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TEACHING THE “OTHER LAW” IN A SOUTH AFRICAN UNIVERSITY: SOME PROBLEMS ENCOUNTERED AND POSSIBLE SOLUTIONS

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SUMMARY

African customary law is a legal system that is recognised in South Africa and forms part of the law of the indigenous people of South Africa. Due to colonialism and apartheid, this legal system was rejected and underdeveloped in favour of common law. The supremacy of the Constitution and its recognition of African customary law as an independent legal system, separate from the common law, aimed to correct past injustices that flowed from the underdevelopment of this important legal system. Whether the Constitution and higher learning institutions have attained the goal of developing African customary law in South Africa is a question that will be explored and debated in this contribution. Its aim is to assess the role of higher learning institutions in developing African customary law through their teaching of this system of law, as well as to outline some of the challenges faced by these institutions in offering an African customary law course to students. Possible solutions are discussed; the aim is to ensure that the teaching component of African customary law is developed, and to contribute to the current debate about curriculum transformation among universities and various stakeholders in higher learning. Curriculum transformation is key to the future development and inclusiveness of the South African community that is so diverse.

1 INTRODUCTION

Most South African universities prescribe a course in customary law as a prerequisite for a degree in law. Customary law, which was not previously regarded as part of South African law, is currently recognised as a legal system in South Africa in terms of section 211(3) of the Constitution of the

Republic of South Africa, 1996 (the Constitution). There are certain other legal systems of a religious nature – such as Muslim and Hindu systems – that are observed but are not as yet recognised in South Africa..[1] When a matter unavoidably deals with these systems of law, they may be applied subject to the Bill of Rights as enshrined in the Constitution. The application of these systems of law and customary law is mostly in the field of private law, especially family law. This is to be expected, as South Africa is a multicultural society.[2]

South African universities employ different names to describe this "other law" in their curricula. Some call it "African Customary Law", while others name the course "Legal Diversity". Some use the term "customary" while others prefer "legal pluralism". Legal Pluralism is used to indicate the plurality of legal systems observed in South Africa. Irrespective of the title of the subject, most universities indicate in their study materials or course outlines that the course deals with the study of customary law. Customary law has been defined as "the customs and usages observed among the indigenous African people of South Africa and which form part of the culture of those people".[3] Another term used to describe this legal system is "indigenous law".

In this discussion, teaching the "other law" refers to customary law as indicated above and does not include the laws of a religious nature that are observed in South Africa. The discussion focuses on the problems faced by teachers of law in their guidance of law students in trying to understand legal concepts in customary law. All textbooks on the subject presented by South African universities are written in English or Afrikaans – for example, Rautenbach and Bekker *Introduction to Legal Pluralism* is written in English and translated into Afrikaans.[4] Although this is positive, these texts refer to certain concepts of law using terms from indigenous languages used by people who adhere to a customary law system. Some students and lecturers who may be speakers of these languages may understand the vernacular concepts used in a different manner from the writers of the texts. In trying to understand these concepts, it may become important that users of these textbooks (both lecturers, authors of textbooks and students) have a working knowledge of the indigenous language used. Besides the language problem, there are other problems that are mentioned and dealt with below in the contribution.

2 NATURE OF SOUTH AFRICAN LAW

The South African legal system has been described as a mixed system of law based on the "common law", consisting mostly of Roman-Dutch law as

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1 Rautenbach *Introduction to Legal Pluralism in South Africa* (2018) 62.

2 Maithufi "Customary Law of Marriage and the Bill of Rights in South Africa: Quo Vadis?" 1996 (2) *THRHR* 298.

3 S 1 of the Recognition of Customary Marriages Act 120 of 1998.

4 See also Bennett *Human Rights and African Customary Law* (1995); Bekker *Customary Law in Southern Africa* (1989) and Himonga and Nhlapo *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014).

influenced by English law.[5] Customary law is also an important component of the South African legal system as confirmed by the Constitution.[6] Customary law is observed by various indigenous African population groups in South Africa.[7] Besides this system of law, certain religious systems of law, such as Christian, Muslim, Hindu, Jewish and other religious laws, are also observed in South Africa.[8] Although the various indigenous African populations observe a system of customary law, minor differences of principle exist among them in the fields of family law, law of property and others.[9]

The Constitution dictates that South African law (the mixed system of law indicated above) has to be applied subject to the Constitution. Where necessary, it also has to be developed in accordance with the spirit, purport and objects of the Bill of Rights.[10] This is because the Constitution is the supreme law of South Africa and any inconsistent law or conduct is null and void.[11] Customary law also has to be applied subject to any legislation that deals with it. In this manner, South African courts are able to shape this legal system to reflect what the Constitution requires.[12]

Despite the plurality of legal systems in South Africa, only customary law has been recognised as a legal system on the same footing as the common law.[13] In this regard, section 211(3) of the Constitution provides as follows:

> "The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

Section 39(2) of the Constitution provides further:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

These constitutional provisions affirm that courts have a role to play in the application and development of customary law. As already mentioned, some religious legal systems in South Africa have not been formally recognised, despite being observed by believers.[14] As a result, *inter alia,* religious marriages have not been recognised and their consequences not enforced.[15]

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5 Rautenbach *Introduction to Legal Pluralism in South Africa* 5.

6 S 211(3) of the Constitution.

7 S 1 of 120 of 1998.

8 Rautenbach *Introduction to Legal Pluralism in South Africa* 62.

9 Himonga and Nhlapo *African Customary Law in South Africa* 23.

10 S 39(2) of the Constitution.

11 S 2 of the Constitution.

12 See *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC); *Mayelane v Ngwenyam* 2013 (4) SA 415 (CC), *Shilubana v Nwamita* 2009 (2) SA 66 (CC), *Mthembu v Letsela* 2000 (3) SA 867 (SCA)). In all these cases, the courts aimed to eradicate the principle of male primogeniture in indigenous communities where males were considered superior to females in terms of succession and marriage. The common denominator in all these cases was the need to attain equality across all genders in order to realise the constitutional provision in terms of s 9, which prohibits discrimination of one person by another.

13 S 211 of the Constitution.

14 Rautenbach *Introduction to Legal Pluralism in South Africa* 62.

15 Amien and Moosa *Religious Legal Systems in South Africa* (2014) 57.

Currently, the consequences of such marriages are enforceable by South African courts in the case of monogamous marriages.[16]

3 OTHER FORMS OF FAMILY LAW AND THE CONSTITUTION

It is interesting that although other legal systems of a religious nature are not as yet recognised by South African law, certain consequences that flow from those relationships are given effect to or enforced by the courts.[17] In certain cases, legislative measures have expressly been enacted to give effect to these consequences or recognise the relationships for specific purposes.[18]

Fundamental changes in this field were brought about by the adoption of the current constitutional dispensation in South Africa. The Constitution now provides for the enactment of legislation aimed at recognising the following forms of marital relationship:

> "(i) marriages concluded under any tradition, or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion."[19]

The road is therefore set for the recognition of marital relationships arising from other laws in South Africa. It has to be noted that currently only customary marriage is recognised in the same manner as civil marriage. The implication of recognition of whatever form of marriage is that it brings about a family that is worthy of protection by South African law.

The intention to make other forms of marital relationship valid is further endorsed in section 39(3) of the Constitution:

> "The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."[20]

The Recognition of Customary Marriages Act (RCMA) was the first step adopted in recognising one of these relationships as valid.[21] Enacted because of the constitutional provisions mentioned above, it provides for the recognition of customary marriages, whether monogamous or polygamous and whether contracted before or after its coming into operation. It lays down the requirement for valid customary marriages, their consequences as well

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[16] See *Ryland v Edros* 1997 (2) SA 690 (C); *Amod v Multinational Motorvehicle Accident Fund* 1999 (4) SA 1319 (SCA); *Daniels v Campbell* 2004 (5) SA 331 (CC)). In 2018, the Legal Resources Centre approached the High Court in Cape Town in order to persuade it to declare the non-recognition of Muslim marriages and the consequences that follow as unconstitutional because non-recognition violates the right to equality of women. To avoid judicial overreach, the application did not succeed but the applicants were ordered to approach Parliament to correct the defect.

[17] Maithufi 1996 *THRHR* 298.

[18] S 31 of the Black Laws Amendment Act 24 of 1936 and S 21(3) of the Insolvency Act 24 of 1936.

[19] S 15(3) of the Constitution.

[20] S 39(3) of the Constitution.

[21] S 2 of 120 of 1998.

as the manner in which they have to be dissolved.[22] It also improves the status of spouses and children of the marriages.[23] The status of female spouses and their children is further enhanced by the Reform of Customary Law of Succeeding and Regulation of Related Matters Act.[24] However, the provisions of the RCMA have been challenged in a number of court cases, particularly when it comes to the protection of women in polygamous marriages. For example, it was found that section 7(1) of the RCMA still discriminates against women based on their gender and affords protection to men that is contrary to the equality clause.[25]

Currently, only customary and civil marriages are recognised as valid marriages. The other form of marital relationship, that has been afforded recognition, is a civil union in terms of the Civil Unions Act.[26] Although recommendations have been made with regard to the possible recognition of religious marriages, these have not as yet received full recognition.[27] However, South African courts have given effect to certain consequences of these marriages.

4 OTHER FIELDS OR BRANCHES OF LAW AND PROBLEMS ENCOUNTERED

Besides the law applicable to customary marriages, other fields of law presented by South African universities include the law of property, contract, delict, succession, inheritance and others. Various problems may be encountered by both lecturers and students in the interpretation of certain customary law concepts used in prescribed textbooks in these fields of law. These problems may relate, *inter alia*, to the following:

1. interpretation in the medium of instruction of concepts used;
2. lack of knowledge to describe concepts in a language other than English or Afrikaans, and frustration of students and lecturers; and
3. inadequate period of tuition.

An explanation of the problems and their possible solutions are discussed below.

5 THE PROBLEMS

5 1 Medium of instruction

For a long time, English and Afrikaans were the only two official languages recognised in South Africa. Tuition in South African universities was and still

[22] Ss 87 and 88 of 120 of 1998.

[23] *Thibela v Minister van Wet en Orde* 1995 (3) SA 147 (T); *Hlophe v Mahlalela* 1998 (1) SA 499 (T) and Himonga and Nhlapo *African Customary Law in South Africa* 21.

[24] S 4 of 11 of 2009.

[25] *Ramuhovhi v President of the Republic of South Africa* (CCT194/16) [2017] ZACC 41 (30 November 2017).

[26] S 2 of 17 of 2006.

[27] Amien and Moosa *Religious Legal Systems in South Africa* 64.

is conducted in these languages. This is despite current efforts to transform curricula and to eradicate Afrikaans as a medium of instruction and for English to be the single medium of instruction in South African universities. It was only after the adoption of the Constitution of 1996 that the other nine South African languages were made official languages.[28] None of these languages, however, are used as a medium of instruction by South African universities which may be grouped in the following categories according to their medium of instruction:

1. those that offer tuition in Afrikaans only;
2. those that offer tuition in English only; and
3. those that offer tuition in both English and Afrikaans.

All textbooks in the subject (customary law) are written exclusively in these official languages. It is therefore expected that all prospective university students be conversant with these languages. Considering the background from which the majority of prospective South African students are drawn, considerable time and effort on the part of educational authorities are required to ensure that students have a thorough knowledge of these languages.

All textbooks in customary law use certain expressions that are derived from some of South Africa's official languages, and which are not languages of instruction, to explain legal principles that cannot easily be translated into one of the languages of instruction. Examples from the field of family law are sufficient to indicate this: words such as *lobolo* (*bohali*, *bogadi*, *mogadi*), *ukuthwala*, *ukungena*, *phuthuma*, *seantlo* and others are frequently used by authors in customary law.[29] Both lecturers and students in this field should be sufficiently conversant with the expressions from these languages so that the lecturers may correctly describe the concepts for the benefit of students. This may be difficult to achieve since South African students, throughout their schooling years, are taught through the medium of English and Afrikaans, some without studying even the basics of other official languages. Moreover, some of the legal concepts in customary law may not be capable of being adequately translated into either English or Afrikaans. A student who is conversant with the concepts as used in the language of the people practising customary law may therefore be lost in studying these concepts as explained in the textbook.

The problems associated with the use of English or Afrikaans to describe customary law concepts has been described as follows:

> "The effort to express African concepts in English or Afrikaans may give rise to misunderstanding. Bennett discusses at length the misconceptions arising from calling customary land tenure communal. It is thus paramount to always keep in mind that a misconception regarding the true content of a customary-

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[28] S 6 of the Constitution.

[29] Please refer to Bennett *Human Rights and African Customary Law*; Bekker *Customary Law in Southern Africa* and Himonga and Nhlapo *African Customary Law in South Africa*. In all these textbooks there is no single translation that clearly explains the terms or principles to students, creating difficulty for both lecturers and students, as already outlined.

law rule could exist as a result of a difference between the language in which it is practised and that which is written down".[30]

5 2 Lack of knowledge to correctly define or interpret concepts and frustration of students and lecturers

The majority of South African law students study a course in customary law for a period of about four to five months; this compares unfavourably with the time allocated for study of the common law in private and public law (approximately four to five years). For example, a course such as criminal law, in most universities, is divided into two parts and is spread over a full year; and yet, customary law, which is such a broad course and also includes criminal law in its content, is taught for one semester, resulting in compromised teaching of the course. For both students and lecturers, the impression is created that customary law is not an important component of South African law. This is amplified by the fact that customary law is still under-developed after 25 years of the democratic dispensation.

