (She refers to *South African Forestry Company Ltd v York Timbers Ltd* [2004] ZASCA 72; [2004] 4 All SA 168 (SCA); and *Brisley v Drotsky* [2002] ZASCA 35, which support the statement in *Maphango v Aengus Lifestyle Properties (Pty) Ltd* ([2012] ZACC 2; 2012 (3) SA 531 (CC); 2012 (5) BCLR 449 (CC)) – that because an individual judge finds the implementation of a contract unfair, it is not to say that it can be deemed as such.) In contrast, she cites Ngcobo J's judgment in *Barkhuizen v Napier* ((CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (4 April 2007)), which indicates that:

> "the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights." (par 30)

Mocumie JA suggests that this is the route the majority judgment in this case should also have followed. Additionally, she points out that the law of contract should be infused with constitutional values, which would include values of *ubuntu* and this should supersede a mere dogmatic application of *pacta sunt servanda* (confirmed by Moseneke J's comments in the recent case of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30).

In the past, the dogmatic application of *pacta sunt servanda* has ruled the roost in our court rooms but the court in *Natal Joint Municipal Pension Fund v Endumeni Municipality* ((920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Natal Pension Fund*) adopted a different approach to the interpretation of documents. This approach has been used consistently by our courts since the *Natal Pension Fund* decision. In this approach, interpretation involves the process of attributing meaning to the words used in a document (be it legislation, some other statutory instrument, or a contract), while "having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence" (*Natal Pension Fund supra* par 18).

Irrespective of the nature of the document, the court held that the language of the document must be considered in the light of:

> "the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production." (par 18)

All these factors must be considered; and the process is objective in nature, not subjective, with a sensible meaning being preferred to one that leads to an insensible or "unbusinesslike" result, or an interpretation that undermines the apparent purpose of the document (par 8). The language of the provision is the undisputed starting point, but the provision must be read in context, while having regard to the purpose of the document and without losing sight of the background preparation and production of said document (par 8).

In terms of the *Natal Pension Fund* judgment, much more is considered during interpretation than just the language and what is stated on a pure linguistic level. It is not that the *pacta sunt servanda* principle is disregarded, but the court looks wider in its interpretation and does not slavishly adhere to this principle.

In paragraphs 111–113, Mocumie JA explains the approach followed when applying public policy to the law of contract. This comes down to two questions: whether the clause is reasonable, and if so, whether it should it be enforced in light of the specific circumstances that prevented compliance (*Barkhuizen v Napier supra* par 56, 57 and 58). Mocumie JA then, in paragraphs 114–119, applies this approach to the *Pridwin* case, and comes to the conclusion that clause 9.3 (the termination clause) is unreasonable (the first step in the approach), mainly because

> "it makes no provision for a hearing or representations prior to expelling any child on the basis of a breach of the contracts on the part of the parents." (par 119)

The dissenting judgment also indicates a "second flaw" – namely, that "the terms of the contracts are overbroad ie termination for 'any reason'" (par 116). Mocumie JA states in paragraph 118:

> "It would be unlikely even in these circumstances, to imagine that a society such as ours, protective of its children, would approve of a clause in a contract between parents and a school, which expels a child from a school out of no wrongdoing on his or her part but that of their parents. It can never be in the best interests of a child where the school fails to use all measures available to deal decisively with parents, to resort to such unconscionable intrusion into the right to compulsory education of a child, under the guise of the 'sanctity of a contract'. In the worst case scenario, even in the law of contracts the appellants cannot be heard to have waived the rights of DB and EB to compulsory education or to be heard on the basis which is clearly contrary to their best interests and public policy." (par 118)

Mocumie JA also refers to *Bafana Finance Mabopane v Makwakwa* ([2006] ZASCA 46; 2006 (4) SA 581 (SCA); [2006] 4 All SA 1 (SCA) par 10) to reiterate that a party cannot be expected to waive the protection to which they are entitled according to legislature, even if they have signed an agreement to this end. This is what has happened in this case, according to Mocumie JA, since enforcement of the contract would mean that EB and DB have waived their rights to a hearing or a fair trial.

According to the dissenting judgment, clause 9.3 is contrary to public policy and is unconstitutional and unenforceable (par 119). Mocumie JA is clearly of the view that a clause such as 9.3, which affords the child no recourse or even an option for a hearing, cannot be accepted as being in line with public policy. Additionally it also gives the school far too much leeway in the application of their policy with regard to expulsion, since the terms of the contract are so wide and "overbroad" (par 118). It also disregards the best interests of the child, which are expressly provided for in terms of section 28 of the Constitution in favour of sanctity of contract. Mocumie JA is also of the opinion that owing to the enforcement of clause 9.3, the children's rights to compulsory education and the right to be heard were waived.

4 Application of public policy

The application of public policy is no easy task. Kruger points out that applying the test to determine public policy is problematic for various reasons (Kruger "The Role of Public Policy in the Law of Contract, Revisited" 2011 128(4) *SALJ* 712–740). He indicates that there is no clear test for public policy, and a general inability to delineate clearly the various considerations that help to shape a public policy analysis. Additionally, the relationship between what is constitutional, and the principles that have always regulated the analysis and application of public policy in the past, is also problematic. Then there is also the difficulty of applying this effectively on a case-to-case basis. However, it must be done. Moseneke J, in his

minority judgment in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* (*supra*), refers to the fact that the "concept of *ubuntu* and the necessity to do simple justice between individuals have been recognised as informing public policy in a contractual context" (*Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd supra* par 61).

South African case law indicates that the enforcement of contractual terms may be upheld, even if these terms have been agreed to by parties in a voluntary manner (*Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173; *Magna Alloys and Research (SA) (Pty) Ltd v Ellis supra* par 891; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *Napier v Barkhuizen* 2006 (4) SA 1 (SCA)). Cachalia JA, in this case, could have followed that route and found that the fact that the school, by means of the principal, can expel a child for *any reason,* without offering the said child/children any opportunity for a hearing, does not conform to public policy As absurd as it may sound, strict enforcement of the contract means that the principal has neither to explain nor rationalise his or her decision; he or she may expel a child simply because he or she does not like the child's face ("any reason" means exactly that – any reason). Obviously, in this matter, the principal felt that the events leading up to the cancellation of the contract warranted his decision to cancel the contract and to expel the two children, but the wording of the contract gives him or her c*arte blanche* when it comes to expulsion. Nonetheless, Cachalia JA did not find this to be against public policy or onerous or unconstitutional. It must be asked how this can promote simple justice between individuals, as called for by Moseneke J. And how does this serve the best interests of the child? Or promote constitutional values, as required by public policy.

It is submitted that the appellants should also have referred the court to section 36 of the Constitution, which calls for all relevant factors to be taken into account to determine if a limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom . These are: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose (see s 36 of the Constitution of South Africa, 1996). If one considers section 36 and its application, then the court might have come to a different conclusion. Section 36(2) provides that except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights

.

The two rights that seem paramount in this case are the best interests of the child and the right to education. The effect of the limitation (from the school's side) seems to be to exclude the children from obtaining education at the particular institution due to the conduct (or misconduct) of the parents, which the school also felt impacted on other children and was thus not in the best interests of the children (the other children). The extent of this limitation means that the children are not able to attend this educational institution.

Then of course questions must be asked as to the relation between the limitation and its purpose (s 36(1)(*d*)), and whether a less restrictive means is available and applicable in order to achieve the same purpose (s 36(1)(*e*)).

The school basically expelled two children because of the actions and conduct of the parents. The school believed the parents' conduct breached the agreement in place between the parties. The parents did not adjust or amend their actions and cooperate with the school as requested and the school believed this was to the detriment of the other children; by expelling DB and EB, the school saw itself as acting in the best interests of the other children.

From the school's side, the purpose of limiting the right to education was to serve the best interests of the children (all the children other than DB and EB) and this made it justifiable. But it should be asked whether a restraining order against the parents, especially the father, could not have been sought to prevent him antagonising and terrorising the educators and coaches as he did. Would such a (less restrictive) limitation, not also have served the purpose of serving the best interests of the children, including DB and EB?

It is submitted that the context of the situation – that these are children and that this matter involves schooling and education – should surely also make the court think twice before deciding such a clause does not fly in the face of public policy. Cachalia JA mentions that such a clause is a common one in commercial contracts and that the indirect effect it would have on the children should not be offered as reason to declare it contrary to public policy. (He refers to the cancellation of a lease agreement as a similar example of the "sins of the fathers" being visited on the children, since the breach of parents causes children (who are innocent) to suffer.) Cachalia JA uses an interesting example – that of a lease agreement that lapses, affecting children whose actions did not contribute to the situation at all. A lease agreement is a commercial agreement and Cachalia JA sees the agreement between the parents and the school as a purely commercial agreement as well. But can it be seen as exactly the same?

Breen states:

> "Arguably, the standard of the best interests of the child is the universal principle guiding the adjudication of all matters concerning the welfare of the child." (Breen *The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law* (2002) 1)

The Constitution has elevated the "best interests of the child" to a fundamental right and reiterates that it should be of paramount importance in any matter that concerns the child. This is echoed in the Convention on the Rights of the Child, (s 28 of the Constitution of South Africa, art 3(1) of the Convention). This principle must also be considered if any other constitutional or legal right of a child is affected (see *Kotzé v Kotzé* 2003 (3) SA 628 (T); *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T)). The best interests of the child have to be "determined in every individual case on the basis of all relevant facts and considerations" (Malherbe "The Constitutional Dimension

of the Best Interests of the Child as Applied in Education" 2008 2 *Journal of South African Law / Tydskrif vir die Suid-Afrikaanse Reg* 268).

If this standard is applied in the case at hand, it is clear that Cachalia JA's reference to a lease agreement cannot be equated with an agreement that involves the education of children which directly involves the best interests of the child (of DB and EB in this case). Expelling children from school because of the parents' behaviour is not in the best interests of the child and flies in the face of public policy, and therefore has a far greater impact on the children one would argue than the cancellation of a lease agreement.

Furthermore, it is submitted that clause 9.3, which gives the school (and specifically the principal) *carte blanche* as far as expelling children is concerned – the only proviso being the giving of a term's notice – is also contrary to public policy. According to the agreement, no reason has to be provided (which does not even happen with the cancellation of a lease agreement) and there is no recourse for the expelled children or their parents.

Mocumie JA in the minority judgment certainly makes valid points that the majority either disregarded or dealt with in an unsatisfactory manner, which, it is submitted, has led to the incorrect decision by the court. This leads to the conclusion that public policy was not served by the majority judgment in this case; sanctity of contract has been protected to the detriment of constitutional values.

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INTERPRETATION OF A TRUST DEED

Harvey v Crawford 2019 (2) SA 153 (SCA)

1 Introduction

Recently, in *Harvey v Crawford* (2019 (2) SA 153 (SCA)) (*Harvey*), the Supreme Court of Appeal had to consider whether the adopted grandchildren of a trust donor were beneficiaries in terms of a notarially executed deed of trust. Presently, an adopted child is for all purposes regarded as the child of the adoptive parent, and an adoptive parent is for all purposes regarded as the parent of the adopted child (s 242(3) of the Children's Act 38 of 2005) (the Children's Act)). This was also the case in 1953, when the deed of trust in *Harvey* was executed and when the Children's Act 31 of 1937 (the 1937 Act) regulated adoption. However, contrary to current legislation, the 1937 Act included a proviso with regard to property that was included in an instrument prior to the date of the adoption order: the instrument was required to display a clear intention that such property would indeed devolve upon an adopted child.

Upon interpretation of the deed in question, the court ruled that the adopted children were not entitled to benefit from the capital in the trust. In this regard, the majority opted for a rather restrictive approach, seemingly out of step with recent developments in the interpretation of contracts. The minority decision, on the other hand, came to the opposite conclusion, displaying a more balanced approach to the issue of interpretation. This decision raises some noteworthy issues regarding the interpretation of *inter vivos* trust deeds with specific reference to adoption. It is submitted that the court erred in its findings; the aim of this case discussion is to analyse the judgment.