The use of vernacular concepts, which may not have been properly explained in the textbooks used, usually leads to dissatisfaction on the part of students and lecturers alike. The cumulative effect of this state of affairs has drawn comment:

> "Add to this, the sometimes expressed, but more often implicitly communicated view of most law teachers that African customary law is not very important or does not really exist. By never or seldom referring to African customary law and by the tone of voice when African customary law is referred to the students view of the relative importance of the general law and customary law can only be reinforced".[31]

The use of vernacular language in explaining concepts in customary law may be useful to those who understand the language used. For those not familiar with that language (both students and lecturers), it may be an obstacle to understanding the legal concept that is explained. Surprisingly, most South African law students are capable of grasping the meaning of the Latin terminology regularly used to explain legal concepts in the common law, but fail to appreciate the meaning of the terminology used in explaining concepts in customary law. This is unfortunate in the new South Africa, bearing in mind that African customary law concepts or principles, like *Ubuntu*, among others, have something to contribute to social cohesion and nation-building beyond racial lines, which are fundamental in the new South Africa.[32]

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30 Rautenbach and Bekker *Introduction to Legal Pluralism* 25.

31 Visser *The Role of Legal Education in the Conflict of Laws: The Internal Conflict of Laws in South Africa* (1990) 68.

32 *S v Makwanyane* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

5 3 Inadequate period of tuition

Many South African universities do not devote adequate time to the study of customary law when compared to other branches of the common law. As already mentioned, when customary law is recognised as an independent course or subject, it is offered for a period of approximately four to five months. Some universities have decided not to offer customary law as an independent subject and teach it in conjunction with other courses or subjects dealing with the common law. For example, the customary law relating to marriage may be taught together with common-law marriage, and the customary law of succession with common-law succession. The problem with this approach is that most textbooks discussing common law do not adequately address the provisions of customary law, the conflicts that may arise from the application of these systems of law, or possible solutions.

As a result of the limited time set aside for the study of customary law, dissatisfaction may spread among lecturers and students. All are pressed for time to write and prepare for tests and examinations during this limited period. Again, the medium of instruction raises its ugly head as a problem for those students who may not be conversant with customary law legal concepts as well as those not conversant with the language of instruction.

Lamenting the limited time devoted to the teaching of customary law and the attitudes inculcated thereby, Visser had this to say:

> "Just think of how the simple fact of time devoted to the teaching of law, other than African customary law, in the typical South African curriculum must convince a student that the general law is more 'important' than African customary law. Generally, it takes a student four to five years to attain the LLB degree. During this time, he or she is required to do four or five courses in private law, one or two courses in commercial law and at least one course in Roman law, criminal law, criminal procedure, civil procedure, conflict of laws, interpretation of statute, administrative law and jurisprudence. All these courses add to the Eurocentric nature of the general law."[33]

This has resulted in students not being equipped to tackle cases in practice in the area of customary law. Nonetheless, the role and importance of customary law in the legal fraternity is emphasised and this is made clear when the Judicial Services Commission (JSC) interviews candidates for the position of judges. Recently, during the interviewing process of prospective judges, the JSC commissioners posed questions on customary law and knowledge of indigenous languages. Candidates who lacked understanding of customary law and indigenous languages were criticised for their inability to contribute meaningfully to the bench when confronted with customary law disputes, among other things. In most instances, candidates appear to be weak in this area of law. Universities must heed the call to address this shortcoming in teaching customary law, and work to equip candidates with enough knowledge and skill for practice, while at the same time helping courts to fulfil the constitutional obligation of developing African customary law in South Africa.

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[33] Visser *The Role of Legal Education in the Conflict of Laws* 69.

6 CONCLUSION AND RECOMMENDATIONS

This article has dealt with some of the problems relating to the offering of customary law in South African universities. Customary law used to be one of the "other laws" that were observed, but not recognised, in South Africa. However, it received full recognition as a legal system in South Africa when the current constitutional dispensation took effect. Examples of problems encountered by lecturers and students in the teaching of customary law are found in almost all known fields of the law. This is reflected in the fact that textbooks on customary law are written in either English or Afrikaans, which serve as the mediums of instruction in South African universities. In these textbooks, one finds words or phrases that are neither English nor Afrikaans, which may lead to translation and interpretation difficulties for lecturers and students who are not conversant with the language used. Is it not time to require lecturers in customary law to have at least a working knowledge of some of the other official languages recognised in South Africa? It is submitted that this would go a long way to avoiding problems that may arise in interpreting concepts known only in customary law. Although apparently a radical and difficult proposition, it is not impossible to achieve in the present-day South Africa.

Accepting that South Africa is a multicultural society is an important stepping stone to realising that its legal system cannot be made up solely of the common law. This is of pivotal importance to all stakeholders involved in the provision of legal education so that customary law can be placed in its rightful position and given the respect it deserves as a component of South African law. It should not be difficult to resolve the problem related to the period devoted to teaching customary law, which appears inadequate to cover the most important concepts in this field. Are South African universities and all stakeholders involved in the provision of legal education prepared to extend the teaching of customary law? Universities could consider inviting people who practise customary law to give guest lectures and seminars to impart knowledge about this field of law, bearing in mind that it is unwritten. This would in turn mean that people who practise customary law, not only as a system of law but as a belief, are involved in the shaping of the curriculum, which could prevent distortions of customary law and also lead to the development of this important legal system.

The development and preservation of customary law teaching depends on the involvement of a variety of people, including students, lecturers and people who practise customary law. It is submitted that customary law is indeed communal and various people should be involved in shaping this important legal system. Although this may have an impact on the tuition fee for the course, it is not impossible to achieve. The importance of this legal system in South Africa should be recognised in the drive towards curriculum transformation in higher learning and in the process contributing towards nation-building.

CONTRACTUAL CAPACITY AND THE CONFLICT OF LAWS IN COMMON-LAW JURISDICTIONS (PART 2): AUSTRALASIA, NORTH AMERICA, ASIA AND AFRICA

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SUMMARY

This series of two articles provides a comparative overview of the position in common-law jurisdictions on the conflict of laws in respect of the contractual capacity of natural persons. The comparative study is undertaken in order to provide guidelines for the future development of South African private international law. Reference is primarily made to case law and the opinions of academic authors. The legal position in the law of the United Kingdom, as the mother jurisdiction in Europe, was investigated in part 1.[1] Although Scotland is a mixed civil/common-law jurisdiction, the situation in that part of the United Kingdom was also discussed.

Part 2 deals with the rules and principles of private international law in respect of contractual capacity in Australasia (Australia and New Zealand), North America (the common-law provinces of Canada and the United States of America), Asia (India, Malaysia and Singapore) and Africa (Ghana and Nigeria). This part also contains a comprehensive summary of the legal position in the common-law countries, followed by ideas for the reform of South African private international law in this regard.

3 AUSTRALASIA

3 1 Australia

As is the position in the United Kingdom, the Australian law governing contractual capacity is not settled.[2] There is further a dearth of case law on the issue and the legal systems that are utilised in the English-law context are referred to by the authors – namely, the *lex domicilii*, the *lex loci contractus* and the proper law of the contract.

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1 Fredericks “Contractual Capacity and the Conflict of Laws in Common-Law Jurisdictions (Part I): The United Kingdom” 2018 39(3) *Obiter* 652.

2 The Australian Law Reform Commission *Choice of Law* (1992) 100; Davies, Bell and Brereton *Nygh’s Conflict of Laws in Australia* 8ed (2010) 406–407; Nygh *Conflict of Laws in Australia* 5ed (1991) 279; Sykes and Pryles *Australian Private International Law* 3ed (1991) 614; and Tilbury, Davis and Opeskin *Conflict of Laws in Australia* (2002) 768.

3 1 1 Australian case law

There are two prominent Australian cases concerning contractual capacity: *Gregg v Perpetual Trustee Company*,[3] which concerned the transfer of rights in respect of immovable property in terms of an antenuptial contract, and *Homestake Gold of Australia v Peninsula Gold Pty Ltd*,[4] which involved the transfer of shares.

3 1 1 (i) *Gregg v Perpetual Trustee Company*[5]

Bertha Major entered into an antenuptial agreement with Francis Gould Smith. The parties were both domiciled in New South Wales (Australia). At the time of the conclusion of the antenuptial agreement (and entering into marriage), Bertha was a minor. In terms of the antenuptial agreement, Bertha transferred her interests in immovable property situated in Queensland (Australia) to her husband, Mr Smith. Upon attaining majority, she executed a document ratifying the agreement, but this was not attested to in the presence of a commissioner. In terms of her domiciliary law (the law of New South Wales), she lacked the capacity to conclude a transaction for the transfer of interests of this nature but, in terms of the *lex situs* (the law of Queensland), she was capable. The court was thus approached to pronounce on whether the mentioned interests were in fact transferred under the circumstances.

The Married Woman's Property Act of Queensland of 1891 came into force before the Smiths were married.[6] Harvey J, relying on the Act, *Re Piercey*[7] and *Murray v Champernowne*,[8] therefore held that "this property became on her marriage her separate estate, and could be dealt with by Mrs Smith accordingly".[9] Harvey J also stated that the confirmation of the ratification by a commissioner *in casu* was irrelevant:

> "No acknowledgement of the deed of confirmation of her marriage settlement was therefore necessary on her part to pass so much of the property as at the date of her marriage was in fact real estate situated in Queensland."[10]

Harvey J arrived at the conclusion that the relevant interests were transferred *in casu* because the "real estate … may be effectively conveyed according to the law of the land where the real estate is situated, and capacity to deal with such an interest is determined by the *lex loci*".[11] From the context it is clear that the "lex loci" here must be read to refer to the *lex situs*.

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3 (1918) 18 SR (NSW) 252.
4 (1996) 20 ACSR 67.
5 *Supra.*
6 The Act entered into force on 1 January 1891 and the Smiths were married on 31 January 1895.
7 [1895] 1 ch 83.
8 [1901] 2 IR 232.
9 *Gregg v Perpetual Trustee Company supra* 256.
10 *Ibid.*
11 *Ibid.*

3 1 1 (ii) *Homestake Gold of Australia v Peninsula Gold Pty Ltd*[12]

This rather complicated decision involved a novel scheme to defeat compulsory acquisition in a takeover by transferring shares to minors. Young J referred to it as the "ham scam case".[13] The minors (or their guardians) would benefit as they would be awarded a small amount of money or (strangely enough) a free ham. The promoters of the scheme, on the other hand, would benefit from having their shares registered in a large number of individual holdings by minors. On 14 August 1995, the Homestake Mining Company ("Homestake Mining") announced that it would make takeover offers to acquire the outstanding shares in the gold mining company Homestake Gold (the plaintiff), as it already owned 81,5 per cent of the ordinary shares in the latter company. On 16 October 1995, the plaintiff's share registry received 918 transfers executed by the defendant, Peninsula, each transferring 100 shares in the capital of the plaintiff. The transferees were all minors. The effect of the registration was that the number of members in Homestake Mining increased by 918 to 4357. Homestake Mining's takeover offer closed on 9 February 1996 and had then become entitled to 99,5 per cent of the paid-up ordinary shares of the plaintiff. As such, Homestake Mining asserted that it had satisfied the requirements for compulsory acquisition, which is allowed in terms of section 701 of the Australian Corporations Law. In the meantime, further share transfers were lodged with the plaintiff's share registry but these were not registered because the transferors were minors and the plaintiff feared that the transfers were not binding on these minors. The issue before the court was precisely the validity of the transfer to the minors in October 1995 and the transfer from them in February 1996 – more particularly, whether the minors had the contractual capacity to ratify or affirm the contracts.

Young J approached the matter from a private international law perspective as the minors were domiciled in Australia, New Zealand and the United Kingdom. He held that the issue of capacity pertains to the domain of the substantive validity of a contract because it determines whether enforceable rights and obligations are to flow from an agreement between contractants. In rejecting the application of the *lex domicilii*, the judge cited the Canadian author McLeod, who submits that the application of the *lex domicilii* is unsatisfactory in modern commerce and should thus be abandoned.[14] The *lex loci contractus*, according to Young J, should also be disregarded because this legal system was only applied in cases involving negotiable instruments[15] or marriage contracts.[16] Although he mentioned Dicey and Morris's Rule 181[17] (the predecessor of Rule 228(1) of Dicey, Morris and Collins)[18] that an individual's contractual capacity is governed by

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12 *Supra*.

13 *Homestake Gold of Australia v Peninsula Gold Pty Ltd supra* 1.

14 McLeod *The Conflict of Laws* (1983) 491.

15 As in *Bondholders Securities Corporation v Manville* [1933] 4 DLR 699; [1933] 3 WWR 1.

16 *Homestake Gold of Australia v Peninsula Gold Pty Ltd supra* 8.

17 Collins, Hartley, McClean and Morse (eds) *Dicey and Morris on the Conflict of Laws* 12ed (1993) 1271.

18 Collins, Briggs, Dickinson, Harris, McClean, McEleavy, McLachlan and Morse (eds) *Dicey, Morris and Collins on the Conflict of Laws* 15ed (2012) 1865.

either the proper law or the law of domicile and residence, the court found the most compelling approach to be that advocated by Cheshire and North[19] – that contractual capacity in a commercial context should be regulated by the proper law of the contract objectively ascertained. Indeed, this legal system was applied by the Ontario Court of Appeal in *Charron v Montreal Trust Co*[20] and later by Brightman J in *The Bodley Head Limited v Flegon*.[21] The objective putative proper law, Young J added, is also favoured by modern Australian authors such as Nygh[22] and Sykes and Pryles,[23] as well as by the Canadian conflicts author, McLeod.[24] As a result, he arrived at the conclusion that contractual capacity is to be governed by the objectively ascertained proper law of the contract. He stated: "I believe I should follow the *Charron* case and apply the proper law of contract."[25]

Sychold,[26] however, is of the opinion that *Charron v Montreal Trust Co*,[27] on which Young J heavily relies, is not strong authority, as the court simply assumed that the problem (that is, that separation agreements between spouses were invalid in Quebec at the time) was one of capacity rather than invalidity due to public policy. In addition, the proper law *in casu* was also the *lex fori* and the Ontarian Court of Appeal was clearly reluctant to apply the civil-law rules of Quebec (the law of Quebec was the *lex domicilii*). According to the author, the court in the *Charron* case[28] arbitrarily decided to apply the proper law to capacity as a matter of policy, as advocated by English commentators, instead of following English case law on marital property settlements (where the *lex domicilii* was always applied). Sychold submits that there remains considerable scope for the application of the *lex domicilii* to contractual capacity, particularly in non-commercial contracts in Australian private international law.[29]

3 1 1 (iii) Summary of Australian case law

From these two decisions, it can be deduced that the Australian courts would be inclined to apply the objective proper law to capacity in respect of commercial contracts in general and the *lex situs* in cases involving immovable property.

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19 North and Fawcett *Cheshire and North's Private International Law* 12ed (1992) 511.
20 (1958) 15 DLR (2d) 240 (Ontario) 240.
21 [1972] 1 WLR 680.
22 Nygh *Conflict of Laws in Australia* 6ed (1995) 303.
23 Sykes and Pryles *Australian Private International Law* 614. However, these authors, of course, support the objective and subjective proper law – see heading 3 1 2 (iv) below.
24 McLeod *The Conflict of Laws* 490–492.
25 *Homestake Gold of Australia v Peninsula Gold Pty Ltd supra* 8.
26 Sychold "Australia" in Verschraegen (ed) *Private International Law* in Blanpain (gen ed) *International Encyclopaedia of Laws* (2007) par 184.
27 *Supra.*
28 *Ibid.*
29 Sychold in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 184.

3 1 2 The authors and the Australian Law Reform Commission

3 1 2 (i) Davies, Bell and Brereton

According to Davies, Bell and Brereton, contractual capacity should be governed by the proper law of the contract. This approach was, according to them, correctly adopted in a Canadian,[30] an English[31] and an Australian[32] case.[33] One question remains, however: could an incapable contractant acquire capacity by selecting an appropriate law? In other words, is the proper law referred to objectively determined or could it also be subjectively ascertained? These authors are undecided on this issue. They refer to Dicey, Morris and Collins's Rule 209(1)[34] (the predecessor of Rule 228(1) of Dicey, Morris and Collins),[35] who suggest that capacity should be governed by the proper law of the contract objectively ascertained,[36] in contrast to Sykes and Pryles's approach, which endorses giving effect to the choice of the contractants – that is, the proper law of the contract subjectively ascertained.[37] The authors also refer to the view of the Australian Law Reform Commission, which accepts Sykes and Pryles's view and recommends that capacity should be governed by the law of habitual residence and the proper law of the contract (either subjectively or objectively determined).[38]

According to Davies, Bell and Brereton, the capacity to conclude a contract involving immovable property is generally governed by the *lex situs*.[39] This is not the position where the contract is merely one to execute a conveyance or mortgage in the future. The capacity to conclude such contracts can only be governed by the contract's proper law. With reference to *Bank of Africa, Limited v Cohen*,[40] the authors submit that the Australian courts would not enforce a contract for the transfer of an interest in immovables situated abroad if the transferor lacked capacity in terms of the *lex situs*.[41]

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30 *Charron v Montreal Trust Co supra.*

31 *The Bodley Head Limited v Flegon supra.*

32 *Homestake Gold of Australia v Peninsula Gold Pty Ltd supra.*

33 Davies *et al Nygh's Conflict of Laws* 406–407.

34 Collins, Morse, McClean, Briggs, Harris, McLachlan and Hill *Dicey, Morris and Collins on the Conflict of Laws* 14ed (2006) 1621, the predecessor of the current Rule 228(1) of Dicey, Morris and Collins (Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1865).

35 Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1865.

36 Davies *et al Nygh's Conflict of Laws* 407.

37 Sykes and Pryles *Australian Private International Law* 614, referred to by Davies *et al Nygh's Conflict of Laws* 407.

38 Australian Law Reform Commission *Choice of Law* 101, referred to by Davies *et al Nygh's Conflict of Laws* 407.

39 Davies *et al Nygh's Conflict of Laws* 669.

40 [1909] 2 ch 129.

41 Davies *et al Nygh's Conflict of Laws* 407.

3 1 2 (ii) Mortensen

Mortensen acknowledges that there is common-law authority for the application of the *lex loci contractus* as well as the *lex domicilii* to contractual capacity. However, it is apparent to the author that these legal systems have now been replaced by a rule requiring the application of the putative proper law of the contract.[42] In an Australian context, the author adds, this would be the putative proper law objectively ascertained.[43] The author further supports the application of the *lex situs* to contractual capacity in the context of immovable property.[44]

3 1 2 (iii) Sychold

Sychold is of the opinion that capacity should be governed by either the proper law of the contract or the habitual residence of the incapable party.[45] He rejects the argument that the proper law must be objectively ascertained, independent of any party autonomy. The position should be similar to the situation in respect of the substantive validity of the contract, where party autonomy prevails.[46]

3 1 2 (iv) Sykes and Pryles

Sykes and Pryles concede that, in the common law, the *lex domicilii* may be the governing law in the context of marriage contracts. This legal system should, however, not apply exclusively as this would mean that a contractant would carry the incapacity in terms of the law of domicile with him or her and escape liability in other jurisdictions. Capacity is not status, but merely an accompaniment or result of status, and it should therefore be governed by the law that governs the transaction.[47]

In respect of non-matrimonial contracts, the proper law of the contract should apply, although there is common-law authority favouring the *lex loci contractus* – namely, *Male v Roberts*.[48] At the time of this decision, the authors submit, there was a strong presumption that the *lex loci contractus* was indeed the proper law of the contract. The case is therefore consistent with the view that the proper law of the contract governs capacity.[49] The authors also commend Dicey and Morris's Rule 182[50] (the predecessor of Rule 228(1) of Dicey, Morris and Collins)[51] that capacity should be governed by either the proper law of the contract or the personal law, which would

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42 Mortensen *Private International Law in Australia* (2006) 403.
43 Mortensen *Private International Law* 404.
44 Mortensen *Private International Law* 460.
45 Sychold in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 185.
46 *Ibid*.
47 Sykes and Pryles *Australian Private International Law* 344.
48 (1800) 3 ESP 163.
49 As decided in *The Bodley Head Limited v Flegon supra* and *Charron v Montreal Trust Co supra*.
50 Collins, Hartley, McClean and Morse (eds) *Dicey and Morris on the Conflict of Laws* 11ed (1987) 1161–1162.
51 Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1865.

mean that an individual possesses capacity if he or she has such under either law.

The proper law in this context, according to many English authors,[52] must be determined objectively, independent of any express (or tacit) choice of law, so that a contractant may not confer capacity on him- or herself merely by selecting the law of a favourable country. Sykes and Pryles do not support this view. They submit that there is no justification for differentiating between capacity to contract and, for example, the essential validity of a contract. In the latter case, contractants may deliberately select the law of a country that upholds the validity of the transaction, as opposed to the law of a country that does not. There seems to be no explanation for why the selection of a legal system may be effective for essential validity but not for capacity. They state:

> "[I]f it is not a true private international law case the choice may not be effective in either instance but in a multistate situation where the law of one of the 'connected' states is chosen it is hard to see why the stipulation should be effective as far as essential validity is concerned but denied effect in regard to capacity."[53]

Further, they submit that the problems that may occur in respect of party autonomy in cases of essential validity and capacity are similar; therefore, analogous rules should be employed.[54] It seems that the authors are therefore supportive of the application of the proper law as such. The proper law is determined by a choice of law by the parties (although it is required that a legal system is chosen with a (close) link to the parties or the contract)[55] or, otherwise, in an objective manner.

Sykes and Pryles submit that the Anglo-Australian rule in respect of contracts relating to immovable property is dissimilar to that advocated by some European and American authors – namely, that all issues in this regard are governed by the *lex situs*. Sykes and Pryles assert that contracts involving immovables should, in addition, be governed by the *lex situs* and the proper law of the contract, subjectively or objectively ascertained (the alternative application of the proper law and the *lex situs*).[56]

3 1 2 (v) Tilbury, Davis and Opeskin

Tilbury, Davis and Opeskin expressly support the view that, in the context of a commercial contract, contractual capacity should be governed by the proper law of the contract.[57] The other main alternatives – namely, the *lex domicilii* and the *lex loci contractus* – cannot be justified as comprehensively as the proper law. The cases in which the *lex domicilii* was applied clearly show the influence of choice-of-law rules in matrimonial matters, where domicile is an important connecting factor. Cases in which the *lex loci*

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[52] Collins *et al* (eds) *Dicey and Morris* 11ed 1161–1162; and North and Fawcett *Cheshire and North's Private International Law* 11ed (1987) 480.
[53] Sykes and Pryles *Australian Private International Law* 614.
[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid.*
[57] Tilbury *et al Conflict of Laws* 768.

contractus was applied, on the other hand, show the influence, in a former period, of the *locus contractus* as the determinant of the applicable law in contractual matters.[58] The reason for applying the proper law of the contract,[59] according to the authors, is the impracticality of supposing that the capable contractant has knowledge of his counterpart's incapacity arising under the *lex domicilii*. The proper law referred to here is objectively ascertained, as this will prevent contractants from conferring capacity upon themselves by expressly selecting a foreign legal system.[60]

3 1 2 (vi) The Australian Law Reform Commission

The Australian Law Reform Commission partially supports Dicey and Morris's Rule 182,[61] the predecessor of Dicey, Morris and Collins's current Rule 228.[62] In terms of the Commission's interpretation of Rule 182, capacity according to the *lex domicilii*, the law of habitual residence or the proper law of the contract is sufficient to validate a contract. However, according to the Commission, domicile is an inappropriate connecting factor in a commercial context. The place of residence of the incapable contractant is preferable.[63] The Commission is in favour of the application of the proper law of the contract, which may be subjectively or objectively determined. This view is based on Sykes and Pryles's contention[64] that there is no justification for differentiating between capacity and, for example, essential validity. Contractants may intentionally select the law of a country that upholds the validity of the contract, as opposed to the law of a country that does not. There seems to be no explanation for why the selection of a legal system may be effective for the purposes of essential validity but not for the purposes of contractual capacity. The Commission therefore recommends that capacity in terms of either the alleged incapable contractant's residence or the proper law of the contract should suffice for the validity of a contract.[65]

3 1 2 (vii) Summary of Australian authors and Law Reform Commission

All the Australian authors,[66] as well as the Australian Law Reform Commission,[67] are in favour of the application of the proper law of the

58 Tilbury *et al Conflict of Laws* 770.

59 As in *The Bodley Head Limited v Flegon supra*, which is discussed in part 1 of this article under heading 2 1 1 1 8.

60 Tilbury *et al Conflict of Laws* 771.

61 Collins *et al* (eds) *Dicey and Morris* 11ed 182; Australian Law Reform Commission *Choice of Law* 101.

62 Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1865.

63 Hence, partially supporting Dicey and Morris.

64 Sykes and Pryles *Australian Private International Law* 614, referring to North and Fawcett *Cheshire and North's Private International Law* 11ed 480.

65 The Australian Law Reform Commission *Choice of Law* 101. Also see Tetley *International Conflict of Laws: Common, Civil and Maritime* (1994) 237.

66 Davies *et al Nygh's Conflict of Laws* 407; Mortensen *Private International Law* 404; Sychold in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 185; Sykes and Pryles *Australian Private International Law* 614; and Tilbury *et al Conflict of Laws* 771.

67 The Australian Law Reform Commission *Choice of Law* 101.

contract to contractual capacity. Mortensen[68] employs the technically correct term, "putative proper law", in this regard. The authors have different opinions on how the proper law must be determined. Mortensen[69] and Tilbury, Davis and Opeskin[70] are of the opinion that the proper law must be objectively determined, but Sychold,[71] Sykes and Pryles[72] and the Australian Law Reform Commission[73] would apply the legal system chosen by the parties (the proper law established subjectively) and, only in the absence of such a choice, the proper law objectively ascertained. Sykes and Pryles,[74] however, require that a connected legal system be chosen. Davies, Bell and Brereton[75] do not express an opinion on whether the proper law must be objectively, or may also be subjectively, determined. Sychold[76] and the Australian Law Reform Commission[77] would pair the proper law with the law of habitual residence in the context of an alternative reference rule. Sykes and Pryles,[78] in commending the views of Dicey and Morris[79] would possibly add both the law of habitual residence and the *lex domicilii* to the application of the proper law. None of the Australian authors is in favour of the application of the *lex loci contractus*.

Davies, Bell and Brereton[80] and Mortensen[81] favour the application of the *lex situs* in respect of immovable property. Sykes and Pryles,[82] on the other hand, reject the application of the *lex situs* in respect of immovables in favour of the subjective or objective proper law of the contract, possibly in addition to the *lex domicilii* and the law of habitual residence. As the other authors[83] and the Australian Law Reform Commission[84] do not distinguish between contracts in respect of immovable property and other contracts, they probably also favour the application of the proper law in this regard (whether objectively or also subjectively determined, and whether or not it is linked to the other alternatively applicable legal systems).