2 Facts

In 1953, Mr Druiff (the donor) executed a notarial deed of trust in terms of which the trust fund had to be applied for the benefit of his four biological children, whom he referred to by name, and of any child or children of his biological children (thus grandchildren) who may be alive at that time (par 2). On the passing of each of his four children, the one-fourth capital share of each child had to be paid to his or her descendants *per stirpes*, in equal shares. If the whole of the capital had not yet been applied for the benefit of the beneficiaries, the trust deed would remain in force until the death of all four children of the donor (see par 3 of *Harper v Crawford* 2018 (1) SA 589 (WCC) (the court *a quo*)), at which stage clause 6 (the termination clause) would apply. Although this clause also provided for the donor's children, such references are irrelevant as the termination clause only came into

effect once they had all passed away. The relevant parts of the termination clause provided that each child's share devolved upon his or her legal descendants *per stirpes*. If a child had no legal descendants, such share had to be divided equally between the remaining legal descendants *per stirpes*, and if there were no legal descendants of such children, then the trustees had to divide the capital between such persons as may be nominated as the heirs in the will of the donor. On the same day he executed the trust deed, the donor also drafted a will in which he nominated his four children as his residual heirs, with their descendants inheriting in the event that any of them passed away before he did.

At the time that the trust deed was executed, the donor's children all had biological children of their own, except for his daughter, Ms Harper. At some stage, Ms Harper had informed the donor that she was considering adoption and, after his death, she adopted two children, a son and a daughter (the adopted children) (par 42). Sometime thereafter, Ms Harper approached the Western Cape Division of the High Court, seeking an order that her one-fourth share would upon her death devolve upon her two adopted children. At that stage, she was the only child of the donor still alive and, upon her death, the trust would expire.

3 Judgments

3 1 Court a quo

In the court *a quo*, the relief sought was based on the grounds that it was not evident from the trust deed that the donor had intended to exclude the adopted children from benefiting from the trust; that, in line with the spirit, purport and objects of the Bill of Rights and public policy, the trust deed should be interpreted to include adopted children; that the donor had been aware of Ms Harper's difficulties in carrying a pregnancy to term when he executed the trust deed; and that, in the alternative, the trust deed be varied in terms of section 13 of the Trust Property Control Act 57 of 1988 (par 5). The application was dismissed, essentially on the basis of the court's interpretation of the trust deed that the donor only intended biological descendants to benefit from the trust (par 26).

The matter then went on appeal. Before the appeal could be heard, Ms Harper passed away (par 10) and she was substituted by the executor of her estate, Mr Harvey, as the first appellant (par 43). The adopted children were the second and third appellants. The principal argument of the appellants was that the court *a quo* did not properly apply the rules relating to the interpretation of contracts (par 11). The respondents (the trustees, the Master of the High Court and the children of Ms Harper's siblings), on the other hand, argued that because the donor had made provision for the possibility of a beneficiary dying without issue, and that he had not made express provision for adopted children, despite being aware of Ms Harper's inability to have a biological child, he did not intend for adopted children to benefit from the trust deed (par 12).

The constitutional and public policy arguments, and variation of the trust deed in terms of section 13 of the Trust Property Control Act, were considered, but rejected by the court. The authors have not focused on the peripheral aspects of public policy and variation of the trust deed and mainly dwell on the central matter of interpretation on which the case turned. There is both a majority judgment (*per* Ponnan JA with Tshiqi, Zondi and Dambuza JJA concurring) and a dissenting minority judgment (*per* Molemela JA), which differ markedly in approach and outcome. At the outset, it may be mentioned that the authors prefer the minority decision for reasons that follow.

3 2 Majority judgment

Ponnan JA relies on *Cohen v Roetz In Re: Estate Late AJA Heyns* (1992 (1) SA 629 (AD)) (*Cohen*), where it was held (639E) that a child or grandchild "does not go beyond a testator's own child (his bloedkind) or an own child of such child" and that the word "descendant" in its "normal or usual meaning … includes only blood relations in the descending line and excludes adopted children" (640A). He also refers to *Brey v Secretary for Inland Revenue* (1978 (4) SA 439), where the court said (442H–443D) that the word "child" has been interpreted by our courts to refer to "a legitimate child only"; and he relies on the *Concise Oxford Dictionary* 9ed to conclude that the ordinary meaning of the word "issue" connotes blood descendants (par 47–48). Although he points out that the matter turns on the construction to be placed on the words "children", "descendants", "issue" and "legal descendants" in the trust deed (par 41) in order to "ascertain the intention of the donor" (par 47), Ponnan JA nevertheless fails to consider what was meant by "legal descendants". He indicates that the donor should have used express terms to include adopted children in the trust deed, that his omission in this regard indicated that he did not intend to include them (par 51), and that he only had in mind descendants through the bloodline (par 47–48). Consequently, the majority dismissed the appeal with costs (par 75).

3 3 Minority judgment

Determining the central issue to be the interpretation of the provisions of the trust deed (par 23–24), and deliberating whether the provisions revealed an intention to exclude adopted children (par 27), Molemela JA considers various judgments. Relying on the decision in *Boswell v Van Tonder* (1975 (3) SA 29 (A)) (*Boswell*), where the court held that adopted children were included under "children", but that the legal fiction of an adopted child being deemed to be a biological child is rebutted if the relevant instrument, read as a whole, reveals an intention to exclude the adopted child, she identifies the question in *Harvey* to be whether the application of "the ordinary rules of interpretation … reveals a testamentary intention that displaces or rebuts that legal fiction" (par 29). She points out that each document must be read as a whole and every will has to be interpreted according to its own language and context (par 30); that the founder used the neutral term "child"

which, according to the decision in *Boswell* (38), cannot be assumed to exclude an adopted child where an instrument was executed before the adoption (par 31); and that the use of the word "any" (where the beneficiaries of the trust were described as "[t]he child or any children" in the trust deed) lends an inclusive character to the class of grandchildren the founder had in mind, and thus included adopted children as income beneficiaries of the trust (par 32). She further supports her view with the context within which the trust deed had been executed – namely, that the donor had been aware of the possibility that Ms Harper might adopt (par 33). Molemela JA also distinguishes the position in *Harvey* from *Cohen* (which carries a lot of weight in the majority decision – see heading *5 4* below); the bequest in *Cohen* had to devolve upon the eldest child, whereas in *Harvey*, no one had been excluded from the trust deed (par 34). She further deduces that it is "highly improbable" that the founder would refer to biological grandchildren as "legal descendants" and that the addition of the prefix "legal" thus broadened the class of beneficiaries to include adopted children (par 33).

Molemela JA concludes that she could not find anything to indicate that the donor intended to exclude adopted children from benefiting from the trust deed; that the words "children", "descendants", "issue" and "legal descendants" in the trust deed should be interpreted to include adopted children; and that the appeal should succeed with costs (par 40).

4 Evaluation

4 1 Introduction

In terms of section 71 of the 1937 Act, an adopted child was "for all purposes whatsoever … deemed in law to be the legitimate child of the adoptive parent". An adopted child was thus treated in the same way legally as any biological child born to married parents and was entitled to any benefit to which such a biological child was entitled. The focus in this matter was not on the legality of the adoptions (all references to adopted children are to legally adopted children), but was on the proviso in section 71(2)(*a*) of the 1937 Act – namely, that an adopted child could not by virtue of the adoption

> "become entitled to any property devolving on any child of his adoptive parent by virtue of any instrument executed prior to the date of the order of adoption (whether the instrument takes effect *inter vivos* or *mortis causa*), unless the instrument clearly conveys the intention that that property shall devolve upon the adopted child".

The trust deed that is at the heart of this matter was such an instrument, and the question to be answered was whether it conveyed an intention that adopted children should benefit from it. The authors are of the opinion that there is ample evidence that the words used in the trust deed could be interpreted to include adopted children. Consequently, the authors believe that the majority erred in finding differently and their intention is to show that it is more than probable that adopted children were intended to be included

as beneficiaries. As background to the discussion, the authors first refer to the issue of adoption within the context of the wording of the trust deed, whereafter the central matter of interpretation and the disparity in approaches in this regard in *Harvey* are considered.

4 2 Adoption and context

Today, the Children's Act regulates adoption, but at the time that the trust deed was executed, the 1937 Act, which has long since been repealed, was in operation. As the Children's Act does not have retrospective effect (*Malcolm v Premier, Western Cape Government* 2014 (3) SA 177 (SCA) par 23; *Shange v MEC for Education, Kwazulu-Natal* 2012 (2) SA 519 (KZD) par 31; Heaton *South African Law of Persons* (2017) 112), the court applied the provisions of the 1937 Act.

As previously indicated (see heading 2 above), the death of the last of the donor's children resulted in the termination of the trust deed. Ms Harper, the mother of the adopted children, was the last of the donor's children to pass away before the appeal was heard. This incident was extremely important for the interpretation of the terms of the trust deed, but it was not in any way considered in the judgment. As a result of Ms Harper's death, the other clauses in the trust deed and the beneficiaries mentioned in these other clauses were of no direct relevance. Although the trust deed in other clauses referred to descendants, children and issue, her death brought into effect the termination clause, which provided for the devolution of the last one-fourth share of the capital upon the "legal descendants" of the children (of the donor) *per stirpes*. Even if it is assumed that the majority's analysis with regard to "children," "issue" and "beneficiaries" as referred to in the trust deed is correct, the majority's failure to probe the meaning of "legal descendants" is not only unfortunate, but led the court in the wrong direction. In its endeavour to determine who the beneficiaries of the trust were, it is submitted that the court should have given due consideration to the appropriate beneficiaries as mentioned in the termination provision. This *lacuna* in the majority judgment is explored in the following paragraphs.

When Ponnan JA concludes that the adopted children were not included as beneficiaries, he explains that the donor should have used express terms in the deed to benefit them (par 51). The authors suggest that the donor did exactly this when referring to the beneficiaries in the termination clause as "legal descendants", but Ponnan JA does not acknowledge this term, nor the reason that the trust deed in this clause specifically referred to "legal descendants," nor the intention conveyed with the use of these words. In effect, the majority judgment thus gives no consideration to who the beneficiaries were at the trust deed's termination. The authors suggest that this was a crucial omission.

In her dissenting judgment, Molemela JA warns against relying purely on the dictionary definition of words, rather than also examining the language used in the document and the facts that provide context (par 23–24). Furthermore, she points out that the narrow interpretation of the wording in the trust deed was contrary to other tools of interpretation, such as context

and surrounding circumstances (par 37) and states that the addition of the prefix "legal" to the word "descendants" broadened the class of beneficiaries to include adopted children. She concludes that the trust deed provided for the adopted children to benefit from it. She bases this conclusion on context and on her assumption that it was "highly improbable" that the donor would refer to biological grandchildren as "legal descendants" (par 32–33). The authors fully support her conclusion that the relevant issue was the reference to the class of beneficiaries as "legal descendants" in the termination clause. Below, the authors explain their reasoning.

Adoption in South Africa is used to alter legal relationships (South African Law Commission Project 110 *Review of the Child Care Act* (2002) par 17.1). Adoption establishes a familial relationship between adoptive parents and adopted children created not by biology, but by law. Although it is trite that blood relationships cannot be created or dissolved (see further Louw "Adoption of Children" in Boezaart (ed) *Child Law in South Africa* (2017) 193), an adoptive family substitutes the biological family for all purposes in law. This is the crux of the matter. The appellants were biologically related to other persons, but as soon as the adoption orders for the appellants had been granted, the biological relationships were legally terminated. (In terms of s 71(3) of the 1937 Act, an adoption order terminated all rights and responsibilities existing between a child and his or her natural parents and their relatives, except the right to inherit from them *ab intestato*). The appellants became the *legal* (as opposed to biological) descendants of their adoptive parents.

Although reference to "legal descendants" in South African trust deeds and in wills is fairly common, and it was analysed in *Boswell* (which Molemela JA also refers to – see heading *3 3* above), the courts have not often needed to explore or analyse the meaning of the term in relation to adopted children. Foreign case law, on the other hand, has done exactly that in circumstances where the facts and the time frame were uncannily similar to the circumstances of *Harvey*. In an Alabama Supreme Court decision, *McCaleb v Brown* (344 So. 2d 485 (1977) (*McCaleb*), a donor executed various trust deeds in 1942, which included conveyance of property to the surviving descendants or legal descendants *per stirpes* of her children. After the donor's death, her son legally adopted the plaintiff, who approached the court in 1977 for a declaratory judgment regarding her rights in property conveyed to her adoptive father. The court identified the only issue for resolution to be whether the plaintiff had been included in the class of beneficiaries described as surviving descendants and as legal descendants of the donor's children (486). Jones J concluded (488) that the plaintiff was included "within the designated class of 'descendants' and 'legal descendants'" of her adoptive father. The decision in *McCaleb* is quite striking in its simplicity but it nevertheless reflects sound reasoning and it is tempting to infer that the court's approach was influenced by the notion that, generally, adopted children should for all intents and purposes be regarded as equal to biological children, unless specifically excluded in a legal instrument. Whereas Ponnan JA infers that the donor's failure to include adopted children in express terms indicated that he had no such intention (par 51), the authors believe that *McCaleb* is further comparative affirmation

that the use of the term "legal descendants" in *Harvey* clearly broadens the class of beneficiaries to include the adopted appellants or constitutes, as Ponnan JA put it, the use of express terms to include them.