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[68] Mortensen *Private International Law* 404.
[69] *Ibid*.
[70] Tilbury *et al Conflict of Laws* 771.
[71] Sychold in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 185.
[72] Sykes and Pryles *Australian Private International Law* 614.
[73] The Australian Law Reform Commission *Choice of Law* 101.
[74] Sykes and Pryles *Australian Private International Law* 614.
[75] Davies *et al Nygh's Conflict of Laws* 407.
[76] Sychold in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 185.
[77] The Australian Law Reform Commission *Choice of Law* 101.
[78] Sykes and Pryles *Australian Private International Law* 614.
[79] Collins *et al* (eds) *Dicey and Morris* 11ed 1161–1162.
[80] Davies *et al Nygh's Conflict of Laws* 669.
[81] Mortensen *Private International Law* 460.
[82] Sykes and Pryles *Australian Private International Law* 618.
[83] Sychold in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* and Tilbury *et al Conflict of Laws*.
[84] The Australian Law Reform Commission *Choice of Law* 101.

3 2 New Zealand

There is no case law from New Zealand dealing specifically with contractual capacity. According to Angelo,[85] capacity will be governed by the law of domicile. The content of domicile is, of course, determined in accordance with the *lex fori*. The author partially cites Rule 209 of Dicey, Morris and Collins[86] (the predecessor of Rule 228(1) of Dicey, Morris and Collins)[87] to the effect that capacity according to the proper law may also be sufficient for the existence of a contract. This implies that there may be scope for the application of the proper law to capacity in the New Zealand context.

4 NORTH AMERICA

4 1 Canada (the common-law provinces)

4 1 1 Charron v Montreal Trust Co[88]

The only common-law Canadian decision concerning contractual capacity is *Charron v Montreal Trust Co*,[89] in which the Ontario Court of Appeal applied the objectively determined proper law of the contract. Peter Charron was originally domiciled in the province of Quebec (Canada) but relocated to Ottawa (Ontario, Canada) in 1906 when he took up employment there. In 1908, he married the plaintiff in Ottawa, where they cohabited until their divorce in 1920. On 21 May 1920, the couple entered into a separation agreement in terms of which Mr Charron was to effect certain payments to the plaintiff. On 1 March 1953, he died in Montreal (Quebec), leaving his entire estate to his five children. It was apparent, however, that for many years prior to Mr Charron's death, no payments were effected in terms of the separation agreement. The plaintiff thus claimed $15 600 against his estate, being the arrears of payments due under the agreement. In defence to this action, it was argued on behalf of Mr Charron's estate, that he lacked the contractual capacity to enter into the separation agreement under the law of his domicile – that is, Quebec.

In the court *a quo*, McRuer CJHC held that the separation agreement was valid and enforceable under Ontarian law and that he did not have to expressly address the issue of capacity.[90] *Charron v Montreal Trust Co* is an appeal by the defendant against the judgment of the Chief Justice that the estate had to effect payment of $15 600 to the plaintiff and carry the costs of the suit.

On appeal, Morden J held that, in respect of marriage and marriage settlements, the *lex domicilii* generally governed capacity. In a Canadian context, however, he continued, there is no clear decision on whether

85 Angelo *Private International Law in New Zealand* (2012) par 75.

86 Collins *et al* (eds) *Dicey, Morris and Collins* 14ed 1621.

87 Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1865.

88 *Supra.*

89 *Supra.*

90 The court also held that the law of Quebec was not applicable to the separation agreement.

capacity is to be governed by the *lex loci contractus* or *the lex domicilii*.[91] Applying the *lex loci contractus* exclusively is not preferred. If the facts of the case were that the parties were domiciled in Quebec and concluded the contract in Ontario while present there only temporarily, application of the *lex loci contractus* would be incorrect as this would be completely fortuitous.[92] The exclusive application of the *lex domicilii* is also not preferred. In the present case, the parties concluded their marriage in Ontario and resided there until the date of the agreement in question. It would be inappropriate to apply the *lex domicilii* to determine capacity in this instance.[93] The solution to the problem, the court resolved, was to apply the objective proper law of the contract to capacity.[94] The judge stated:

> "[A] party's capacity to enter into a contract is to be governed by the proper law of the particular contract that is the law of the country with which the contract is most substantially connected. In this case there is no doubt that the proper law of the agreement was the law of [Ontario],[95] and by that law, neither party to the agreement lacked the necessary capacity."[96]

Morden J agreed with the Chief Justice's decision that the agreement was valid and enforceable in terms of Ontarian law. The defendant therefore had to effect payment to the plaintiff for the mentioned amount.[97]

According to Rafferty, the proper law referred to in the *Charron* case was the objectively determined proper law, not one chosen by the parties.[98] The reason for this is that contractants may not bestow capacity on themselves by agreeing to apply a different proper law (different from the law with which the contract is most closely connected) having a more favourable rule regarding capacity.

4 1 2 Canadian authors

4 1 2 (i) Pitel and Rafferty

Pitel and Rafferty emphasise that the rules on contractual capacity remain unclear in Canadian private international law.[99] There are, according to the authors, three possibilities in this regard – namely, the *lex loci contractus*, the law of the country of habitual residence and the putative proper law of the contract. It would appear that the authors regard the latter legal system as the most tenable. One question remains: if a contract contains an express choice of law, would a court apply the chosen law to the issue of capacity? The obvious concern is that contractants could elect an applicable law by

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91 *Charron v Montreal Trust Co supra* 244.

92 *Ibid.*

93 *Ibid.*

94 The court referred to Cheshire *Private International Law* 5ed (1957) 221–224; Falconbridge *Essays on the Conflict of Laws* 2ed (1954) 383–385; and Morris *et al* (eds) *Dicey and Morris on the Conflict of Laws* 7ed (1958) 769–774.

95 There is a spelling error in the original text; it reads: Ontaario.

96 *Charron v Montreal Trust Co supra* 244–245.

97 *Charron v Montreal Trust Co supra* 245.

98 Rafferty (gen ed) *Private International Law in Common-Law Canada: Cases, Text and Materials* 3ed (2010) 756.

99 Pitel and Rafferty *Conflict of Laws* (2010) 281.

which they are capable and, in this way, avoid the restrictions in another country's law. Applying the putative proper law objectively determined may address this concern, but the alternative approach of using the putative proper law, including any express choice, "is probably more adaptable to the various circumstances".[100] This choice would still have to be *bona fide*, legal and consistent with public policy. The authors add that there is still the possibility of a Canadian court applying the law on capacity from another country as a mandatory rule.[101]

It is generally accepted, the authors add, that the *lex situs* governs the capacity to transfer immovable property, as well as the formal and essential validity of such transfers.[102] In this context, the courts would be inclined to use the doctrine of *renvoi* so as to apply the law of the country that the courts of the *situs* would apply and not necessarily the domestic law of the *situs*.[103] It would, after all, be senseless to apply another law, since the courts of the *situs* have ultimate control over the immovable property. A court will usually lack jurisdiction to ascertain title in respect of foreign immovables, so there are few decisions concerning choice of law in this context. Therefore, many of the decisions concerning foreign immovables relate to contracts to transfer the property, rather than the transfer itself. There is a distinction between the contract to transfer the property and the transfer itself, the conveyance. The authors submit that in the case of a contract concerning foreign immovable property, the proper law should govern the contract, instead of the *lex situs*.[104]

4 1 2 (ii) Walker

Walker indicates that, as in England, the possible legal systems to govern contractual capacity in Canadian private international law are the *lex domicilii*, the *lex loci contractus* and the objective proper law of the contract.[105] She does not support the application of the *lex loci contractus* because this legal system may be fortuitous. She apparently does not favour the *lex domicilii* as a general rule, as she remarks that support for this legal system is drawn from cases that did not concern commercial contracts.[106] Application of the *lex domicilii* would also be contrary to the expectations of the parties.[107] However, the author has no objection to the application of the objectively determined proper law.[108] Perhaps the *lex domicilii* may apply in

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100 *Ibid*.

101 One could imagine a court applying the *lex domicilii*, the *lex patriae* or even the *lex fori* in this regard.

102 Pitel and Rafferty *Conflict of Laws* 326.

103 As suggested by Dicey, Morris and Collins (Collins *et al* (eds) *Dicey, Morris and Collins* 14ed 83).

104 Pitel and Rafferty *Conflict of Laws* 327, *contra Bank of Africa, Limited v Cohen supra*.

105 Walker *Castel and Walker: Canadian Conflict of Laws* 6ed (2005) § 31.4d; and Walker *Halsbury's Laws of Canada: Conflict of Laws* (2006) 517. In the most recent update issue, she no longer refers to the *lex loci contractus* as a possible governing legal system (Walker 2005 update issue *Castel and Walker: Canadian Conflict of Laws 6ed* (2014) § 31.5b).

106 Walker *Castel and Walker* 6ed § 31.4d.

107 Walker *Castel and Walker* (2005/2014) § 31.5b.

108 *Ibid*.

respect of contracts relating to marriage and the *lex situs* with regard to immovable property.[109]

4 1 2 (iii) Summary of Canadian authors

To summarise, the Canadian authors hold divergent views on contractual capacity. Pitel and Rafferty[110] favour the putative proper law of contract, including an express choice of law if such choice was made *bona fide*, was legal and not inconsistent with public policy. They support the application of the *lex situs* to capacity with regard to contracts involving immovables in general, but in respect of foreign immovable property, they believe the proper law should govern.[111] Walker[112] seems to reject the application of the *lex domicilii* and the *lex loci contractus* in a commercial context but has no objection to the application of the objectively determined proper law. However, she possibly favours the *lex situs* in respect of contractual capacity concerning immovable property.[113]

4 2 United States of America

4 2 1 American case law

In the American common law, there is support for both the *lex domicilii* and the *lex loci contractus* governing contractual capacity.[114] As an illustration, reference is made to the conflicting decisions in *Milliken v Pratt*[115] and *Union Trust Company v Grosman*.[116] Insofar as immovable property is concerned, reference is made to *Polson v Stewart*.[117]

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109 Walker *Halsbury's Laws of Canada: Conflict of Laws* (2011) 618; Walker *Castel and Walker* 6ed § 31.4d; and see Walker *Halsbury's Laws of Canada* (2006) 517.

110 Pitel and Rafferty *Conflict of Laws* 281.

111 Pitel and Rafferty *Conflict of Laws* 326–327.

112 Walker *Castel and Walker* 6ed § 31.4d.

113 Walker *Halsbury's Laws of Canada* (2011) 618; Walker *Castel and Walker* 6ed § 31.4d and see Walker *Halsbury's Laws of Canada* (2006) 517.

114 Clarence Smith "Capacity in the Conflict of Laws: A Comparative Study" 1952 1 *International and Comparative Law Quarterly* 446–471; Symeonides *American Private International Law* (2008) 227–228; and Van Rooyen *Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg* (1972) 119.

115 125 Mass 374 (1878).

116 245 US 412 (1918).

117 45 NE 737 (1897).

4 2 1 (i) *Milliken v Pratt*[118]

The Pratts were permanent residents of the state of Massachusetts in the United States of America (USA). Mr Pratt, who conducted business in Massachusetts, applied for credit from a partnership established in Maine (USA) to facilitate the purchase of goods from the partnership. The partners would only grant the credit request if Mrs Pratt guaranteed payment. Mr Pratt obtained this guarantee in writing from his wife and mailed it from Massachusetts to the partnership in Maine. After having thus successfully obtained credit, Mr Pratt purchased goods, which the partners shipped from Maine to Massachusetts. However, Mr Pratt failed to pay for the goods and the partnership accordingly instituted an action in Massachusetts for the enforcement of Mrs Pratt's guarantee. At the time of the purchase of the goods, Mrs Pratt lacked the capacity under Massachusetts law to conclude a contract of suretyship but was capable in terms of the law of Maine.

In deciding which legal system to apply to the issue, the court held that the law of the state where the contract was "made"[119] should govern. The court continued, stating that the contract was concluded in Maine as it "was complete when the guarantee had been received and acted on by the plaintiffs at Portland (Maine), and not before".[120] The court therefore ruled in favour of the plaintiffs since the contract of suretyship was valid (and thus binding) according to the law of Maine. In delivering judgment, Gray CJ expressly rejected the application of the *lex domicilii* to contractual capacity:

> "[I]t is more just, as well as more convenient, to have regard to the law of the place of the contract, as a uniform rule operating on all contracts of the same kind, and which the contracting parties may be presumed to have in contemplation when making their contracts, than to require them at their peril to know the domicil of those with whom they deal, and to ascertain the law of that domicil, however remote, which in many cases would not be done without such delay as would greatly cripple the power of contracting abroad at all."[121]

4 2 1 (ii) *Union Trust Company v Grosman*[122]

While the Grosmans, domiciled in Texas (USA), were temporarily in Illinois (USA), Mr Grosman executed two promissory notes in favour of the plaintiff. At the same time, Mrs Grosman concluded a contract of suretyship for payment as part of the same transaction. In terms of the law of Texas, the

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118 *Supra*. See the discussion by Cramton, Currie, Kay and Kramer *Conflict of Laws: Cases-Comments-Questions* 5ed (1993) 17–20; Hay, Weintraub and Borchers *Conflict of Laws* 13ed (2009) 493–496; Lowenfeld *Conflict of Laws: Federal, State, and International Perspectives* 2ed (revised) (2002) 14–17; Simson *Issues and Perspectives in Conflict of Laws: Cases and Materials* 4ed (2005) 24–27; Symeonides, Collins, Perdue and Von Mehren *Conflict of Laws: American, Comparative, International* (1998) 29–32; and Vernon, Weinberg, Reynolds and Richman *Conflict of Laws: Cases, Materials and Problems* 2ed (2003) 255–258.