5 Techniques of interpretation and *Harvey v Crawford*

5 1 Introduction

The majority and minority decisions in *Harvey* display a striking contrast in approach and conclusions in their respective interpretations of the trust deed. The crucial question was whether the term "legal descendants" conveyed the clear intention that the property would also devolve upon adopted children. Both judgments refer to canons of construction at some length, but it is the approach adopted in the minority decision that the authors suggest is the more appropriate and in tune with recent developments in this regard.

It is trite that, on the one hand, the principles and rules of contractual interpretation generally apply to trusts *inter vivos* while, on the other, the rules pertaining to the construction of wills apply to trusts *mortis causa* (Cameron, De Waal and Solomon *Honoré's South African Law of Trusts* (2018) 319). An *inter vivos* trust is established by contractual means and therefore should be interpreted accordingly (*CIR v Estate Crewe* 1943 AD 656; *Crookes v Watson* 1956 (1) SA 277 (A) 285E–287C). Although not all authorities entirely agree (see eg, Kerr "The Juristic Nature of Trusts *Inter Vivos*" 1958 *SALJ* 84 92–93), there is direct authority to the effect that the creation, variation and acquisition of rights by trust beneficiaries is regulated in terms of the law of contract, more specifically as a form of contract for the benefit of a third person (*stipulatio alteri*) (see eg, *Crookes v Watson supra* 285E–287C; see, however, De Waal "Die Wysiging van 'n *Inter Vivos* Trust" 1998 *TSAR* 326 329–330). Nevertheless, irrespective of the exact juristic nature of the trust *inter vivos*, it remains clear that its interpretation is largely a contractual issue (see further eg, *Potgieter v Potgieter* 2012 (1) SA 637 (SCA) par 19–24; *Potgieter v Shell Suid-Afrika (Edms) Bpk* 2003 (1) SA 163 (SCA) par 8–11; *Sea Plant Products Ltd v Watt* 2000 (4) SA 711 (C) 720–722; *Ally v Mohamed* [1998] JOL 3393 (D) 10). It therefore seems axiomatic that the principles of contractual interpretation should have been dutifully applied in *Harvey*, but as far as the majority decision is concerned, this was not entirely the case.

5 2 Construction of a will as opposed to a trust inter vivos

A will is a unilateral legal act and, subject to certain limitations pertaining to public policy, vagueness and some statutory restrictions, a testator has the freedom to make a will of his or her own choosing, which a court is required to enforce in accordance with the maxim *voluntas testatoris servanda est* (Jamneck "Freedom of Testation" in Jamneck & Rautenbach (eds) *The Law*

of Succession in South Africa (2017) 125). In accordance with this principle of freedom of testation, succession law regards the "golden rule" of interpretation to be the ascertaining of the wishes of the testator from the language used in a will (*Greyling v Greyling* 1978 (2) SA 114 (T) 118C; *Robertson v Robertson's Executors* 1914 AD 503 507 (*Robertson*)). Consequently, as Paleker ("Interpretation of Wills" in Jamneck & Rautenbach *The Law of Succession in South Africa* 230) puts it, "[a]ll the rules for the interpretation of wills are geared towards determining and giving effect to the intention of the testator". This essentially seems to be a subjective approach to will construction. A trust *inter vivos*, on the other hand, is in nature distinct from a will; the trust deed – as a species of contract – does not have to comply with the formalities required by law for the validity of wills (Jamneck "Testate Succession: General Rules" in Jamneck & Rautenbach *Law of Succession in South Africa* 53). This is the case even when a testator bequeaths benefits to a trust *inter vivos* in his or her will (*Kohlberg v Burnett* 1986 (3) SA 12 (A) 26A–B; Jamneck in Jamneck & Rautenbach *Law of Succession in South Africa* 53).

5 3 Developments in the construction of contracts

The South African law of contract strongly reflects elements of both a subjective and objective approach to contractual liability (see Lubbe & Murray *Farlam and Hathaway Contract: Cases, Materials and Commentary* (1988) 106; Pretorius "The Basis of Contractual Liability in South African Law (2)" 2004 *THRHR* 383 383–388; Kritzinger "Approach to Contract: A Reconciliation" 1983 *SALJ* 47) and this has influenced the manner in which contractual instruments are construed. Consequently, on the one hand, there is authority supporting a subjective approach to contractual interpretation, or rather a "factual or historical-psychological approach" (see Lubbe & Murray *Farlam and Hathaway Contract* 451) (see eg, *Concord Insurance Co Ltd v Oelofson* 1992 (4) SA 669 (A) 671D–E 672D–G 673G–674B 675B–D*; Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) 828A–B; *Russell and Loveday v Collins Submarine Pipelines Africa (Pty) Ltd* 1975 (1) SA 110 (A) 129G–H; *Jones v Anglo-African Shipping Co (1936) Ltd* (1972 (2) SA 827 (A) 834D; *Joubert v Enslin* 1920 AD 6 37–38). On the other hand, there are also indications of a generally objective approach to contractual interpretation (see eg, *Hlobo v Multilateral Motor Vehicle Accidents Fund* 2001 (2) SA 59 (SCA) 66–67; *Fiat SA v Kolbe Motors* 1975 (2) SA 129 (O) 137; *Nelson v Hodgetts Timbers (East London) (Pty) Ltd* 1973 (3) SA 37 (A) 45; *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) 479; *Worman v Hughes* 1948 (3) SA 495 (A) 505).

The tension between the subjective and objective approaches has been apparent in South African contract law for some time, but a detailed discussion of this is not necessary for present purposes (see further Pretorius "Mistake/Absence of Consensus" in Hutchison & Pretorius (eds) *The Law of Contract in South Africa* (2017) 93ff). However, it may further be mentioned that the subjective approach to contractual construction is nevertheless heavily dependent on objective factors to prove what the

intention of the parties is, creating a somewhat paradoxical situation (Maxwell "Interpretation of Contracts" in Hutchison & Pretorius *The Law of Contract in South Africa* 283). It is also quite apparent that the latter approach bears more than a superficial resemblance to the manner in which wills are interpreted.

Traditionally (see generally Cornelius *Principles of the Interpretation of Contracts in South African Law* (2016) 78–85), in the case of a written contractual instrument, the courts favoured a textual, layered approach to interpretation that focused on the language used in the document in accordance with its grammatical and ordinary meaning. There was also a differentiation between evidence regarding background circumstances explaining the genesis and purpose of the contract, which was permissible, and extrinsic evidence regarding surrounding circumstances pertaining to previous negotiations, correspondence and subsequent conduct of the parties, which was only permissible if the document was ambiguous (see *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) 768A–E).

The first definitive knell signalling a change in approach occurred in *KPMG Chartered Accountants (SA) v Securefin Ltd* (2009 (4) SA 399 (SCA) (*KPMG Chartered Accountants*)), where Harms DP concluded that the time had come to accept that there was no merit in distinguishing between "background circumstances" and "surrounding circumstances" (par 39). The distinction was artificial and both terms were vague and confusing; in consequence, courts tended to admit everything (see further, Maxwell in Hutchison & Pretorius *The Law of Contract in South Africa* 274–275). Harms DP preferred the terms "context" or "factual matrix." The implication of doing away with the aforesaid distinction is that the issue of ambiguity loses its relevance within the context of the admissibility of evidence in determining the meaning of contractual provisions (Cornelius *Principles of the Interpretation of Contracts in South African Law* 86; and see further Cornelius "Background Circumstances, Surrounding Circumstances and the Interpretation of Contracts" 2009 *TSAR* 767). The courts proceeded to apply this aspect of Harms DP's judgment in *KPMG Chartered Accountants* (see eg, *Unica Iron and Steel (Pty) Ltd v Mirchandani* 2016 (2) SA 307 (SCA) par 21; *National Health Laboratory Service v Lloyd-Jansen van Vuuren* 2015 (5) SA 426 (SCA) par 14; *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA) par 24).

The decision in *KPMG Chartered Accountants* provided much of the impetus for the eventual shift to a contextual approach to extrinsic evidence. Another significant step in this process was the judgment of Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (2012 (4) SA 593 (SCA) (*NJMPF*)), during which he observed:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. … The process is objective, not subjective. … The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the

> provision and the background to the preparation and production of the document." (par 18)

One of the salient features of this *dictum* is that it endorses an objective approach that considers what an objective bystander would have understood the parties to have agreed rather than what they subjectively intended (see further Maxwell in Hutchison & Pretorius *The Law of Contract in South Africa* 268*ff*). This also means that direct evidence of the parties' subjective intentions remains inadmissible – even from a contextual perspective. In this regard, the approach supports normative considerations underlying the parol evidence rule (see Lubbe & Murray *Farlam and Hathaway Contract* 463; Maxwell in Hutchison & Pretorius *The Law of Contract in South Africa* 276–277), which, in the case of a document purporting to be the exclusive memorial of a contract, renders inadmissible extrinsic evidence varying, contradicting or adding to the document's terms (*Johnston v Leal* 1980 (3) SA 927 (A) 943B; Van Huyssteen, Lubbe & Reinecke *Contract: General Principles* (2016) 303).

In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* (2014 (2) SA 494 (SCA) (*Bothma-Batho Transport*)), Wallis JA further affirmed the new contextual approach in the following terms:

> "Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'." (par 12)

It should, however, be mentioned that Harms DP previously cautioned in *KPMG Chartered Accountants* (par 39 with reference to *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) 455B–C) that, to the extent that evidence may be admissible to contextualise a document to establish its "factual matrix or purpose or for purposes of identification", it should be used as conservatively as possible.

5 4 Disparate approaches in Harvey v Crawford

Various further issues arising from the latest shifts in contractual interpretation do not need to be canvassed here (for a discussion of these issues, see eg, Hutchison "Relational Theory, Context and Commercial Common Sense: Views on Contract Interpretation and Adjudication" 2017 *SALJ* 296; Myburgh "Thomas Kuhn's Structure of Scientific Revolutions, Paradigm Shifts, and Crises: Analysing Recent Changes in the Approach to Contractual Interpretation in South African Law" 2017 *SALJ* 514). What is important is that the majority and minority decisions in *Harvey* tend to reflect different views on the construction of the trust deed in these circumstances.

The matter for determination by the court was not the donor's intention, but the intention as reflected in the instrument – in other words, the language

used within context (also see *Van Zyl v Van Zyl* 1951 (3) SA 288 (A) 291G–292A; *Robertson* 507).

Although Molemela JA at times also refers to the trust deed as a will, her dissenting judgment is spot on when she points out that this is not a will construction case (par 23); rather, the matter turns on the interpretation of the trust-deed provisions and specifically the interpretation given to the relevant phrases used to describe the beneficiaries (par 23–24). She tends to approach the matter of construction from the viewpoint of the law of contract, and duly takes note (par 25–26) of the decisions in *NJMPF* (par 18) and *Bothma-Batho Transport* (par 12). Molemela JA also relies on the legal fiction referred to in *Boswell* (see heading *3 3* above) to identify the question in *Harvey* to be "whether the application of ordinary rules of interpretation to the provisions of the donor's Trust Deed reveals a testamentary intention that displaces or rebuts that legal fiction" (par 29). Although she refers here to "testamentary intention", it is clear that the learned judge's construction of the trust deed in question leans heavily on the principles of contractual interpretation, including the background circumstances (par 33).

While confirming that a trust deed must be construed in accordance with the rules regarding the interpretation of written contracts (par 45), the majority nevertheless takes a much more restrictive approach to interpreting the trust deed. Unfortunately, in the process, the majority does not reflect on recent developments in contractual interpretation. The court refers to *Moosa v Jhavery* (1958 (4) SA 165 (N)), wherein it was said:

> "the trust speaks from the time of its execution and must be interpreted as at that time. It is the settlor's intention at that time that must be ascertained from the language he used in the circumstances then existing. Subsequent events (and in these are included statutes) cannot, I consider, be used to alter that intention." (169D–F)

Similarly, the majority seems to endorse the view that a will falls to be interpreted by giving words and phrases used by the testator the meaning that they bore at the time of execution (with reference to *Greeff v Estate Greeff* 1957 (2) SA 269 (A) par 46).