119 *Milliken v Pratt supra* 375.

120 *Milliken v Pratt supra* 376. See the commentary by Hay *Conflict of Laws* 2ed (1994) 196; Hay *et al Conflict of Laws* 496; and Weintraub *Commentary on the Conflict of Laws* 4ed (2001) 441.

121 *Milliken v Pratt supra* 382. Also see McDougal, Felix and Whitten *American Conflicts Law* 5ed (2001) 495; and Scoles, Hay, Borchers and Symeonides *Conflict of Laws* 3ed (2000) 882.

122 *Supra*.

contract of suretyship would have been void but in the law of Illinois, the contract was valid. The Federal High Court, through Holmes J, thus had to pronounce on which law was applicable.

In addressing the issue, Holmes J upheld Mrs Grosman's reliance on incapacity. The court stated: "It is extravagant to suppose that the [domiciliary] courts … will help a married woman to make her property there liable in circumstances in which the local law says that it shall be free, simply by stepping across a state line long enough to contract."[123] The *lex domicilii* (the law of Texas) was thus applied and the contract was declared void.[124]

4 2 1 (iii) *Polson v Stewart*[125]

This early American decision concerned the capacity to conclude a contract for the transfer of immovable property. The finding of the High Court of Massachusetts, through Holmes J, differed from the decisions of the other cases concerning immovable property discussed in this contribution. *In casu*, a woman concluded a contract in her residential state, North Carolina (USA), for the transfer of immovable property situated in Massachusetts (USA). In terms of the *lex domicilii*, she was capable of contracting but in terms of the *lex situs*, she lacked capacity. Holmes J nevertheless decided that the contract was valid and therefore applied the *lex domicilii* in preference to the *lex situs*.

4 2 1 (iv) Summary of American case law

Milliken v Pratt[126] and *Union Trust Company v Grosman*[127] both concern contractual capacity in respect of contracts of suretyship, yet the courts have taken different views in their judgments. In the former case, the court applied the *lex loci contractus* but in the latter, the *lex domicilii*. Further, American courts, as illustrated in *Polson v Stewart*,[128] may be inclined to apply the *lex domicilii* and not the *lex situs* to capacity cases involving immovable property.

4 2 2 Restatement (Second)

The most important contemporary approach to private international law of contract in the United States is the Restatement (Second), as 23 states follow this approach.[129] Five further states[130] could be added to this total as

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[123] *Union Trust Company v Grosman supra* 416.

[124] See McDougal *et al American Conflicts Law* 495.

[125] *Supra*.

[126] *Supra*.

[127] *Supra*.

[128] *Supra*.

[129] Alaska; Arizona; Colorado; Connecticut; Delaware; Idaho; Illinois; Iowa; Kentucky; Maine; Michigan; Mississippi; Missouri; Montana; Nebraska; New Hampshire; Ohio; South Dakota; Texas; Utah; Vermont; Washington; and West Virginia. See Symeonides "Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey" 2011 59 *The American Journal of Comparative Law* 300 331. See also Symeonides *American Private International Law* 225. As far as the present author could determine, no distinction is drawn between international and interstate conflict cases.

these adhere to the "significant contacts approach", which is highly comparable to that employed in the Restatement in that it also entails taking a variety of connecting factors into consideration. The discussion on choice-of-law methodology in the United States is therefore limited to the Restatement. There is uncertainty on precisely how the states adhering to these approaches will resolve a particular contract conflict issue. In fact, the Restatement itself, and the courts that follow it, have been described as "equivocal" in designating the applicable law.[131] Nevertheless, the Restatement remains a prominent point of departure for choice-of-law analysis.[132] The Restatement operates as follows: the rule intended to apply to a particular issue appears as the first statement. This is generally followed by a secondary statement setting out the rule that the courts will "usually" apply in given situations.[133]

Paragraph 198 of the Restatement contains the rules applicable to contractual capacity. The primarily applicable rule, § 198(1), states the following: "The capacity of the parties to contract is determined by the law selected by application of the rules of §§ 187–188." [134] The secondary rule, in § 198(2), reads as follows: "The capacity of a party to contract will usually be upheld if he has such capacity under the local law of the state of his domicil."[135]

Paragraph 198(1), the primarily applicable rule, in effect states that contractual capacity is to be governed by the law chosen by the parties, as recognised in § 187,[136] if they have in fact done so. Paragraph 187 relates to an express choice of law by the parties. In terms of § 187(1), the primarily applicable rule of this provision, if the parties elected the law of a certain state to govern a particular issue, which they were entitled to address in their contract, it should be applied. In terms of the secondary statement of this provision, § 187(2), where such an issue could not have been addressed in their contract, such as capacity, formalities and substantial validity,[137] the chosen law is nevertheless applicable, unless it holds no substantial relationship to the parties or the contract and no other grounds exist for its election.[138] This law would not apply where it would be contrary to the policy of a state that has a materially greater interest regarding the particular issue

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130 Arkansas; Indiana; Nevada; North Carolina; and Puerto Rico (the Puerto Rican *Projet* is discussed in Fredericks *Contractual Capacity in Private International Law* (Dr Jur thesis, University of Leiden) 2016 159. See Symeonides 2011 *The American Journal of Comparative Law* 32.

131 Symeonides *American Private International Law* 225.

132 *Ibid.* The American authors generally refer to the discussed case law and the Restatement. See Cramton *et al Conflict of Laws*; Felix and Whitten *American Conflict Laws* 6ed (2011); Hay *et al Conflict of Laws*; Lowenfeld *Conflict of Laws*; McDougal *et al American Conflicts Law*; Scoles *et al Conflict of Laws*; Simson *Issues and Perspectives*; Symeonides *et al Conflict of Laws*; Vernon *et al Conflict of Laws*; and Weintraub *Commentary on the Conflict of Laws*.

133 The American Law Institute *Restatement of the Law Second, Conflict of Laws 2d* (1971) VIII.

134 The American Law Institute *Restatement of the Law Second* 632.

135 *Ibid.*

136 See The American Law Institute *Restatement of the Law Second* 561.

137 The American Law Institute *Restatement of the Law Second* 564.

138 § 187(2)(a).

and which would otherwise be the proper law.[139] Therefore, § 198(1),, in the first place, provides for the application of the subjectively ascertained proper law.[140]

According to the commentary of The American Law Institute, permitting contractants to elect the law to govern the validity of their contract promotes the primary objectives of contract law – namely, the protection of the justified expectations of the parties and the possibility of predicting their contractual rights and duties accurately.[141] Therefore, the applicable law subjectively ascertained secures certainty and predictability. Granting contractants this power of choice is also consistent with the fact that individuals are at liberty to determine the nature of their contractual obligations. This does not make legislators of them. The forum selects the law applicable by applying its own choice-of-law rules. It may use a choice-of-law rule that provides that the law of the state elected by the parties shall be applied to determine the validity of the contract. The law of the state chosen by the parties is applied because this is the outcome demanded by the forum's choice-of-law rule and not on account of the contractants being legislators.[142] The power of choice would obviously enable contractants to evade prohibitions that exist in the state that would otherwise be the proper law of the contract. In American private international law, according to the Restatement, however, the demands of certainty, predictability and convenience enjoy priority in this regard;[143] therefore parties to a contract should have the power to choose the applicable law.

In the absence of such a choice, the proper law, in terms of § 198(1), is to be determined with reference to § 188.[144] According to § 188(1), the primarily applicable rule in this regard, the proper law of a contract shall be the law of the state that has the most significant relationship to the parties and the contract, having particular regard to the relevant factors enunciated in § 6.[145] The connecting factors ("contacts") in terms of the secondary statement (§ 188(2)) to be considered in applying the principles of § 6 to ascertain the proper law (which would be the same or similar in terms of the "significant contacts approach") include: the *locus contractus*; the place of negotiating the contract; the *locus solutionis*; the location of the subject matter of the contract; and the domicile, habitual residence, nationality, place of incorporation and place of business of the contractants. The contacts will have to be evaluated according to their relative importance with regard to the particular issue.[146] Paragraph 198(1) therefore also provides for the

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[139] § 187(2)(b).

[140] See Symeonides *American Private International Law* 228.

[141] The American Law Institute *Restatement of the Law Second* 565.

[142] *Ibid.*

[143] *Ibid.*

[144] See The American Law Institute *Restatement of the Law Second* 575. Also see Symeonides *American Private International Law* 228.

[145] These factors include: "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied" (The American Law Institute *Restatement of the Law Second* 10).

[146] The American Law Institute *Restatement of the Law Second* 575.

application of the objectively determined proper law in the absence of a permissible subjectively determined *lex causae*.

These rules focus on the protection of the justified expectations of the contractants,[147] a factor that is of considerable importance in respect of issues relating to the validity of a contract, such as capacity.[148] Parties to a contract will generally expect the contractual obligations to be binding upon them. The application of the law of a state that would invalidate the contract is undesirable as this would frustrate their expectations. Of course, the law of such a state may nevertheless be applied where the interests of this state, in applying the invalidating rule, substantially outweigh the value of protecting the justified interests of the parties.[149]

Each connecting factor or contact in § 188(2) carries a specific weight in determining the proper law of the contract.[150] According to The American Law Institute, the *locus contractus* on its own is rather insignificant. Where issues involving the validity of the contract are governed by this legal system, it will apply by virtue of the fact that it coincides with other contacts.[151] This suggests that the *lex loci contractus* will generally not apply independently, but that the *locus contractus* is one of the connecting factors to be taken into consideration. In other words, the law of the state where the contract is concluded will govern, for example, where it is also the law of the place of negotiation and the *lex loci solutionis* or the *lex situs* and the law of domicile of the parties. Of course, the *locus contractus* will not be taken into consideration where it is purely fortuitous and holds no relation to the parties or the contract.[152]

According to The American Law Institute, the place of negotiating the contract is a significant connecting factor. This is because the state where the negotiations were held and agreement was reached has an obvious interest in the matter. This connecting factor plays a lesser role where the contractants do not meet personally but enter into negotiations from different states by mail or telephone.[153]

The state where the performance is to be effected has an obvious interest in the nature of the performance and the party who must perform. Where the contractants are to perform in the same state, this state will be so closely related to the contract and the parties that it will normally be the proper law, even in respect of issues not strictly associated with performance. The *locus solutionis* will, however, not be taken into consideration where it is uncertain or unknown at the moment of contracting, or when the performance is to be divided approximately equally between two or more states with different rules on the particular issue.[154] Paragraph 188(3) states that "[i]f the place of

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147 The values of certainty, predictability and uniformity of result underlie the need for protecting the justified expectations of the parties. See The American Law Institute *Restatement of the Law Second* 576.

148 The American Law Institute *Restatement of the Law Second* 577.

149 *Ibid*.

150 The American Law Institute *Restatement of the Law Second* 579.

151 The American Law Institute *Restatement of the Law Second* 580.

152 *Ibid*.

153 The American Law Institute *Restatement of the Law Second* 580.

154 *Ibid*.

negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied".[155]

Where the contract involves movable and immovable property, the location of this property is significant. The state where the property is situated will have a natural interest in transactions concerning it. The parties themselves will also regard the location of the property as important. Where the property is the principle subject matter of the contract, it can be assumed that the parties reasonably expected the law of the state where the property is situated to govern numerous issues arising from the contract.[156]

The place of domicile, habitual residence or nationality and the place of incorporation and the place of business of the parties are all factors indicating an enduring relationship to the parties. It may be deduced from the discussion of § 198(2) below that an individual at all times maintains a close relationship with his or her personal law.[157]

The proper law of the contract must be determined with reference to certain presumptions in §§ 189–197.[158] For instance, contracts of sale of movable property (chattels) will usually be governed by the *lex loci solutionis* in respect of delivery.[159]

Paragraph 198(2), which is the secondary statement (in other words, the rule customarily followed by the courts), merely states that where a contractant is capable in terms of his or her domiciliary law, he or she shall be regarded as possessing contractual capacity.[160] Protection of the incapable contractant is the focal point of the rules concerning incapacity.[161] The rationale behind § 198(2) is thus that, in these circumstances, a contractant's law of domicile has determined that he or she is not in need of the protection that a rule of incapacity would provide. He or she should therefore be regarded as capable of commercial interaction.[162] Where a contractant's domiciliary law regards him or her as capable, there can be little reason for the law of another state to apply that would afford him or her protection and would lead to the invalidation of the contract. This would in any event be contrary to the parties' expectations. The rule should only be deviated from in exceptional circumstances – for example, where a contractant is habitually resident in a state where he is incapable but his relationship to the state of his or her domicile is rather insignificant.[163]

Paragraph 198 also applies to contracts involving immovable property. The official commentary in respect of this paragraph states that the "capacity to make a contract for the transfer of an interest ... in land ... is determined by the law selected by application of the rule of this section and of the rules

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155 Except as otherwise stipulated in §§ 189–199 and 203. See The American Law Institute *Restatement of the Law Second* 575.

156 The American Law Institute *Restatement of the Law Second* 581.

157 *Ibid.*

158 The American Law Institute *Restatement of the Law Second* 586–632.

159 § 191, discussed by The American Law Institute *Restatement of the Law Second* 594–600.

160 See Born *International Civil Litigation in United States Courts* (1996) 673. Also see Symeonides *American Private International Law* 228.