The majority then proceed to apply a somewhat textual approach to interpreting the trust deed in finding that adopted children were excluded as beneficiaries. The court prefers the line taken in *Cohen* (641F) that the test is "not whether they were specifically excluded by the will, but rather whether the will clearly conveyed an intention to include them (so that any property under the will might devolve upon them)" (par 50). In ascertaining the intention of the donor, the majority rely on the matter in *Cohen* (see heading *3 2* above) in concluding that the ordinary meaning to be ascribed to the words "descendants", "children" and "issue" has to be that the donor had in mind descendants through the bloodline (par 48). *Cohen* is also heavily relied on in finding that the word "descendant", in its normal or usual meaning, includes only blood relations in the descending line and excludes adopted children. One should, however, caution that this meaning, assigned by the majority, is not necessarily the same as the one for "legal descendant", which they do not consider, and which rather crucially was used in the termination clause of the trust deed.

The majority find a clear similarity between the language used in *Cohen* and that used in the trust deed in the present matter – hence the majority's partiality to that case. The court also states that the trust deed appeared to have been drafted by a professional person, probably an attorney, and surmises that if the donor had intended to benefit adopted children, he would presumably have been advised of the need to include such class of children in express terms in the deed. Ponnan JA accepts that his failure to do so indicated that he had no such intention (par 51). This does not quite follow in light of the factual circumstances existing at the time of execution of the deed; if that argument carried any weight, the donor could just as well have been advised to use the term "legal descendants" to make provision for the possibility of including legally adopted children as beneficiaries. It has already been argued that the prefix "legal" used in the trust instrument extended the class of beneficiaries. And if that is the case, any further conjecture about the donor's state of mind or the reason that he did not specifically use the words "adopted children" seems to be somewhat superfluous.

The line of construction taken by the majority seems to be very much the same as that used when interpreting a will and, as explained, it is submitted this was not the correct approach. The court appeared unwilling to look beyond the meaning of certain words in the trust deed, as previously interpreted – mainly in the matter of *Cohen*. There is little sign of the new approach to contractual interpretation in the majority decision and the authors suggest that this is regrettable.

6 Equitable interpretation and the Constitution

The authors have focussed on the issue of interpretation, which they view as being what the matter really turned on (as did Molemela J). However, if it were argued (contrary to our view) that the trust deed were ambiguous in relation to the question of adopted children as beneficiaries, it is quite apparent that a search for the intention of the donor in this regard could deliver conflicting results, depending on how the matter was approached. Despite the fact that extrinsic evidence, regarding the genesis and purpose of the deed and previous negotiations and correspondence between the parties, is admissible in accordance with the new contextual approach to contractual interpretation, a search for the real intention will in fact often be fruitless when it comes to a contractual document; as Brian CJ famously proclaimed in the 15th century, "the Devil himself knows not the intent of a man" (*Anon* (1477) YB 17 Ed 4).

Thus, the million-dollar question is what to do where there is ambiguity. Traditionally, it has been accepted that where a contract is tinged by ambiguity and does not reflect a "clearly expressed intention", a court should apply fairness, equity and good faith in determining the intention of the parties (see eg, *Joosub Investments (Pty) Ltd v Maritime & General Insurance Co Ltd* 1990 (3) SA 373 (C) 383E–F; *Mittermeier v Skema Engineering (Pty) Ltd* 1984 (1) SA 121 (A) 128A–C; *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) 706–707; *Rand Rietfontein Estates Ltd v Cohn* 1937 AD 317 330–331; *Trustee, Estate Cresswell &*

Durbach v Coetzee 1916 AD 14 19; *Van Rensburg v Straughan* 1914 AD 317; Lubbe & Murray *Farlam and Hathaway Contract* 468). In *South African Forestry Co Ltd v York Timbers Ltd* (2005 (3) SA 323 (SCA) 340I), the Supreme Court of Appeal reaffirmed that although a court may not "superimpose on the clearly expressed intention of the parties its notion of fairness", where there is ambiguity, "the principle that all contracts are governed by good faith is applied and the intention of the parties is determined on the basis that they negotiated with one another in good faith".

In addition to the notion of good faith in contractual relationships, Cornelius places equitable interpretation in contemporary contract law squarely on the shoulders of the Constitution and states that courts are thereby required to exercise a "generally equitable jurisdiction". Consequently, the principles enshrined in the Bill of Rights must be taken into account when considering what is equitable or reasonable. He also mentions that the Constitution inclines more to promoting equality than liberty (Cornelius *Principles of the Interpretation of Contracts in South African Law* 112).

Even if our argument that beneficiaries under the trust deed included adopted children (in line with the minority decision) is open to criticism and it were accepted that the trust deed in *Harvey* was ambiguous in this regard, the authors suggest that it would nevertheless have been fair and equitable, and indeed in line with the spirit, purport and objects of the Bill of Rights, to include adopted children as beneficiaries thereunder. The approach of the minority in *Harvey* seems to be more in tune than the majority decision with our constitutional dispensation and the promotion of equality, including the equality of adopted children. Put slightly differently, in a sense the approach of the majority in *Harvey* does little to promote the equality of adopted children where there is or could be ambiguity as to children beneficiaries in terms of a trust deed.

7 Conclusion

The central issue in *Harvey* was the interpretation of a trust deed; the authors suggest that what the court had to determine was not the donor's subjective intention, but the intention as objectively construed from the instrument in its context. The majority favoured quite a limited approach to the issue that focused largely on a restricted interpretation of the words used in the trust deed. Some might even suggest that this was a strict literalist approach, which is regarded as outdated (see Cornelius *Principles of the Interpretation of Contracts in South African Law* 111).

The minority decision preferred a more nuanced and balanced approach, one that the authors suggest is more in keeping with current law and which dictated an outcome that is both fair and legally defensible. The mechanics of Molemela JA's interpretation of the trust deed have been ventilated above; in summary, it suffices to say she pointed out that a narrow interpretation of the wording in the trust deed was contrary to certain tenets of interpretation, such as context and surrounding circumstances. It requires little argument to show that the minority judgment displays an approach to

interpretation that is heavily contextualised and – if the term may be used – holistic. The authors also suggest that this approach is more in tune with modern developments in contractual interpretation and general shifts in law regarding the rights of adopted children.

In the American decision, *McCaleb*, when similarly urged to consider the intention of the donor, the court observed (488) that "[i]f we allow the luxury of speculation about intent, it is as reasonable to argue her love for an adopted child would have been as great as for a child of her blood". And furthermore, that it was "unwilling to base its opinion upon the rambling arguments of speculation" (488). Although foreign law, these sentiments seem entirely apposite within the circumstances of *Harvey*. The authors suggest that a strong case can be made for finding that the deed in question included adopted children as beneficiaries thereunder.

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SECTION 2C(1) OF THE WILLS ACT 7 OF 1953 AND THE MEANING OF "SPOUSE"

Moosa NO v Minister of Justice 2018 (5) SA 13 (CC)

1 Introduction

It happens from time to time that a beneficiary under a will chooses not to accept his or her inheritance. One possible reason, which is relevant to the discussion below, may be the beneficiary's desire to allow persons to inherit, or inherit more than would otherwise have been the case, as a result of the renunciation. (For a fuller discussion of the various circumstances in which a beneficiary may wish to renounce, see Corbett, Hofmeyr and Kahn *The Law of Succession in South Africa* 2ed (2001) (Corbett) 17–18.)

The effect of a renunciation on the devolution of the deceased testator's estate is determined by a number of factors, including the particular provisions of the will, and varies from case to case. One determining factor is section 2C of the Wills Act 7 of 1953 (as amended) – of which the counterpart in intestate succession is s 1(6) and (7) of the Intestate Succession Act 81 of 1987 (as amended). Section 2C reads as follows:

> "(1) If any descendant of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such a benefit, such benefit shall vest in the surviving spouse.
>
> (2) If a descendant of the testator, whether as a member of a class or otherwise, would have been entitled to a benefit in terms of the provisions of a will if he had been alive at the time of death of the testator, or had not been disqualified from inheriting, or had not after the testator's death renounced his right to receive such a benefit, the descendants of that descendant shall, subject to the provisions of subsection (1), *per stirpes* be entitled to the benefit, unless the context of the will otherwise indicates."

Note that, in terms of this section, if a beneficiary who is entitled to a benefit together with the surviving spouse renounces that inheritance, then the consequent devolution of the benefit will differ from that which follows renunciation in other circumstances, or that following a beneficiary's predecease or lack of capacity to inherit. In the first scenario, the benefit devolves on the surviving spouse, whereas in all the other scenarios, it devolves on the beneficiary's descendants.

The wording of the section has been criticised, and in some respects it is certainly problematic (for a critical discussion of the section, see Jamneck

"Die Interpretasie van Artikel 2C van die Wet op Testamente 7 van 1953" 2002 *THRHR* 223). Although this note does not primarily relate to these criticisms, some of the issues that have been raised are discussed below. The main focus of this note is rather on the important question of what meaning is to be attached to the term "surviving spouse" in section 2C(1). Does it encompass only the survivor of a marriage under the Marriage Act 25 of 1961? Or does it include the survivors of Hindu marriages, monogamous and polygynous Muslim marriages, and monogamous and polygynous marriages under African customary law? This question has recently been addressed in respect of Muslim marriages in *Moosa NO v Minister of Justice* (2018 (5) SA 13 (CC)), which is the first case involving a Bill-of-Rights-based challenge to the meaning of the term "spouse" in the context of testate succession. (In the context of intestate succession, the meaning of the term has been addressed in a number of cases – in particular, *Daniels v Campbell NO* 2004 (5) SA 331 (CC) (relating to monogamous Muslim marriages), *Hassam v Jacobs NO* 2009 (5) SA 572 (CC) (relating to polygynous Muslim marriages), *Govender v Ragavayah NO* 2009 (3) SA 178 (D) (relating to Hindu marriages), and *Gory v Kolver NO* 2007 (4) SA 97 (CC) (relating to unformalised same-sex partnerships).) Accordingly, it is *Moosa NO v Minister of Justice* (*supra*) that is the subject of this note, which critically evaluates the case and discusses its implications for other sections of the Wills Act.

Before discussing the *Moosa* case, however, it is useful to examine certain historical developments relating to how a beneficiary's predecease, lack of capacity, and renunciation have been treated.

2 Historical evolution

It is not necessary for our purposes to go into the full history of how predecease, lack of capacity, and renunciation have been treated in our law, but there are certain developments leading up to the introduction of section 2C of the Wills Act in 1992 that are relevant to better understand its provisions.

These developments (as gleaned from the authorities cited below) are as follows:

- Immediately before the enactment of section 2C in 1992, the consequences of the predecease of a child of the testator were regulated by section 24 of the General Law Amendment Act 32 of 1952. Section 24 provided in essence that a benefit given to a child of the testator would go to that child's lawful descendants *per stirpes* if the child predeceased the testator. The section was thought necessary because the common-law legal position, which was similar but not identical to the section, had become unsettled owing to a decision in *Galliers v Rycroft* ((1900) 17 SC 569) (Corbett 215). (For discussion of the *Galliers* decision, see *Horowitz v Brock* 1988 (2) SA 160 (A) 185J–186H; Corbett 215–217; Cronjé and Roos *Casebook on the Law of Succession/Erfreg Vonnisbundel* (1997) 258–259; and Jamneck 2002

THRHR 227.) Before 1992, the law did not provide for substitution by descendants if a beneficiary lacked capacity to inherit, or renounced an inheritance (Jamneck 2002 *THRHR* 228).