161 The American Law Institute *Restatement of the Law Second* 632.

162 *Ibid.*

163 *Ibid.*

of § 189".[164] As such, the contractual capacity of parties to conclude contracts involving immovable property is in principle governed by the provisions in § 198(1) and (2). This rule should be applied in conjunction with § 189, which concerns contracts for the transfer of interests in land. According to § 189, which contains no secondary statement, the validity of a contract to transfer interests in immovables, in the absence of an effective choice of law by the parties, is governed by the *lex situs*.[165] This is interpreted to mean that the provision in § 198(1), read with §§ 187 and 198(2), is applicable to the capacity to conclude contracts relating to immovable property. Where the applicable law has been elected by the parties, as described in § 187, this law governs capacity in respect of immovables. Where the parties have not chosen a legal system to govern the contract, the *lex situs* applies and not the objectively determined proper law. The objective proper law may, however, be applicable in the alternative. For instance, when the contract would be invalid in terms of the *lex situs* but valid according to the objectively determined proper law, then the latter law applies.[166] The objective proper law, however, does not apply where the value of protecting the parties' expectations is outweighed by the interest of the *situs* state in applying its invalidating rule. Also, if a state, other than that indicated by the objective proper law or the *lex situs*, has a substantial interest in having its law applied, then the law of this state is applicable.[167] Therefore, according to the Restatement (Second), the contractual capacity to conclude contracts in respect of immovable property may be governed by the subjectively or objectively ascertained proper law, the *lex domicilii* and the *lex situs*.

Numerous factors justify the rule in favour of the law of the location of the immovable property. These factors closely resemble those discussed under the importance of the *situs* of the subject matter above,[168] except that here the emphasis is on the nature of the property. The state where the property is situated has a natural interest in contracts concerning it, especially since it is immovable in nature.[169] It is also assumed that, because the immovable property is the subject matter of the contract, the parties would expect the *lex situs* to govern several issues arising from the contract. The rule promotes the choice-of-law values of certainty, predictability, uniformity of decision and simplicity in determining the proper law.[170]

The Restatement (Second), the majority approach in American private international law of contract, therefore applies the proper law of the contract (subjectively and objectively ascertained) and the *lex domicilii* to capacity in respect of movable and immovable property (the alternative application of

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164 The American Law Institute *Restatement of the Law Second* 634.

165 See McDougal *et al American Conflicts Law* 579. Although the rule concerns "validity", its scope is broad as it applies to such issues "as whether a married woman has capacity to sell or lease her interests in land" (The American Law Institute *Restatement of the Law Second* 587).

166 The American Law Institute *Restatement of the Law Second* 588.

167 *Ibid.*

168 See the text at fn 155–156.

169 The American Law Institute *Restatement of the Law Second* 588.

170 *Ibid.*

the proper law and the *lex domicilii*). In respect of immovable property, the *lex situs* must be added to the list.[171]

5 THE FAR EAST

5 1 India

As is the position in the other common-law countries discussed above, in India the issue of which law applies to contractual capacity is not clear.[172] It is certain, however, that the choice lies between the *lex domicilii*, the *lex loci contractus*, the proper law of the contract and the *lex situs*.[173]

5 1 1 Indian case law

5 1 1 (i) Early case law

There are two early Indian cases (*Kashibadin v Schripat*[174] and *Lachmi v Fateh*)[175] where the *lex domicilii* was applied by virtue of section 11 of the Indian Contract Act of 1872.

5 1 1 (ii) *TNS Firm, through one of its partners, TNS Chockalingam Chettiar v VPS Mohammad Hussain*[176]

VPS Mohammed Hussain, the first defendant, a merchant conducting business in Colombo (Ceylon – today Sri Lanka), became a client of TNS Firm, the plaintiff, a company in Ceylon, in January 1923. Besides purchasing rice from TNS Firm, the first defendant also entered into loan agreements with the firm. By 1 May 1923, the balance due to the plaintiff exceeded Rs 15 000. The debt was never settled and the plaintiff sued the first defendant for the outstanding amount. The second defendant was included in the proceedings on the grounds that he was the previous endorsee of certain bills of exchange handed to the plaintiff by the first defendant's agents as security. The court *a quo* granted an order against the first defendant but dismissed the suit against the second. The court was convinced that the second defendant was a minor and lacked the capacity to

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171 The legal position in Louisiana and Oregon and the proposal in the Puerto Rico *Projet* is discussed in Fredericks *Contractual Capacity* 156 and 159.

172 Diwan and Diwan *Private International Law: Indian and English* (1998) 523; and Agrawal and Gupta "India" in Verschraegen (ed) *Private International Law* in Blanpain (gen ed) *International Encyclopaedia of Laws* (2003) par 202.

173 Diwan and Diwan *Private International Law* 523 assert that the *lex loci contractus* may also be seen as a possible governing legal system but they discard it as being "least justified on principle."

174 ILR (1891) 19 Bom 697, as referred to by Agrawal and Gupta in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 202 and Diwan and Diwan *Private International Law* 523.

175 ILR (1902) 25 All 195, as referred to by Agrawal and Gupta in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 202.

176 AIR 1933 Mad 756.

contract at the time of the transaction. On appeal, the High Court of Madras, per Ramesam J, had to pronounce, *inter alia*, on the issue of the second defendant's capacity – more particularly, whether he was exempt from liability as a result of incapacity.

It was apparent to the court that the second defendant lacked capacity in terms of the law of Ceylon, the *lex loci contractus*, but was capable according to Indian law, the *lex domicilii*. Ramesam J thus had to decide which legal system was applicable to contractual capacity in this context. He held that exception 1 to Dicey's Rule 158 was relevant in this matter.[177] Also, although previously authority predominantly favoured the application of the *lex domicilii* to capacity,[178] "as to ordinary mercantile contracts the preponderance now seems to be the other way".[179] Ramesam J was obviously referring to the application of the *lex loci contractus*. With further reference to *Sottomayer v De Barros (2)*, in which the *lex loci contractus* was applied,[180] he arrived at the conclusion that the second defendant was exempted from liability owing to incapacity under the law of Ceylon. Ramesam J thus applied the *lex loci contractus* to contractual capacity, confirming the decision of the court *a quo*.

5 1 1 (iii) *Nachiappa Chettiar v Muthu Karuppan Chettiar*[181]

In casu, a dispute arose between the Chettiar brothers, Nachiappa and Muthu Karruppan, regarding the alienation of immovable property situated in Ceylon as per a bequest in their father's will. The issue particularly was whether their father, Annamalai Chettiar, had the capacity to dispose of property that belonged to the joint family in favour of one of his sons – namely, the respondent, Muthu Karruppan. In an *obiter dictum*, the High Court of Madras pronounced on the capacity to contract in respect of immovables.

The court, through Rajamannar J, held that it is a well-established rule that "all rights over and in relation to an immovable (land) are, subject to certain exceptions, governed by the law of the country where the immovable is situate (*lex situs*)".[182] Consequently, he added that "a person's capacity to alienate an immovable by sale or mortgage, *inter vivos*, or to devise an immovable, or to acquire, or to succeed to an immovable is governed by the *lex situs*".[183]

5 1 1 (iv) *Technip Sa v Sms Holding (Pvt) Ltd*[184]

In casu, Pal J had to pronounce on whether Technip, a company incorporated in France, had acquired control of South East Asia Marine

177 Berriedale Keith (ed) *Dicey on The Conflicts of Laws* 4ed (1927) 599.
178 With reference to *Cooper v Cooper* (1888) 13 App Cass 88.
179 *TNS Firm v VPS Mohammad Hussain supra* par 24.
180 Although the incorrect reference is provided (namely: 1897), the court was clearly referring to *Sottomayer v De Barros (2)* (1879) 5 PD 94.
181 AIR 1946 Mad 398.
182 *Nachiappa Chettiar v Muthu Karuppan Chettiar supra* par 32.
183 *Nachiappa Chettiar v Muthu Karuppan Chettiar supra* par 33.
184 [2005] 60 SCL 249 SC.

Engineering and Construction Ltd (SEAMEC), a company incorporated in India, in April 2000 or in July 2001. The date of the acquisition was important as this concerned the price of the shares payable to the respondents, the shareholders of SEAMEC. The Supreme Court stated in passing that issues of capacity are in principle governed by the *lex domicilii*, except where the application of this legal system would be contrary to public policy.[185] This is, of course, not binding on lower courts since it is merely *obiter dictum*; it may at most serve as persuasive authority. Although this is the most recent case on the issue of contractual capacity, it is unclear how the *dictum* may influence future decisions.

5 1 1 (v) Summary of Indian case law

Judicial opinion in India regarding the question of which legal system should govern contractual capacity is not uniform. There is support for the application of the *lex domicilii*[186] and the *lex loci contractus*[187] and, for the purposes of immovable property, the *lex situs.*[188] It remains to be seen what the influence on the lower courts will be of the Supreme Court's *obiter dictum* in *Technip Sa v Sms Holding (Pvt) Ltd*[189] in favour of the *lex domicilii*.

5 1 2 Indian authors

5 1 2 (i) Agrawal and Singh

Capacity in respect of non-commercial contracts, according to the authors (who differ from other common-law authority), should be governed by the putative proper law of the contract. Where such a contract relates to immovable property, their view is that the *lex situs* should be applied.[190]

In the case of commercial contracts, capacity may be governed by the *lex loci contractus*, the *lex domicilii*, the proper law of the contract or the *lex situs*.[191] The authors emphasise that there is Indian case law applying the *lex domicilii*[192] and the *lex loci contractus*[193] to capacity (also the *lex situs* in respect of immovables),[194] but not in favour of the application of the proper law doctrine.[195] Indian private international law, the authors add, should be taken as settled on the issue in favour of the *lex loci contractus*. The authors seem to maintain this view despite substantial criticism by other Indian

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185 *Technip Sa v Sms Holding (Pvt) Ltd supra* 4.
186 *Kashibadin v Shripat supra*; and *Lachmi v Fateh supra*.
187 *TNS Firm v VPS Mohammad Hussain supra*.
188 *Nachiappa Chettiar v Muthu Karuppan Chettiar supra*.
189 *Supra*.
190 Agrawal and Singh *Private International Law in India* (2010) par 201.
191 Agrawal and Singh *Private International Law* par 201. Also see Agrawal and Gupta in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 201.
192 With reference to *Kashibadin v Shripat supra*.
193 With reference to *TNS Firm v VPS Mohammad Hussain supra*.
194 With reference to *Nachiappa Chettiar v Muthu Karuppan Chettiar supra*.
195 Agrawal and Singh *Private International Law* par 202. Also see Agrawal and Gupta in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 202.

authors of the application of this legal system.[196] For instance, a contractant may evade incapacity by simply concluding the contract in a country where he or she would possess contractual capacity. Also, where the *locus contractus* is temporary, there is no justification in principle for applying the *lex loci contractus*.[197]

5 1 2 (ii) Diwan and Diwan

Diwan and Diwan submit that all the common-law cases (including Indian decisions) that favour the *lex domicilii* involve status, particularly matrimonial status. The *lex domicilii* was then applied to commercial contracts by way of analogy. However, according to the authors, it is generally viewed as entirely unacceptable for the *lex domicilii* to govern capacity in commercial contracts.[198]

The same can be said regarding the *lex loci contractus*, especially when considering the objections to the exclusive application of this legal system. First, a contractant may avoid incapacity simply by selecting a place where he or she is capable. Secondly, the *lex loci contractus* is inadequate where the *locus contractus* is temporary or fortuitous.[199]

The authors find the application of the proper law of the contract, objectively ascertained, to be the most appropriate approach. The proper law should not be subjectively determined as this would allow a contractant to confer capacity upon him- or herself merely by choosing a favourable legal system.[200] The authors concur with Dicey and Morris[201] in this regard that the objective proper law would provide for situations where a contractant is incapable in terms of the *lex loci contractus* but capable according to the *lex loci solutionis*. The authors here refer to the common-law position, where the *lex loci solutionis* (the law of the country of the performance) was usually chosen as the proper law of the contract.[202] The objective-proper-law approach, of course, involves the application of the legal system that has the most substantial connection with the contract and application of which would be "correct on principle and … in accordance with justice and convenience".[203]

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196 Agrawal and Singh *Private International Law* par 203. Also see Agrawal and Gupta in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 203.

197 Agrawal and Singh *Private International Law* par 203. Also see Diwan and Diwan *Private International Law* 524; and Agrawal and Gupta in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 203.

198 Diwan and Diwan *Private International Law* 523, referring to Dicey and Morris (undated) 745. The authors are probably referring to Morris *et al* (eds) *Dicey and Morris on the Conflict of Laws* 8ed (1967).

199 Diwan and Diwan *Private International Law* 524, referring to Morris *et al* (eds) *Dicey and Morris* 8ed 744.

200 Diwan and Diwan *Private International Law* 524.

201 Morris *et al* (eds) *Dicey and Morris* 8ed 745.

202 For the position in South African law today, see Fredericks *Contractual Capacity* 7–41.

203 Diwan and Diwan *Private International Law* 524.

The authors submit that the Indian private-international-law rule on capacity in respect of immovable property is clear: the capacity to buy and sell immovable property is governed by the *lex situs* of the property.[204]

5 1 2 (iii) Summary of Indian authors

The views held by the Indian authors are divergent. Diwan and Diwan[205] expressly reject the (exclusive) application of either the *lex domicilii* or the *lex loci contractus* to contractual capacity but support the objective proper law of the contract.[206] According to these authors, it is settled Indian law that the *lex situs* governs capacity in respect of contracts relating to immovable property.[207] Agrawal and Singh,[208] on the other hand, distinguish between non-commercial and commercial contracts. According to them, capacity in respect of non-commercial contracts should be governed by the putative proper law. When a contract relates to immovable property, the *lex situs* applies.[209] In the case of commercial contracts, capacity should be governed by the *lex loci contractus*, despite authoritative criticism in this regard.[210]

5 2 Malaysia

5 2 1 Introduction

As is the position in India and other common-law systems, there is a lack of clarity on the question of which law governs contractual capacity. Nevertheless, according to the authors, the choice of a governing law lies between the *lex domicilii*, the *lex loci contractus* and the proper law of the contract.[211] It is uncertain what the position is in respect of immovable property.