- As regards intestate succession, before the enactment of the Intestate Succession Act in 1987, a predeceased child was represented by his or her descendants *per stirpes* (Corbett, Hahlo and Hofmeyr *The Law of Succession in South Africa* (1980) 585). With respect to lack of capacity or renunciation, there was a practice that the descendants of an heir who lacked capacity to inherit or who renounced his or her inheritance were not permitted to represent the heir, and the inheritance was allowed to accrue to his co-heirs and the surviving spouse (South African Law Commission *Working Paper 19 Project 22 Review of the Law of Succession: Disqualification from Inheriting, Substitution, Succession Rights of Adopted Children* (September 1987) par 3.77). (The Commission was the forerunner of the South African Law Reform Commission.) There was, however, uncertainty and debate about the actual dictates of the law with respect to lack of capacity and renunciation in intestate succession, and it seems that the practice did not always accord with the law (SALC *Working Paper 19 Project 22* par 3.77–3.84).
- The motive behind the practice was presumably that it allowed the deceased's children to bestow a benefit upon a financially needy surviving spouse if all of them renounced their inheritances, thereby avoiding the donations tax, transfer duty, and other cost implications that might flow from accepting the inheritance and donating it to the surviving spouse. (This benefit flows from the established principle that a beneficiary who renounces is regarded in law as never having inherited (*Klerck and Schärges NNO v Lee* 1995 (3) SA 340 (SE), approved in *Wessels NO v De Jager* NO 2000 (4) SA 924 (SCA) par 9).
- When the Intestate Succession Act was enacted in 1987, the legislature decided to include an interim measure to legitimate the existing practice regarding the treatment of lack of capacity and renunciation in intestate succession, pending further investigations (SALC *Working Paper 19 Project 22* par 3.85). This took the form of section 1(4)(*c*) of the Intestate Succession Act. The section, which has since been repealed, had the effect that the benefit of anyone who was disqualified from inheriting on intestacy, and a renounced benefit, would be shared between the surviving spouse and the other children of the deceased, and if all the deceased's children renounced, then the entire estate would accrue to the surviving spouse. (The section achieved this by deeming the heir who lacked capacity or who renounced, and all those who would otherwise be entitled to represent him or her, to be predeceased.)
- In time, it came to be seen as unfair to prevent the children of those who lack capacity from inheriting by representation (South African Law Commission *Project 22: Review of the Law of Succession – Report* (June 1991) (*Project 22 Report)* par 5.47). As the South African Law Commission pointed out, this amounts to visiting the sins of the fathers

on the children (SALC *Project 22 Report* par 5.47). Furthermore, the Commission was of the view that there is no clear reason for representation not to apply in case of renunciation (SALC *Project 22 Report* par 5.47). Although these comments were made in the context of a discussion on intestate succession, the Commission recommended that the rules applicable to renunciation and incapacity in testate succession should be the same as those in intestate succession (SALC *Report on Project 22* par 5.56).

- As a result of these criticisms, in 1991, the Commission recommended that (in both intestate and testate succession) renunciation and lack of capacity should be on the same footing as predecease – namely, that the heir would be represented by his or her descendants, except that the practice of allowing a descendant to effectively renounce in favour of the surviving spouse should be retained (see SALC *Project 22 Report* par 5.53 read with par 5.56).
- As a consequence of these recommendations, the present legal position relating to incapacity and renunciation in testate and intestate succession was enacted in 1992, in the form of section 2C(1) and (2) of the Wills Act and section 1(6) and (7) of the Intestate Succession Act. Section 2C(2) of the Wills Act creates the general rule in testate succession that a descendant of the testator who renounces, lacks capacity, or predeceases is represented by his or her descendants *per stirpes*, and its counterpart in intestate succession is section 1(7). Section 2C(1) of the Wills Act creates the exception that gives a renounced benefit in a will to the surviving spouse when the section is applicable, and its counterpart in intestate succession is section 1(6) of the Intestate Succession Act. Section 24 of the General Law Amendment Act and section 1(4) of the Intestate Succession Act were repealed.

In light of this historical development, it can be seen that section 2C appears to have three principal objectives. It removes what had come to be seen as unfair treatment of the descendants of an *indignus*, and other persons who lack capacity to inherit; it facilitates a method by which the deceased's children can benefit the deceased's surviving spouse by renunciation, without incurring the donations tax, transfer duty, and other expenses often involved in donating assets; and it promotes uniformity in the rules (in testate and intestate succession respectively) that apply to renunciation and lack of capacity.

Having explained the historical evolution of section 2C, the author sets out the facts of the *Moosa* case, which case is the genesis of this note. Some of the relevant issues that emerge from section 2C(1) are then examined, whereafter the Constitutional Court's judgment in *Moosa* is explained and evaluated. The author also suggests some respects in which the judgment may have wider significance beyond the confines of the section.

3 The facts and judgment in the Constitutional Court

The matter originated in the Western Cape Division of the High Court (the judgment of which is reported as *Moosa NO v Harneker* 2017 (6) SA 425 (WCC)), and came before the Constitutional Court by way of an application for, *inter alia*, an order confirming the declaration of constitutional invalidity and reading-in ordered by the High Court. The case concerned the proper distribution of the estate of the late Mr Osman Harneker (the deceased). The deceased was survived by two wives – namely, the second applicant whom he had married in 1957, and the third applicant whom he had married in 1964 – as well as by nine children born of these marriages (*Moosa NO v Minister of Justice supra* par 4). In what follows, the second and third applicants are referred to as the deceased's "first wife" and "second wife" respectively. Both marriages took place in accordance with Islamic law (*Moosa NO v Minister of Justice supra* par 4*)*, and accordingly were not legally recognised (*Moosa NO v Minister of Justice supra* par 5).

In 1982, the deceased applied for a bank loan for the purchase of a house and was advised that in order to facilitate the loan he should formalise one of his marriages by marrying in terms of the Marriage Act (*Moosa NO v Minister of Justice supra* par 5). It is not clear from the judgments why this was of any concern to the bank making the loan. Pursuant to this advice, the deceased married his first wife in terms of the Marriage Act, doing so with the consent of his second wife (*Moosa NO v Minister of Justice supra* par 5). Thereafter, the house was purchased and was registered in the names of the deceased and his first wife (*Moosa NO v Minister of Justice supra* par 5).

At the time of his death, the deceased left a will directing that his estate should devolve in terms of Islamic law in accordance with a certificate to be issued by the Muslim Judicial Council or any other recognised Muslim Judicial Authority (*Moosa NO v Harneker supra* par 7). The certificate that was duly issued prescribed the shares in which his estate was to be divided among his two spouses, four sons and five daughters (*Moosa NO v Harneker supra* par 7). There is a slight variance at this point between certain facts recorded in the respective judgments of the court *a quo* and Constitutional Court (compare *Moosa NO v Minister of Justice supra* par 7 with *Moosa NO v Harneker supra* par 8), but the material point for our purposes is that all the descendants then renounced their inheritances under the will. (Points omitted from the judgment of the Constitutional Court, but which appear from the judgment of the court *a quo* (par 8), are that the descendants specified that the renounced benefits be inherited in equal shares by the two wives, and that the executor "opted not to follow the Islamic law with regard to renunciation".)

Following this renunciation, the executor of the estate took the view that, for the purposes of section 2C(1) of the Wills Act, each of the spouses qualified as a "spouse" (*Moosa NO v Minister of Justice supra* par 8). Accordingly, the executor believed that the inheritances that had been renounced by the deceased's descendants should be awarded to the two

spouses in equal shares (*Moosa NO v Minister of Justice supra* par 8). The implementation of this distribution involved registration of transfer in the deeds office of the deceased's half share of the immovable property that was registered in the joint names of the deceased and his first wife (*Moosa NO v Minister of Justice supra* par 9 read with par 5). However, at this point the winding-up of the deceased's estate met an obstacle; the Registrar of Deeds took the view that only the deceased's first wife was a spouse for the purposes of section 2C(1) of the Wills Act, and that in terms of section 2C(2) of the Wills Act, the benefits renounced by the children of the second wife vested in the descendants of those who renounced them (*Moosa NO v Minister of Justice supra* par 9). Accordingly, he refused to register the transfer to the second wife (*Moosa NO v Minister of Justice supra* par 9). It is difficult to understand the Registrar's view that the descendants of the second wife's children were entitled to benefit from their parents' renunciation in terms of section 2C(2); if the marriage to the second wife was not recognised, then, in terms of section 2C(1), all renounced benefits should have gone to the first wife who was married under the Marriage Act. (This point is discussed further in part six of this note.)

In order to resolve this impasse, the executor and the two spouses sought an order in the Western Cape High Court that, *inter alia*, the failure of the relevant section to include a husband or wife in a marriage that was solemnised under the tenets of Islamic law was unconstitutional; and for an appropriate reading-in in order to rectify the unconstitutionality. The relevant orders were granted by the High Court and application was accordingly made to the Constitutional Court for confirmation of these orders as required by section 172(2)(*a*) of the Constitution of the Republic of South Africa, 1996 (Constitution).

In the event, the Constitutional Court, in a unanimous judgment, wholeheartedly approved the reasoning of the High Court (*Moosa NO v Minister of Justice supra* par 10) and adopted it as its own in a summary that covered the following points. It held that the words "surviving spouse" in section 2C, enacted as they were during the "pre-constitutional era", were clearly intended to refer to the survivor of a common-law monogamous marriage and could not now be interpreted to include multiple spouses (*Moosa NO v Minister of Justice supra* par 10(a)). This being so, the court held that the section differentiates in three ways – namely, (i) between those married under the Marriage Act, 1961 and those married under Islamic law; (ii) between a surviving spouse in a monogamous civil marriage and one in a polygynous Muslim marriage; and (iii) between surviving spouses in polygynous customary unions (whose marriages are recognised in terms of the Recognition of Customary Marriages Act 120 of 1988) and surviving spouses of polygynous Muslim marriages (*Moosa NO v Minister of Justice supra* par 10(b), (c) and (d) respectively). This differentiation, the court held, constitutes unfair discrimination in terms of section 9(3) of the Constitution because it bears no rational connection to a legitimate governmental purpose (*Moosa NO v Minister of Justice supra* par 10(e)). With respect to the second spouse in particular, it was held that section 2C(1) unfairly discriminates against her by recognising the first spouse as a surviving

spouse by virtue of her civil marriage but not recognising the second spouse because her marriage was in terms of Islamic law (*Moosa NO v Minister of Justice supra* par 10(f); the court used the term "civil union" but clearly meant a marriage under civil law, not a union under the Civil Union Act 17 of 2006). The section also treated her differently to the survivor of a polygynous customary union, the court held (*Moosa NO v Minister of Justice supra* par 10(f); the court used the term "civil union" but clearly meant a marriage under civil law, not a union under the Civil Union Act 17 of 2006).

There was no attempt by the Minister of Justice, or any other party, to justify the infringement pursuant to section 36 of the Constitution, nor could the Constitutional Court think of any justification (*Moosa NO v Minister of Justice supra* par 11). Consequently, the court concluded that section 2C(1) violated the second wife's right to equality, and it endorsed the reasoning of the court *a quo* to that effect (*Moosa NO v Minister of Justice supra* par 12).

Before ordering the required relief, the Constitutional Court expanded on the reasoning of the court *a quo* by discussing the effect of the discrimination on the second wife's dignity (*Moosa NO v Minister of Justice supra* par 13–16). Her non-recognition as a "surviving spouse", the court said,

> "strikes at the very heart of her marriage of fifty years, her position in her family and her standing in her community. It tells her that her marriage was, and is, not worthy of legal protection. Its effect is to stigmatise her marriage, diminish her self-worth and increase her feeling of vulnerability as a Muslim woman." (*Moosa NO v Minister of Justice supra* par 16)

This, the court held, provided further reason for declaring section 2C(1) to be constitutionally invalid (*Moosa NO v Minister of Justice supra* par 16).

In light of the above reasons, the Constitutional Court confirmed the declaration of constitutional invalidity (par 21, part one of the order), and directed that section 2C(1) should be read as including the following words after the last word of the section:

> "For the purposes of this sub-section, a 'surviving spouse' includes every husband and wife of a monogamous and polygynous Muslim marriage solemnised under the religion of Islam." (par 21, part two of the order)

The court also ruled that its declaration of invalidity operates retrospectively with effect from 27 April 1994 (the commencement date of the Constitution of the Republic of South Africa 200 of 1993) except that

> "it does not invalidate any transfer of ownership that was finalised prior to the date of this order of any property pursuant to the application of section 2C(1) of the Wills Act 7 of 1953, unless it is established that, when the transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicant brought the present application." (*Moosa NO v Minister of Justice supra* par 21, part three of the order)

The applicants – in addition to asking for an order of constitutional invalidity and a reading-in – also asked the Constitutional Court to rule that, in the application of section 2C(1), the inheritance repudiated by the deceased

testator's descendants should always be divided equally among the surviving spouses (*Moosa NO v Minister of Justice supra* par 18). They argued that this would advance the constitutional value of equality (*Moosa NO v Minister of Justice supra* par 18). The Constitutional Court declined to make such a ruling, however, stating that

> "a ruling of this nature may infringe on the principle of freedom of testation, which is fundamental to testate succession. It would therefore be ill-advised for this court to make any such pronouncement. If the division of assets in a particular will offends public policy, which is now rooted in our Constitution and its enshrined values, then an affected individual is entitled to apply to the High Court for relief." (*Moosa NO v Minister of Justice supra* par 18)

The court also refused the request of the respondents and the *amicus curiae* (namely, Trustees of the Women's Legal Centre Trust) for an order allowing any interested person to seek a variation of the court's order should "any serious administrative or practical problems arise in the implementation of [the court's] order" (*Moosa NO v Minister of Justice supra* par 19). It took the view that such an order would not be warranted because its retrospectivity is limited and the applicants had not asked for it to be included (*Moosa NO v Minister of Justice supra* par 19).

Before evaluating the court's judgment, it is useful to consider certain peripheral matters in parts four to six of this note.

4 Can section 2C(1) be overridden by a testator?

An interesting question is whether the provisions of section 2C(1) are invariable, and not subject to any contrary instructions in the testator's will.

There is nothing in section 2C(1) to indicate that it is subject to the testator's wishes. By contrast, section 2C(2) expressly stipulates that its provisions apply "unless the context of the will otherwise indicates". Similarly, section 2B, which provides for loss of an inheritance by a former spouse in certain circumstances, states that the section applies "unless it appears from the will that the testator intended to benefit his previous spouse notwithstanding the dissolution of his marriage". Section 2D, which makes provisions regarding adopted children, persons born out of wedlock, and bequests to children of a person or a class of persons, opens with the words "unless the context otherwise indicates". But there is no such proviso in section 2C(1), and the proviso at the end of section 2C(2) is not worded in such a way that it can be construed as also applying to section 2C(1). This omission in section 2C(1) is remarkable in view of the express protection of a testator's freedom in all the other sections in which this would be appropriate, and might suggest that the section cannot be overridden in the testator's will. However, Jamneck has suggested that the wording of section 2C(1) of the Wills Act was based on the wording of the corresponding sections of the Intestate Succession Act; and that, since in intestate succession there was no need to provide for a contrary intention of the deceased, the failure to include this reservation in section 2C(1) was simply

an oversight in the drafting of the section (Jamneck 2002 *THRHR* 395–396), rather than an indication of an intention to bind the hands of the testator.

It is submitted that the provisions of section 2C(1) are, despite the failure to include an express provision to that effect, nevertheless subject to any contrary instructions in the testator's will. An example of such a contrary instruction would be where the testator provides that if a beneficiary renounces his or her inheritance, such benefit is to go to the beneficiary's descendants *per stirpes*. In these circumstances and for the reasons set out below, it is submitted that section 2C(1) will not override the testator's wishes by giving the renounced benefit to the surviving spouse of the testator.

If section 2C(1) cannot be overridden by a testator, this represents a serious inroad into freedom of testation, which in terms of the principles of statutory interpretation should not be lightly inferred from the provisions of section 2C(1) (Du Plessis "Statute Law and Interpretation" in Joubert (founding ed) *The Law of South Africa* vol 25(1) 2ed (2011) §340). There is no apparent reason that the legislature would wish to override the testator's freedom of testation in this particular situation when it has not done so in the other instances where section 2C applies – namely, a beneficiary failing to inherit due to predecease, or incapacity to inherit. Nor has it overridden the testator's freedom of testation in situations governed by sections 2B or 2D. Furthermore, it makes no sense for a testator to be entitled to disinherit a spouse completely in terms of freedom of testation but not be able to regulate whether a spouse who has been included as a beneficiary also takes a benefit renounced by the testator's descendant. (Regarding the testator's freedom to disinherit a spouse, see Corbett 44. For an example of an outright exclusion, see *Morienyane v Morienyane* [2005] LSHC 226 https://lesotholii.org/ls/judgment/high-court/2005/226 (accessed 2019-08-07).) Finally, since a testator's freedom of testation enjoys constitutional protection as part of his or her right to property and right to dignity (*In re BoE Trust Ltd NO* 2013 (3) SA 236 (SCA) par 26 and par 27, respectively), it should not lightly be decided that it has been interfered with. In the case of a Muslim testator, the testator's religious freedom (s 15(1) of the Constitution) is also engaged because it is part of his or her religious duty to make a will that ensures his or her estate devolves in accordance with Sharia law. (Regarding the religious duty of a Muslim testator in this respect, see Omar *The Islamic Law of Succession and its Application in South Africa* (1988) 3.)

Taking all these factors into consideration, the author believes that a testator is entitled to override section 2C(1) in his or her will, notwithstanding that the right to do so is not expressly protected by the section. This view finds some support in the court's statement (made when it rejected the request that it declare that under section 2C(1) assets should always be divided among surviving spouses) that "a ruling of this nature may infringe on the principle of freedom of testation, which is fundamental to succession" (par 19). Nevertheless, the matter is open to doubt.

5 When does section 2C(1) operate?

For section 2C(1) to operate, a descendant of the testator "who, *together with the surviving spouse of the testator*, is entitled to *a benefit*" (emphasis added) must renounce his or her inheritance.

There is a lack of clarity as to what the emphasised words mean and, therefore, as to when a renunciation will trigger the operation of the section (see De Waal and Schoeman-Malan *Law of Succession* 5ed (2015) 147 for a discussion of the possible meanings of the above quoted words; see also Jamneck 2002 *THRHR* 388–390). The words could mean that the section is only triggered when the descendant and the surviving spouse are co-beneficiaries of the same asset or assets (which the author calls the "narrow view"). Alternatively, it could mean that the section is triggered whenever both a descendant and a surviving spouse are beneficiaries under the will, even when they are each bequeathed separate assets (which the author calls the "broad view").

Professor Kahn has suggested that the broad view should be preferred because he says it equates to the position under the corresponding section in the Intestate Succession Act (*1994 Supplement* to *The Law of Succession in South Africa* 71; however, the comment is not repeated in the 2001 edition of Corbett). Section 1(6) of the Intestate Succession Act employs similar wording to section 2C(1) of the Wills Act, but the surviving spouse in intestate succession will always benefit from a repudiation by the deceased's descendants because the surviving spouse and descendants will always be co-beneficiaries of the same assets, since intestate heirs each inherit an undivided share of the estate (s 1(6) of the Intestate Succession Act, read with s 1(1)(*c*) thereof). Professor Kahn's view is supported by the recommendation of the South African Law Commission that "the position in respect of testate representation should be in consonance with the position in respect of intestate representation" (SALC *Project 22 Report* par 5.56). The Commission went on to say, "it is … recommended that if a descendant of the testator renounces his right to receive a benefit in terms of a will, that benefit should vest in the surviving spouse" (SALC *Project 22 Report* par 5.56). Thus, restricting section 2C(1) to the narrow situation described above was not part of the Law Commission's recommendations.

If one accepts that the purpose of section 2C(1) is to provide an avenue for a descendant to benefit a needy surviving spouse – by giving up an inheritance, without incurring the possible liability for donations tax and other expenses that could result from adiating and then donating the assets to the testator's surviving spouse – then this provides a further reason to favour the broad view (see the discussion of the rationale behind the section in part two of this note). It is most unlikely that the legislature would want to facilitate the renunciation, and protect the descendant's sacrifice from donations tax and other costs, only when the surviving spouse and the descendant are co-beneficiaries of the same asset but not when they are bequeathed different assets.

A further argument against the narrow view is that, in many instances where the surviving spouse and the descendant are co-beneficiaries of the same asset, the surviving spouse will in any event have a right of accrual under common law, which would render section 2C(1) superfluous in those cases. (For a discussion of accrual, see Corbett 243–258; and De Waal and Schoeman-Malan *Law of Succession* 199–203.)

A comparison of the corresponding sections of the Wills Act and the Intestate Succession Act is informative on this question of interpretation. As mentioned earlier, the report of the South African Law Commission that preceded the enactment of these sections recommended that the testate and intestate positions should be in agreement (SALC *Project 22 Report* par 5.56). Section 2C(1) of the Wills Act was enacted by the Law of Succession Amendment Act (43 of 1992), which simultaneously enacted the corresponding changes to the Intestate Succession Act, including section 1(6) of that Act. Section 1(6) of the Intestate Succession Act reads as follows:

> "If a descendant of a *deceased*, excluding a minor or mentally ill descendant, who, together with the surviving spouse of the *deceased*, is entitled to a benefit *from an intestate estate* renounces his right to receive such a benefit, such benefit shall vest in the surviving spouse." (emphasis added)

It is significant to note that – with the exception of the words emphasised in the above quotation, which had to change because of the differing contexts – the wording of the two sections is identical. In particular, they both refer to the surviving spouse and the renouncing descendant being together entitled to "a benefit". In the context of intestate succession, this requirement is unremarkable, because, as mentioned earlier, the beneficiaries always inherit the *entire estate* in undivided shares. However, in the context of testate succession, where the surviving spouse and renouncing descendant are often bequeathed separate unrelated assets, the words appear to take on a greater significance, possibly suggesting that the surviving spouse and renouncing beneficiary must inherit the same asset in undivided shares in order for the section to be triggered. Seen in this light, the reference to "a benefit" in section 2C(1) of the Wills Act may well have been a clumsy implementation of the Law Commission's recommendation that the two provisions be "consonant", using substantially the same words in the two sections, rather than an indication that section 2C(1) of the Wills Act only applies when the surviving spouse and renouncing descendant jointly inherit the same asset.

Taking all the above factors into account, it is submitted that section 2C(1) should be interpreted in accordance with the broad view. This is also the view of Cronjé and Roos (*Casebook on the Law of Succession/Erfreg Vonnisbundel* 260). Although Jamneck discusses the issue (Jamneck 2002 *THRHR* 388–389), she comes to no firm conclusion (Jamneck 2002 *THRHR* 390). Until a court rules on the issue, however, it is impossible to say with complete certainty what the correct interpretation of the section is.

6 Persons who cannot benefit from section 2C(1)

It should be noted that, whether following the narrow or broad interpretation of section 2C(1), if the testator chose not to include his or her surviving spouse in the will at all (a choice the testator is entitled to make in terms of the principle of freedom of testation), a descendant beneficiary who would like to benefit the surviving spouse cannot use the provisions of section 2C(1) to achieve this by renouncing his or her inheritance. The section does not operate in favour of a spouse whom the testator has chosen to disinherit.

Furthermore, if the testator included in his or her will a former spouse, from whom the testator was divorced, and the testator's descendant renounced his or her inheritance, then section 2C(1) would not operate in favour of the former spouse. (A former spouse is not a "surviving spouse".) The renounced benefits would devolve in terms of section 2C(2), or in terms of other provisions of succession law if the testator's descendant had no descendants, or to the testator's new spouse if he or she had remarried. Accordingly, a descendant whose mother or father is divorced from the testator cannot benefit his or her parent using section 2C(1).

Finally, section 2C(1) does not stipulate that the surviving spouse must be the parent of the descendant who renounces, in order to benefit from the renunciation. Thus, if a male testator who married under the Marriage Act married a second time, following the dissolution of his first marriage by divorce, and his descendant by his first wife renounced in circumstances in which section 2C(1) applies, the renounced benefit would go to the descendant's stepmother and not to the descendant's actual mother. Effectively, therefore, such a descendant is deprived of benefiting his or her mother by choosing to renounce. (The same would apply *mutatis mutandis* where the testator is female.) For the same reason, if a testator who was married under the Marriage Act had children by a girlfriend (that is, a woman to whom he was not married) and they renounced their inheritances, then the benefit thereof would go to the testator's lawful wife, and not to the descendants of the children who renounced. Accordingly, in the *Moosa* case, the Registrar was incorrect to take the view that the descendants of the children of the second wife were entitled to benefit from the inheritances that their parents renounced (for his view, see *Moosa NO v Minister of Justice supra* par 9).

7 In what proportions do polygynous spouses share a renounced benefit in terms of the reading-in when section 2C(1) operates?