No reported Malaysian decisions could be found dealing specifically with contractual capacity.[212] Malaysian conflicts authors have, however, expressed some views in this regard.

5 2 2 Malaysian authors

Hickling and Wu believe that, in a Malaysian context, the *lex domicilii* should be disregarded as a possible governing law, but that this is not true in

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[204] Diwan and Diwan *Private International Law* 407. The authors add that, therefore, if an individual is incapable in terms of the law of the country where the property is situated, then any *conveyance* of such property anywhere in the world would be invalid. But conveyance will of course never be done in a country other than the *situs*. The statement may, however, be applicable to a foreign court order in this regard.

[205] Diwan and Diwan *Private International Law* 523–524.

[206] Diwan and Diwan *Private International Law* 524.

[207] Diwan and Diwan *Private International Law* 407.

[208] Agrawal and Singh *Private International Law* par 201.

[209] *Ibid.*

[210] Agrawal and Singh *Private International Law* par 203.

[211] Hickling and Wu *Conflict of Laws in Malaysia* (1995) 170–171.

[212] Hickling and Wu *Conflict of Laws* do not refer to any cases decided by the Malaysian courts.

respect of the *lex loci contractus*.[213] According to the authors, the latter legal system remains a compelling choice in addressing capacity.[214]

It does seem, however, that the authors in the final instance support the approach enunciated in Dicey and Morris's Rule 147[215] (the predecessor of Rule 228 by Dicey, Morris and Collins)[216] that a contractant should be regarded as having capacity if he is capable in terms of the proper law of the contract, the *lex domicilii* or the law of residence. This view is "liberal and realistic".[217] The authors also refer to Canadian case law, [218] where the proper law of the contract was applied to capacity.[219]

5 3 Singapore

5 3 1 Introduction

No reported Singaporean decisions could be found specifically addressing contractual capacity.[220] Being a common-law system, the choice in the private international law of Singapore nevertheless lies between the *lex domicilii*, the *lex loci contractus* and the proper law of the contract. It is uncertain what the position is in respect of immovable property.[221]

5 3 2 Singaporean authors

In addressing the issue of which legal system should be applied to contractual capacity, the conflicting considerations are the following: as a matter of protection, the *lex domicilii* should govern, but to facilitate contracting, the proper law should be decisive. According to Tan, this conflict is difficult to resolve.[222]

In respect of the proper law as an applicable legal system, the author explains that if an individual may be incapable of concluding a contract by reason of, for instance, minority, it would be arguing in a circle to apply "the proper law of the contract" to determine whether it is void. The circularity may be avoided by applying the putative proper law, as objectively determined.[223]

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213 Hickling and Wu *Conflict of Laws* 170–171.

214 *Ibid* with reference to the early English cases, *Male v Roberts supra* and *Schmidt v Spahn* (1863) Leic 229.

215 Morris (gen ed) *Dicey and Morris on the Conflict of Laws* 10ed (1980) 778.

216 Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1865.

217 Hickling and Wu *Conflict of Laws* 171.

218 *Charron v Montreal Trust Co supra*.

219 They also refer to the American decision in *Milliken v Pratt supra*. However, in the discussion above (see heading 4 2 1 (ii)), it was illustrated that the court applied the *lex loci contractus* to the issue of capacity.

220 Tan *Conflict Issues in Family and Succession Law* (1993) 471 does not refer to any decisions of the courts of Singapore.

221 Tan *Conflict Issues* 471.

222 *Ibid*.

223 *Ibid*.

In the final instance, the author supports the approach advocated by Dicey and Morris in Rule 182[224] (now Rule 228 of Dicey, Morris and Collins),[225] which he refers to as "the alternative reference test" – that is, that an individual has capacity if he or she is capable in terms of the (putative) proper law (as objectively determined), the *lex domicilii* or the law of habitual residence.[226]

6 AFRICA[227]

6 1 Ghana

Oppong[228] argues that the proper law should govern contractual capacity in Ghanaian private international law.[229] The application of the *lex domicilii*, the *lex loci solutionis* or the *lex loci actus* may lead to arbitrary results. He states:

> "The most closely connected test takes account of all connecting factors. It is more likely to lead to an outcome consistent with the expectations of the parties."[230]

He argues that, although the courts should take account of the choice of law clause in the contract,

> "it should not be allowed to prevail or exclusively govern the issue of capacity to contract. Allowing choice of law agreements to supersede other connecting factors would enable parties to evade limitations imposed on them by national laws."[231]

It seems that the objectively determined proper law usually has priority over the subjectively determined proper law if they do not coincide, but it remains unclear when account must nevertheless be taken of a choice-of-law clause in these circumstances.

6 2 Nigeria

No reported Nigerian decisions could be found specifically addressing the law applicable to contractual capacity. The Nigerian conflicts author, Agbede, has expressed some views on the issue.[232] He draws a distinction between non-commercial and commercial contracts. He submits that, in the

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[224] Collins *et al* (eds) *Dicey and Morris* 11ed 1202–1207.

[225] Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1865.

[226] Tan *Conflict Issues* 472.

[227] The legal position in South Africa is discussed in Fredericks *Contractual Capacity* 7–41.

[228] Oppong *Private International Law in Ghana* (2012) par 92–94; and Oppong *Private International Law in Commonwealth Africa* (2013) 142.

[229] According to a decision of the courts in Ghana, the proper law of the contract governs the question whether a natural person has the capacity to bind a company that is not yet incorporated: see *Jadbranska Slobodna Plovidba v Oysa Ltd* [1979] GLR 129; 1978 (2) ALR Comm 108, as discussed by Oppong *Private International Law in Ghana* par 92–93.

[230] Oppong *Private International Law in Ghana* par 94.

[231] *Ibid.*

[232] Agbede "Nigeria" in Verschraegen (ed) *Private International Law* in Blanpain (gen ed) *International Encyclopaedia of Laws* (2004) par 73.

case of the former, the *lex domicilii* should apply,[233] but in the case of the latter, the proper law of the contract should be the applicable law.[234] It is settled law in Nigeria, he continues, that the contractual capacity for the disposition of interests in immovable property, either *inter vivos* or *mortis causae*, is governed by the *lex rei sitae*.[235]

7 SUMMARY OF THE LEGAL POSITION IN COMMON-LAW JURISDICTIONS

In case law from the common-law countries, as discussed, support (as to which law should govern contractual capacity) may be found for the *lex domicilii*,[236] the *lex loci contractus*[237] and the objective proper law of the contract.[238] In respect of immovable property, the *lex situs*[239] and the *lex domicilii*[240] have been applied. It is apparent that the courts do not draw a clear distinction between commercial and non-commercial matters. For instance, although the *lex domicilii* was applied predominantly in non-commercial matters,[241] there are also two decisions concerning commercial issues where the *lex domicilii* was held to govern capacity,[242] as well as an *obiter dictum* of the Indian Supreme Court in this regard.[243] Also, although the *lex loci contractus* predominantly featured in cases concerning commercial contracts,[244] it was applied in one decision of the English Probate Division that concerned a non-commercial matter.[245] The proper law

[233] According to the author, while this legal system "governs most aspects of capacity to enter into legal relations its application on [the] issue of capacity is not exclusive" (Agbede in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 75).

[234] He also makes the sweeping statement that in civil-law systems "most problems of capacity are governed by a single law – the *lex patriae*" (Agbede in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 74). This statement is, however, clearly incorrect, as illustrated in Fredericks *Contractual Capacity* 109–164.

[235] Agbede in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 75, with particular reference to Rule 115 of Dicey and Morris (Collins (gen ed) *Dicey and Morris on the Conflict of Law* 13ed (2000) 958).

[236] *Baindail v Baindail* [1946] P 122; *Cooper v Cooper supra*; *De Virte v MacLeod* (1869) 6 SLR 236; *Kashibadin v Schripat supra*; *Lachmi v Fateh supra*; *Obers v Paton's Trustees* (1897) 24 R 719; *Polson v Stewart supra*; *Sottomayor v De Barros (1)* (1877) 3 PD 1; and *Union Trust Company v Grosman supra*. Regard must also be had to the *obiter* remark by Pal J in *Technip Sa v Sms Holding (Pvt) Ltd supra* 4.

[237] *Male v Roberts supra*; *McFeetridge v Stewarts & Lloyds Ltd* 1913 SC 773; *Milliken v Pratt supra*; *Sottomayer v De Barros (2) supra*; and *TNS Firm v VPS Mohammad Hussain supra*. Also see the comments by Lord Greene MR in *Baindail v Baindail supra* 128.

[238] *Charron v Montreal Trust Co supra*; *Homestake Gold of Australia v Peninsula Gold Pty Ltd supra*; *The Bodley Head Limited v Flegon supra*.

[239] *Bank of Africa, Limited v Cohen supra*; *Gregg v Perpetual Trustee Company supra*; and *Nachiappa Chettiar v Muthu Karrupan Chettiar supra*.

[240] *Polson v Stewart supra*.

[241] *Baindail v Baindail supra*; *Cooper v Cooper supra*; *De Virte v MacLeod supra*; *Obers v Paton's Trustees supra*; and *Sottomayor v De Barros (1) supra*.

[242] *Union Trust Company v Grosman supra*; and *Polson v Stewart supra*.

[243] *Technip Sa v Sms Holding (Pvt) Ltd supra* 4 per Pal J.

[244] *Male v Roberts supra*; *McFeetridge v Stewarts & Lloyds supra*; *Milliken v Pratt supra*; and *TNS Firm v VPS Mohammad Hussain supra*.

[245] *Sottomayer v De Barros (2) supra*.

of the contract (objectively ascertained) was applied in commercial[246] and non-commercial contexts.[247] There is one English decision in which the court refrained from indicating the law applicable to capacity in a commercial context.[248]

The proper law of the contract is by far the most popular legal system to be proposed by the common-law authors, either as the sole legal system or as part of an alternative reference rule in this regard. The term "proper law" in the context of contractual capacity should be understood to refer to the putative proper law. If one of the parties does not have the capacity to conclude a contract, no contract comes into existence. The proper law as applicable to contractual capacity must therefore be the legal system that would be the proper law of the contract if it came into existence. The putative proper law then determines whether the contract is in fact concluded.[249] Only a minority of authors, such as Agrawal and Singh,[250] Rogerson,[251] Crawford and Carruthers,[252] Hill and Chong,[253] Mortensen,[254] O'Brien,[255] Pitel and Rafferty,[256] and Tan[257] employ the technically correct term "putative proper law".

There is a difference of opinion among the authors as to whether the proper law of the contract must be determined objectively or whether a choice of law should be taken into account. Authors such as Carter,[258] Clarkson and Hill,[259] Crawford and Carruthers,[260] Dicey, Morris and Collins,[261] Diwan and Diwan,[262] Hill and Chong,[263] McClean and Beavers,[264] Tilbury, Davis and Opeskin,[265] and Walker[266] are of the opinion that the proper law must be determined objectively. Sychold[267] and the Australian Law Reform Commission[268] would apply the proper law either subjectively or

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[246] *Homestake Gold of Australia v Peninsula Gold Pty Ltd supra*; and *The Bodley Head Limited v Flegon supra*.

[247] *Charron v Montreal Trust Co supra*.

[248] *Republica De Guatemala v Nunez* [1927] 1 KB 669 (CA).

[249] See, for e.g., Rogerson *Collier*'s *Conflict of Laws* 4ed (2001) 321.

[250] Agrawal and Singh *Private International Law* par 201 in respect of non-commercial contracts.

[251] Rogerson *Collier's Conflict of Laws* 321.

[252] Crawford and Carruthers *International Private Law in Scotland* 2ed (2006) 437.

[253] Hill and Chong *International Commercial Disputes: Commercial Conflict of Laws in English Courts* 4ed (2010) 551.

[254] Mortensen *Private International Law* 404.

[255] O'Brien *Smith's Conflict of Laws* 319.

[256] Pitel and Rafferty *Conflict of Laws* 281.

[257] Tan *Conflict Issues* 472.

[258] Carter "Contracts in English Private International Law" 1987 57 *British Yearbook of International Law* 23 24.

[259] Clarkson and Hill *The Conflict of Laws* 4ed (2011) 250.

[260] Crawford and Carruthers *International Private Law* 437.

[261] Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1869.

[262] Diwan and Diwan *Private International Law* 524.

[263] Hill and Chong *International Commercial Disputes* 551.

[264] McClean and Beevers *Morris The Conflict of Laws* 7ed (2009) 386.

[265] Tilbury *et al Conflict of Laws* 771.

[266] Walker *Castel and Walker* (2005/2014) § 31.5b.

[267] Sychold in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 185.

[268] The Australian Law Reform Commission *Choice of Law* 101.

objectively determined. This is also the position under the Restatement (Second).[269] According to Rogerson,[270] a choice of law may be taken into account if it was not made in order to confer capacity. Pitel and Rafferty[271] are of the opinion that only an express choice of law may be taken into account; the choice of law must also be *bona fide*, legal and not in contravention of public policy.[272] According to Sykes and Pryles,[273] the parties are only allowed to choose the law of a connected state. Oppong[274] states that a choice of law must be taken into consideration but should not prevail or apply to the matter exclusively.