As mentioned earlier, the Constitutional Court was asked to rule that the renounced benefits would always be distributed equally between the surviving spouses whenever section 2C(1) applies, but it refused to do so (*Moosa NO v Minister of Justice supra* par 18). In fact, its order makes no express mention of how the renounced benefits are to be shared between the surviving spouses. It merely rules that, for the purposes of section 2C(1),

the term "'surviving spouse' includes every husband and wife of a monogamous and polygynous Muslim marriage" (*Moosa NO v Minister of Justice supra* par 21, part three of the order). The interesting question is thus how the renounced benefits are to be divided between multiple surviving spouses when section 2C(1) applies, and in particular how they are to be divided in the *Moosa* case.

The section states that the renounced benefit "shall vest in the surviving spouse"; in terms of the reading-in, this includes "every husband and wife" of a Muslim marriage. There is nothing in the section, as amended by the reading-in, that indicates the proportions in which the renounced benefits vest in the surviving spouses, and it must follow that they vest in them in equal proportions. Consequently, if a Muslim testator had more than one wife, and fathered children by each wife, but only the children by one wife renounced in circumstances in which section 2C(1) applies, then the renounced benefit would be shared between all the testator's surviving wives, and there is no way the renouncing beneficiaries could avoid this. Or if the testator had five children by one wife and four children by another wife, and they all renounced in circumstances in which section 2C(1) applies (as was the case in *Moosa*), then the two spouses will inherit equally, even though more benefits may have been renounced by one wife's children than by the other wife's children. (One must bear in mind that the sum of the amounts a wife's children inherit, and renounce, will be a factor not only of how many children each wife bore the deceased but also of how many of those children were male, because if the deceased had sons and daughters, the sons inherit twice the amount the daughters inherit (see Omar *The Islamic Law of Succession and its Application in South Africa* §10.4; see also the certificate issued by the Muslim Judicial Council (*Moosa NO v Minister of Justice supra* par 6)).

Accordingly, in the *Moosa* case, the two surviving spouses benefit equally from the renunciation, although this is not part of the order of court.

8 Evaluation and discussion

The judgment is welcome insofar as it enhances equality by providing for surviving spouses of Muslim marriages to benefit from a renunciation of a benefit by the descendant of a deceased testator in terms of the provisions of section 2C(1), on the same footing as the survivor of a marriage under the Marriage Act, in the circumstances described in the section. Although the finding of unconstitutionality and the outcome of the decision are in the author's view correct, the author has a number of criticisms of the judgment. In what follows, these are examined and thereafter the possibly wider implications of the judgment are explored.

An unsatisfactory aspect of the judgment is that the court does not seem to have given sufficient thought to the significance of the deceased's stipulation in his will that his estate was to devolve in accordance with Islamic law. The judgment of the court *a quo* states, surprisingly without comment, that "[t]he Executor opted not to follow the Islamic law with regard

to renunciation" (*Moosa NO v Harneker supra* par 8). Presumably, this was done because those who renounced their inheritances had stipulated that the renounced benefits were to go to the two wives (*Moosa NO v Harneker supra* par 8). Similarly, after referring to the renunciation, the Constitutional Court simply states without comment that "[the executor] specified that their shares must be distributed equally to the [two wives]" (*Moosa NO v Minister of Justice supra* par 7). There is no mention, in either the judgment of the Constitutional Court or that of the court *a quo*, of any enquiry being made of the Muslim Judicial Council as to the consequences in Islamic law of a beneficiary renouncing his or her inheritance. If a testator is entitled to override the provisions of section 2C(1) in his or her will (a right that the author has argued in favour of in part four of this note), then surely the Muslim Judicial Council ought to have been consulted as to the consequences of the renunciation, because his will states that his estate is to devolve in accordance with Islamic law? As Kernick correctly states:

> "In the case of a genuine repudiation, the consequences cannot depend upon the wishes of the beneficiary who wants to repudiate. He must simply repudiate and leave it to the law to determine the consequences." (Kernick *Administration of Estates and Drafting of Wills* (1998) §58.2 fifth par)

Whether Islamic law permits such a renunciation, and the consequences in terms of Islamic law if it does not, are questions beyond the scope of this note. If Islamic law does not countenance a renunciation, could it be that the testator actually died partly intestate insofar as the devolution stipulated in his will was thwarted in part by the refusal of certain beneficiaries to accept the inheritance conferred upon them by Islamic law, and that his will only countenanced an Islamic distribution? If such is the case, then the children would presumably have renounced their intestate inheritances too and section 1(6) of the Intestate Succession Act would have given the benefits to the two surviving spouses. However, the reading-in stipulated in *Moosa NO v Minister of Justice supra* seems to have inadvertently excluded this possibility.

A further criticism relates to the particular remedy chosen by the court. Having found the provisions of section 2C(1) to be unconstitutional in its treatment of Muslim surviving spouses, the court had to choose whether the remedy lay in simply reinterpreting the word "spouse" in light of the "spirit, purport and objects of the Bill of Rights" (s 39(2) of the Constitution), or whether a reading-in was required. In the event, the court ordered a reading-in. While this decision was consistent with the treatment of polygynous Muslim marriages in the context of intestate succession in *Hassam v Jacobs NO* (*supra*), the author doubts the choice was correct, as is evident below from a brief overview of the *Hassam* case and *Daniels v Campbell NO* (*supra*).

In the *Hassam* case, the court had to deal with a challenge to the exclusion of survivors of a Muslim polygynous marriage from the benefits of intestate succession in that they were not hitherto recognised as "spouses" for the purposes of that Act. The court in *Hassam* ordered that the words "or spouses" be read into the Intestate Succession Act immediately after the

word “spouse” wherever that word appeared in section 1 of that Act (*Hassam v Jacobs NO supra* par 57). The court held that a simple reinterpretation of the word “spouse” in that Act was not permissible, because

> “to read the word ‘spouse’ so as to include multiple spouses would be a significant departure from the ordinary, commonly understood meaning of the word, as it is used in the [Intestate Succession] Act.” (*Hassam v Jacobs NO supra* par 48)

Consequently, so the *Hassam* court held, a reading-in was required in order to rectify the unconstitutionality of the Act (*Hassam v Jacobs NO supra* par 48). This is the same approach taken in *Moosa NO v Minister of Justice* (*supra*).

In the author’s opinion, however, the Constitutional Court’s treatment of polygynous Muslim marriages in these two cases is inconsistent with its comments in *Daniels v Campbell NO* (*supra*). In the *Daniels* case, the court had to deal, *inter alia*, with the exclusion of the survivor of a monogamous Muslim marriage from inheritance under the Intestate Succession Act. The *Daniels* court did not order a reading-in because it found it sufficient to reinterpret the word “spouse” where it appeared in the relevant sections of the Intestate Succession Act (*Daniels v Campbell NO supra* par 37). Although Sachs J (who delivered the majority judgment in *Daniels*) cautioned that the judgment dealt only with monogamous marriages (par 36), it is difficult to see how his comments regarding the natural meaning of “spouse” do not apply equally to both monogamous and polygynous Muslim marriages. He states:

> “The word ‘spouse’ in its ordinary meaning includes parties to a Muslim marriage. Such a reading is not linguistically strained. On the contrary, it corresponds to the way the word is generally understood and used. *It is far more awkward from a linguistic point of view to exclude parties to a Muslim marriage from the word ‘spouse’ than to include them*. Such exclusion as was effected in the past did not flow from courts giving the word ‘spouse’ its ordinary meaning. Rather, it emanated from a linguistically strained use of the word flowing from a culturally and racially hegemonic appropriation of it. Such interpretation owed more to the artifice of prejudice than to the dictates of the English language.” (par 19, emphasis added)

It is hard to see how Sachs J’s comments, if they are true of a spouse in a monogamous marriage, are not also true of a spouse in a polygynous marriage. After all, a man’s first bride is in a monogamous marriage unless and until he takes a second wife. Does the term “spouse” naturally cover her until such time as he takes a second wife but thereafter fail to include her? Such linguistic acrobatics make no sense. A failure to recognise such persons as “spouses” in the ordinary meaning of that term, without requiring a reading-in, merely perpetuates the notion that such marriages are somehow lesser marriages. Accordingly, it is submitted that the Constitutional Court ought to have followed the reinterpretation approach, and that doing so would not have involved a linguistically strained use of the word.

In *Moosa NO v Minister of Justice* (*supra*), the Constitutional Court did not discuss the possibility of a reinterpretation of the term "spouse" and simply confirmed the reading-in order of the court *a quo*. However, in doing so, it endorsed the decision of the court *a quo*, which had relied on the decision in *Hassam v Jacobs NO* (*supra*). The *Hassam* judgment sought to explain away its different treatment of polygynous Muslim marriages by arguing that, in the case of a monogamous marriage, the difference between a marriage under the Marriage Act and a Muslim marriage is merely one of religion, but that, in the case of a polygynous marriage, the additional element of polygyny takes the interpretation of "spouse" (so as to include the survivor of a polygynous marriage) too far (*Hassam v Jacobs NO supra* par 48). The author finds the explanation to be unconvincing in light of Sachs J's comment in the *Daniels* case, as quoted in the previous paragraph.

If the purpose of section 2C(1) is to enable descendants to benefit a surviving spouse, without incurring the various costs that would be associated with receiving the inheritance and then making a donation of it (as suggested in the discussion of the historical evolution of the section in part 2 of this note), then the Constitutional Court's refusal to make an order regarding the proportion in which the surviving spouses are to benefit is unsatisfactory as it may have disadvantaged certain descendants. The author is referring to the disadvantage experienced by beneficiaries who wish to benefit a surviving parent by renouncing an inheritance when the survivor was in a polygynous marriage. This disadvantage arises as follows. It is argued in part seven of this note that in terms of section 2C(1), as modified by the reading-in, a renounced benefit vests in all the surviving spouses in equal shares. There is nothing in the wording of the section that can justify allocating the renounced benefit in any other proportions, and nothing that indicates that the renounced benefit only goes to the parent of the descendant who renounced. Thus the result of the reading-in seems to be that (subject to the testator's freedom of testation) the renounced benefits are always to be distributed equally between the surviving spouses, although the Constitutional Court declined to make an order in those terms. This places the descendants of a polygynous testator at a disadvantage compared to the descendants of other testators because the latter, if they wish to benefit the surviving spouse who is their parent, do not have to concern themselves with whether other beneficiaries are renouncing too, and how much they are renouncing. This is an unsatisfactory outcome of the judgment, rather than a criticism of the court; it is difficult to see how the Constitutional Court could have addressed it differently. The particular order sought by the applicants is not necessarily the best approach, even if the order were modified to protect the testator's freedom of testation. The decision about how the renounced benefit ought to be shared between the surviving spouses is ultimately something that ought to be addressed by the legislature.

It is submitted that the wording of the order with respect to retrospectivity in the *Moosa* case is problematic. The retrospective effect of the order (backdated to the coming into operation of South Africa's interim constitution (Constitution of the Republic of South Africa Act 200 of 1993)) is made

subject to the proviso that "it does not invalidate any transfer of ownership … pursuant to the application of section 2C(1)" that was finalised prior to the date of the order (unless the transferee was on notice of a legal challenge to the constitutionality of the section made on the same grounds as in the *Moosa* case). Where an estate involving a Muslim surviving spouse and descendant-beneficiaries was wound up before the *Moosa* judgment, and the beneficiaries repudiated, then the proper distribution would have been for the renounced benefits to go to the beneficiaries' children. The *Moosa* case has now retrospectively changed the wording of section 2C(1) to provide in effect that the proper distribution would be to the surviving spouse. The difficulty with making retrospective changes to distribution is that, at common law, it seems that where a wrong beneficiary has been paid, or a beneficiary has received too much, the correct beneficiary has a claim against those who benefitted from the error in distribution. As Corbett states:

> "Where the wrong person has been paid out as heir … the true heir can recover the inheritance with a *condictio* from the wrong one. Where the wrong heir had acted in good faith, recovery will be limited to enrichment at the time of the action." (Corbett 14)

However, it would be unfair for a surviving Muslim spouse to be entitled to recover an inheritance from the descendants after the *Moosa* judgment if she had failed to challenge the distribution to them at the time of the winding-up of the estate. A suitably worded proviso that limits the retrospectivity of the reading-in order would, therefore, have been appropriate. It is submitted, however, that the particular wording of the proviso included in the actual order in the *Moosa* case is problematic, as explained below.

The problem with the proviso that the court included in its order of retrospectivity is, first, that it only protects the transferees of property that was distributed "pursuant to the application of s 2C(1)". It does not protect the transferees of property that was distributed pursuant to the application of section 2C(2). The only persons who could have received transfer "pursuant to the application of section 2C(1)" were spouses married to the deceased under the Marriage Act. In other words, the proviso is only relevant to a family, similar to the family in the *Moosa* case, where the deceased had both a spouse married under the Marriage Act and another spouse or spouses married by Muslim rites only, and where the spouse married under the Marriage Act received transfer of the inheritance repudiated by the deceased's descendants. However, if the deceased had had, for example, two spouses to whom he was married by Muslim rites only, and his children renounced their inheritances, then his grandchildren would have been the proper beneficiaries of the renunciation, but would have benefited pursuant to section 2C(2), not section 2C(1). Those transferees are not protected by the proviso because its wording is too narrow. Yet this could arguably be the most common situation in which an enrichment claim might result from the retrospective change in the wording of section 2C(1). These descendants may now face a claim brought against them by surviving Muslim spouses who failed to challenge the constitutionality of section 2C when the estate

was being distributed. A full examination of this possibility is, however, beyond the scope of this note.

The proviso also poses difficulties for a descendant who, in the (then correct) belief that section 2C(1) did not apply to marriages solemnised under Muslim law, renounced his or her inheritance with the intention of benefiting his or her children in terms of section 2C(2). If the transfer pursuant to the renunciation has not yet been implemented, then the deceased's surviving spouse(s) will now be entitled to the transfer in terms of section 2C(1), and not the descendant's children. A decision to renounce, once made, is in principle irrevocable except in special circumstances. Thus a beneficiary will have to seek the court's permission to retract a renunciation on the basis that it was not his or her intention for the spouses to benefit from the renunciation. (Regarding the irrevocable nature of a renunciation and the principles governing a retraction thereof, see *Bielovitch v The Master* 1992 (2) SA 736 (N) and *Ex parte Estate Van Rensburg* 1965 (3) SA 251 (C).)

A less significant quibble with the judgment is that, in the course of its argument, the court asserts:

> "*[R]egistered* customary law polygamous marriages fall within [section 2C(1)'s] ambit since partners in an African customary law marriage are 'spouses' in a legally recognised marriage." (*Moosa NO v Minister of Justice supra*, emphasis added)

In the author's view, the correctness of this statement is to be doubted – for two reasons. First, if customary-law marriages fall within the ambit of section 2C(1), it is doubtful that they require registration in order to do so, because section 4(9) of the Recognition of Customary Marriages Act states that "[f]ailure to register a customary marriage does not affect the validity of that marriage". Secondly, the legal validity of customary-law marriages does not *ipso facto* mean that the surviving spouses of such a marriage are entitled to benefit in terms of section 2C(1), bearing in mind that the court held that the term "spouse" in that section only embraces marriages under the Marriage Act. If the meaning of the word "spouse" in section 2C(1) cannot be reinterpreted to include the survivor of a polygynous marriage (which is the reason the court gives for requiring a reading-in in the *Moosa* case), then how can the section include the survivor of a lawful polygynous marriage entered into under customary law, even if the marriages are "for all purposes recognised as marriages" (as stipulated by s 2(3) and (4) of the Recognition of Customary Marriages Act)? Thus a reading-in, or reinterpretation of the term "spouse", or some more appropriate provision in the Recognition of Customary Marriages Act, may be required in order to entitle the survivor of a lawful customary-law marriage to the benefits of section 2C(1) of the Wills Act. The survivor of a marriage or union under the Civil Union Act is arguably in a stronger position because of the more detailed provisions of section 13 of the Civil Union Act. Section 13(1) expressly states that "[t]he legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union". Furthermore, section 13(2)(*b*) states that any reference to "husband, wife, *or*

spouse in any other law … includes a civil union partner" (emphasis added). Sections 2(3) and (4) of the Recognition of Customary Marriages Act do not go nearly so far. This criticism does not, however, detract from the correctness of the court's final decision in *Moosa*.

It is submitted that the Constitutional Court was unwise to refuse the request by the respondents and the *amicus curiae* for an order to be made allowing any interested person to approach the court for a variation of its order "should any serious administrative or practical problems arise in the implementation of [the] order" (*Moosa NO v Minister of Justice supra* par 19). It gave as its reasons that the retrospectivity of the order is limited, and that the applicants had not asked for such an order (paraphrased from par 19). In the author's view, this omission is unfortunate because there was no one before the court to represent the interests of other persons who may be deprived of the benefit of section 2C(2) by the court's order. This includes persons affected by the retrospectivity of the order.

It is questionable whether the court's approach to the award of costs was fair. The Constitutional Court made no order as to costs (*Moosa NO v Minister of Justice supra* par 21), and no costs order was made in the court *a quo* in respect of the proceedings there (*Moosa NO v Harneker supra* par 38). This contrasts with the costs order in *Hassam v Jacobs NO* (*supra*) (in which an order was made for polygynous Muslim spouses to inherit as surviving spouses on intestacy) where the Constitutional Court made a costs order against the Minister in respect of both the proceedings in the court *a quo* and those before the Constitutional Court (*Hassam v Jacobs NO supra* par 56 and 57). The court in *Hassam* supported its costs order with the comment that "the applicant launched these proceedings to vindicate her constitutional rights. Moreover she has been wholly successful" (*Hassam v Jacobs NO supra* par 56). Perhaps it is time for costs orders against the relevant Minister to be the norm in matters such as this. As Amien has correctly pointed out, such applications involve substantial financial and emotional costs to the applicants (Amien "A Discussion of *Moosa NO and Others v Harnaker* [sic] *and Others* Illustrating the Need for Legal Recognition of Muslim Marriages in South Africa" 2019 *Journal of Comparative Law in Africa* 115 128). One might add that they also involve undesirable delay. On the other hand, a brief survey of the range of working papers that have been issued by the South African Law Reform Commission in its Project 25, which deals with the updating of legislation in light of the equality clause, reveals what a truly Herculean task this is. (For the Commission's interim views relating, *inter alia*, to the Wills Act, see South African Law Reform Commission *Discussion Paper 129 Project 25 Statutory Law Revision: Legislation Administered by the Department of Justice and Constitutional Development* (October 2011). This discussion paper does not, however, envisage any changes to section 2C of the Wills Act (Jamneck "The Problematic Practical Application of Section 1(6) and 1(7) of the Intestate Succession Act Under a New Dispensation" 2014 *PER* 991), although it does propose certain changes to the corresponding sections of the Intestate Succession Act, which are critically evaluated in Jamneck's article.)

Putting aside these criticisms of the *Moosa* case, it is worth noting that it has potential significance in a number of situations outside the particular context of section 2C, as appears from the discussion below.

The *Moosa* case is significant for persons married by Hindu rites. The reasoning adopted there with respect to survivors of Muslim marriages is equally applicable to the survivors of marriages by Hindu rites. Clearly, the survivor of a Hindu marriage should also be entitled to enjoy the benefit of section 2C(1). Since such marriages are monogamous, this should be achievable by a reinterpretation of the term "surviving spouse" so as to include such a survivor.

The decision in the *Moosa* case may also have implications for other sections of the Wills Act in which the term "spouse" is used, such as sections 2B and 4A of the Act. Section 2B of the Act treats a "previous spouse" as predeceased if the testator dies within three months after his or her marriage to the "previous spouse" was dissolved by a "divorce or annulment by a competent court", if the execution of the will preceded the dissolution. (For a discussion of section 2B, see Corbett 541; De Waal and Schoeman-Malan *Law of Succession* 103; Wood-Bodley "Wills, Divorce, and the Provisions of Section 2B of the Wills Act: *Louw NO v Kock*" (2018) 135 *SALJ* 418.) Persons who cannot benefit from the operation of this section, because there is still no general recognition of Muslim or Hindu marriages in our law, may wish to challenge the constitutionality of the section on the basis that, as in the *Moosa* case, the differentiation involved has no rational connection to any legitimate governmental purpose. A full constitutional analysis of this issue is, however, beyond the scope of this note.

Section 4A(1) of the Wills Act deprives persons who wrote out the will by hand, or who participated in the execution of the will in certain specified ways, of the capacity to inherit under the will (unless one of the exceptions in section 4A(2) applies). (For a discussion of s 4A, see Corbett 86–87; and De Waal and Schoeman-Malan *Law of Succession* 121–124.) The section also deprives "the spouse of such person at the time of the execution of the will" of the capacity to inherit under the will (s 4A(1)). Such person's inheritance then goes to another beneficiary determined by the provisions of the will or, in the absence of a relevant provision, to the deceased's intestate beneficiaries. Suppose the spouses of the testator's two sons witnessed the testator's will. If son "A" and his spouse were married under the Marriage Act at the time, then, in terms of section 4A(1), son "A" is deprived of capacity to take any benefit under his father's will. However, if son "B" and his spouse were married only by Muslim or Hindu religious rites at the time, then son "B" would not be deprived of the capacity to benefit under his father's will. It is difficult to see a rational connection to any legitimate governmental purpose in this differentiation. The decision in the *Moosa* case, in another context of the Wills Act, providing for equal recognition of marriages celebrated only by religious rites, lends support to the notion that section 4A(1) may also be open to constitutional challenge. A full constitutional analysis of this issue is, however, beyond the scope of this note.

Finally, in view of the substantial similarity between the provisions of sections 1(6) and (7) of the Intestate Succession Act and sections 2C(1) and (2) of the Wills Act, the judgment suggests that the failure to provide for Muslim and Hindu marriages in section 1(6) of the Intestate Succession Act will not pass constitutional scrutiny. (For a discussion of these sections and proposals for their amendment currently under consideration by the South African Law Reform Commission, see Jamneck 2014 *PER* 3).

9 Conclusion

The decision in *Moosa NO v Minister of Justice* (*supra*) is welcomed insofar as it advances equality by including the survivors of Muslim marriages (both monogamous and polygynous) in the benefits conferred on a surviving spouse by section 2C(1) of the Wills Act. The decision does not affect the position of surviving Hindu spouses, nor of the survivors of unformalised same-sex relationships who have undertaken reciprocal duties of support; these persons continue to be excluded from the benefit of section 2C(1).

It seems that the surviving spouses and partners in marriages and civil unions under the Civil Union Act already enjoy the benefits of section 2C(1) (see s 13(2)(*b*) of that Act). According to the *Moosa* judgment, surviving spouses in registered marriages under African customary law do so too, although the correctness of this statement is open to doubt, for reasons indicated in part eight of this note.

The applicants in the *Moosa* case were not awarded a costs order against the Minister of Justice. It is unfortunate that members of the public who successfully enforce their rights under the equality clause, to the benefit also of other similarly placed citizens, should have to carry their own costs.

The reading-in ordered by the Constitutional Court is backdated to operate from 27 April 1994 (*Moosa NO v Minister of Justice supra* par 21, part three of the order). However, a proviso to the order protects from challenge transfers of ownership pursuant to section 2C(1) that were completed before the date of the order, provided that the parties were not on notice of a challenge to the constitutionality of section 2C(1), on the same grounds as in *Moosa*, when the transfer took place (*Moosa NO v Minister of Justice supra* par 21, part three of the order). There is no similar proviso, however, with respect to transfers made pursuant to section 2C(2). It seems that this may open the way to claims by Muslim surviving spouses against persons who received benefits in terms of section 2C(2) that were renounced by a descendant of the testator after 27 April 1994. Furthermore, a descendant who after 27 April 1994 renounced his or her inheritance in the expectation that the benefit would pass to his or her descendants in terms of section 2C(2) may now need to apply to court for permission to retract the repudiation if ownership in the relevant property has not yet been transferred. This is because a repudiation (once made) is regarded in our law as irrevocable, except in exceptional circumstances. A full exploration of these issues is, however, beyond the scope of this note.

The *Moosa* judgment was not required to deal with the vexed question of the precise circumstances that trigger the operation of section 2C(1); nor with the question whether a testator can override the provisions of section 2C(1) by making an appropriate stipulation in his or her will. For the reasons set out in part five of this note, it is submitted that section 2C(1) should be broadly interpreted so that it operates whenever a surviving spouse and a descendant (who renounces) inherit under the will, not only when they are inheriting as co-beneficiaries of the same asset or assets. It is further submitted, for the reasons discussed in part four of this note, that a testator can override the provisions of section 2C(1) by appropriate provisions in his or her will. These points are open to some doubt, however, and will remain moot until addressed in the courts.

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