Various authors favour the sole application of the proper law to contractual capacity (at least insofar as commercial contracts are concerned); they include Agbede,[275] Davies, Bell and Brereton,[276] Diwan and Diwan,[277] Mortensen,[278] O'Brien,[279] Oppong,[280] Pitel and Rafferty,[281] and Tilbury, Davis and Opeskin.[282] However, more writers would apply the proper law as part of an alternative reference rule. A combination of the proper law and the law of domicile is advocated by Carter,[283] Clarkson and Hill[284] and Crawford and Carruthers.[285] This is also the position in the Restatement (Second).[286] Sychold[287] and the Australian Law Reform Commission[288] favour the application of the proper law together with the law of habitual residence. Dicey, Morris and Collins[289] are of the opinion that the proper law should be applied together with "the law of domicile and residence" ("the personal law"). It is not clear whether a person has to be domiciled and resident in the same country for the personal law to apply or whether the law of domicile and the law of residence are both applicable legal systems. This proposal is nevertheless subscribed to by authors such as Hill and Chong,[290]

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269 The American Law Institute *Restatement of the Law Second* § 187 and § 188.

270 Rogerson *Collier's Conflict of Laws* 321.

271 Pitel and Rafferty *Conflict of Laws* 281.

272 Briggs, who supports applying the subjective proper law of the contract, similarly asserts that it could be excluded on the basis of public policy (Briggs *Private International Law in English Courts* (2014) 583, 596, 615–616 and 948–949).

273 Sykes and Pryles *Australian Private International Law* 614.

274 Oppong *Private International Law in Ghana* par 94.

275 Agbede in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 74.

276 Davies *et al Nygh's Conflict of Laws* 407.

277 Diwan and Diwan *Private International Law* 524.

278 Mortensen *Private International Law* 404.

279 O'Brien *Smith's Conflict of Laws* 319.

280 Oppong *Private International Law in Ghana* par 94.

281 Pitel and Rafferty *Conflict of Laws* 281.

282 Tilbury *et al Conflict of Laws* 771.

283 Carter 1987 *British Yearbook of International Law* 24.

284 Clarkson and Hill *The Conflict of Laws* 250.

285 Crawford and Carruthers *International Private Law* 437; Angelo *Private International Law* par 75; and Rogerson *Collier's Conflict of Laws* 320–321.

286 The American Law Institute *Restatement of the Law Second* § 198(2), § 187 and § 188.

287 Sychold in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 185.

288 The Australian Law Reform Commission *Choice of Law* 101.

289 Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1865.

290 Hill and Chong *International Commercial Disputes* 551.

and McClean and Beevers.[291] Hickling and Wu[292] and Tan[293] are in favour of the simultaneous application of the proper law, the law of domicile and the law of habitual residence.

Anton and Beaumont[294] and Agrawal and Singh[295] would apply the *lex loci contractus* as the sole applicable legal system in respect of ordinary commercial contracts.[296] Dicey, Morris and Collins[297] and Clarence Smith[298] add the *lex loci contractus* as an applicable legal system in specific circumstances. According to Dicey, Morris and Collins, this legal system must apply in the alternative (together with the proper law and the law of domicile and residence) if both parties were in the same country at the time of the contract's conclusion, unless fault were present on the part of the contract-assertor in that he or she had been aware of the incapacity in terms of the proper law or the law of domicile and residence, or had not been aware thereof as a result of negligence.[299] Clarence Smith is of the opinion that the *lex loci contractus* should only be applied in the alternative (that is, in addition to the *lex domicilii*) if no fault were present on the part of the contract-assertor in that he or she had not known and could not reasonably have been expected to know that the counterpart was incapable according to his or her *lex domicilii*.[300]

In respect of contractual capacity relating to immovable property, considerable support exists for the application of the *lex situs*.[301] Clarkson and Hill,[302] O'Brien[303] and Pitel and Rafferty[304] draw a distinction between

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[291] McClean and Beevers *Morris The Conflict of Laws* 386; Fawcett, Harris and Bridge *International Sale of Goods in the Conflict of Laws* (2005) 658. Authors such as Angelo *Private International Law* par 75; Carter 1987 *British Yearbook of International Law* 24; and Sykes and Pryles *Australian Private International Law* 614 merely refer to the proposal but do not express any preference.

[292] Hickling and Wu *Conflict of Laws* 171.

[293] Tan *Conflict Issues* 472.

[294] Anton and Beaumont *Private International Law* 2ed (1990) 276. Also see Beaumont and McEleavy *Private International Law AE Anton* 3ed (2011) 491.

[295] Agrawal and Singh *Private International Law* par 203.

[296] Hickling and Wu *Conflict of Laws* 170–171; and Cheng *The Rules of Private International Law* 71 and 128.

[297] Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1865.

[298] Clarence Smith 1952 *International and Comparative Law Quarterly* 470.

[299] Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1865. The statement is made in the context of art 11 of the Rome Convention and art 13 of the Rome I Regulation.

[300] *Ibid.*

[301] Agbede in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 75; Agrawal and Singh *Private International Law* par 201 (but only in respect of non-commercial contracts); Anton and Beaumont *Private International Law* 604; Beaumont and McEleavy *Private International Law* 940; Briggs *Private International Law* 583; Clarence Smith 1952 *International and Comparative Law Quarterly* 471; Clarkson and Hill *The Conflict of Laws* 474; Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1332–1333; Davies *et al Nygh's Conflict of Laws* 669; Diwan and Diwan *Private International Law* 407; Mortensen *Private International Law* 460; O'Brien *Smith's Conflict of Laws* 551; Pitel and Rafferty *Conflict of Laws* 326; Rogerson *Collier's Conflict of Laws* 384; Walker *Halsbury's Laws of Canada* (2011) 618; and Walker *Castel and Walker* 6ed § 31.4d. Also see Walker *Halsbury's Laws of Canada* (2006) 517. The courts also applied this legal system in *Bank of Africa, Limited v Cohen supra*; *Nachiappa Chettiar v Muthu Karuppan Chettiar supra*; and *Gregg v Perpetual Trustee Company supra.*

[302] Clarkson and Hill *The Conflict of Laws* 474–476.

[303] O'Brien *Smith's Conflict of Laws* 551–552.

local and foreign immovable property. In the first-mentioned scenario, the *lex situs* must apply but the proper law of the contract[305] should govern capacity in respect of foreign immovables. Sykes and Pryles[306] reject the *lex situs*, as they prefer the application of the proper law (subjectively or objectively determined) to govern capacity in this context. The American Law Institute follows a different approach. In terms of the Restatement (Second), capacity in respect of contracts involving immovables is governed by the subjectively and objectively determined proper law,[307] the *lex domicilii*,[308] as well as the *lex situs*, unless it is clear that the contract should rather be governed by another law – for instance, on the basis of public policy.[309] Many of the authors,[310] as well as the Australian Law Reform Commission,[311] do not make a distinction between contracts in respect of immovables and other contracts. They are therefore presumably of the opinion that the general arrangement with regard to contractual capacity should also apply in respect of immovable property.

8 DEVELOPMENT OF SOUTH AFRICAN PRIVATE INTERNATIONAL LAW

The content of South African private international law of contract in respect of contractual capacity is highly comparable to the position in the common-law countries. Traditionally, both in South Africa and in the common-law systems, the *lex domicilii* and the *lex loci contractus*, as well as the *lex situs* for immovables, have been applied by the courts to questions of contractual capacity. The latest addition to this list has been the (putative objective) proper law of the contract, already accepted in case law from Australia,[312] Canada[313] and the United Kingdom.[314] As indicated,[315] the court in the South African case of *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd*[316] would have preferred to apply the (putative objective) proper law to the issue of contractual capacity, rather than the *lex loci contractus*, as the *locus contractus* "could be a matter of pure chance, especially if it is made by letter or telefax or over the telephone,"[317] or could be added by electronic

304 Pitel and Rafferty *Conflict of Laws* 327.
305 Which may or may not also be the *lex situs*: see Clarkson and Hill *The Conflict of Laws* 474–476.
306 Sykes and Pryles *Australian Private International Law* 618.
307 The American Law Institute *Restatement of the Law Second* § 198(1).
308 The American Law Institute *Restatement of the Law Second* § 198(2).
309 The American Law Institute *Restatement of the Law Second* § 189.
310 Angelo *Private International Law*; Carter 1987 *British Yearbook of International Law*; Crawford and Carruthers *International Private Law*; Hickling and Wu *Conflict of Laws*; Hill and Chong *International Commercial Disputes*; McClean and Beevers *Morris The Conflict of Laws*; Oppong *Private International Law in Ghana*; Sychold in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws*; and Tan *Conflict Issues*.
311 The Australian Law Reform Commission *Choice of Law.*
312 *Homestake Gold of Australia v Peninsula Pty Ltd supra.*
313 *Charron v Montreal Trust Co supra.*
314 *The Bodley Head Limited v Flegon supra.*
315 See heading 1 of part 1 of this article: Fredericks 2018 *Obiter* 654.
316 2000 (1) SA 167 (W).
317 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd supra* 172A–B; *Powell v Powell* 1953 (4) SA 380 (W) 383A–C and *Guggenheim v Rosenbaum (2)* 1961 (4) SA 21 (W) 29H–33A.

means.[318] On the facts of the particular case, no definite choice in favour of the proper law was made as the *lex loci contractus* and the proper law were the same legal system.[319] Various South African authors support the proper law as an alternatively applicable legal system.[320]

It must immediately be made clear that application of the putative proper law is not supported insofar as it is based on a purported choice of law by the parties. The parties should indeed never be allowed to confer capacity on themselves by a mere choice of law, as this would undermine the protection of the interests of the incapable party in the relevant personal-law system.[321] This view is generally accepted by common-law[322] and South African authors.[323]

However, there are convincing arguments in favour of the alternative application of the putative *objective* proper law of the contract[324] – that is, the law that would have been the proper law of the contract if the parties had had the relevant capacity at the time of the conclusion of the contract, not

[318] See s 22(2) and s 23(*c*) of the Electronic Communications and Transactions Act 25 of 2002, which will, in a South African court, determine where an electronic contract was concluded, as the *lex fori* determines the content of connecting factors (see *Ex Parte Jones: In re Jones v Jones* 1984 (4) SA 725 (W) and *Chinatex Oriental Trading Co v Erskine* 1998 (4) SA 1087 (C) 1093H; an exception is nationality (Forsyth *Private International Law. The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* 5ed (2012) 11; Schoeman, Roodt and Wethmar-Lemmer *Private International Law in South Africa* (2014) par 24; and Vischer "Connecting Factors" in Lipstein (ed) *International Encyclopedia of Comparative Law* (1992) 22). An electronic contract is concluded where acceptance of the offer is received by the offeror (s 22(2)). The acceptance must be regarded as having been received at the offeror's usual place of business or residence (s 23(*c*)). Also see Fredericks *Contractual Capacity* 9–10, 210–211 and 220.

[319] *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd supra* 172G–H.

[320] Kahn "Conflict of Laws" 2000 *Annual Survey of South African Law* 871 876; Kahn "International Contracts – V: The General Rule in South Africa, and the Issue of Capacity" 1991 20 *Businessman's Law* 126 128; Sonnekus "Handelingsbevoegdheid van Getroudes en die Norme van die Internasionale Privaatreg" 2002 27 *TRW* 145 147–148; and Van Rooyen *Die Kontrak* 126. Schoeman *et al Private International Law* par 115 merely refer to the approach. The (objective) proper law is also the most popular approach with the common-law authors: see headings 2–6 above.

[321] Fredericks *Contractual Capacity* 233, 243 and 245.

[322] Carter 1987 *British Yearbook of International Law* 24; Clarkson and Hill *The Conflict of Laws* 250; Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1869; Crawford and Carruthers *International Private Law* 437; Diwan and Diwan *Private International Law* 524; Fawcett and Carruthers *Cheshire, North & Fawcett Private International Law* 14ed (2008) 751; Hill and Chong *International Commercial Disputes* 551; McClean and Beevers *Morris The Conflict of Law* 386; and Rogerson *Collier's Conflict of Laws* 320. *Contra* The American Law Institute *Restatement of the Law Second* § 187 and § 188; The Australian Law Reform Commission *Choice of Law* 101; Oppong *Private International Law in Ghana* par 94; Sychold in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 185; and Sykes and Pryles *Australian Private International Law* 614.

[323] Edwards and Kahn *LAWSA II.2 Conflict of Laws* (2003) par 333; Forsyth *Private International Law* 337, 338, 340 and 343; Kahn 1991 *Businessman's Law* 128; Schoeman *et al Private International Law* par 107; Van Rooyen *Die Kontrak* 126.

[324] As to which other legal systems should apply together with the putative objective proper law in an alternative reference rule, see Fredericks "Personal Laws and Contractual Capacity in Private International Law" 2019 1 *THRHR* 69; Fredericks "The Role of the *Lex Loci Contractus* in Determining Contractual Capacity" 2018 4 *TSAR* 754–770; Fredericks "The *Lex Rei Sitae* and Contractual Capacity in Respect of Immovable Property" 2018 2 *THRHR* 281; and Fredericks *Contractual Capacity* ch 6.

taking any express or tacit choice of law into consideration.[325] The objective proper law of the contract is the law most closely connected to the contract. Application of the objective proper law would allow most aspects of a contract to be governed by the same legal system, which would be convenient for the parties and the courts. Application of the objective proper law would lead to more legal certainty (if the rules in this regard are reasonably predictable; and definitely if compared to the application of the *lex domicilii*). Uniform application of the objective proper law would promote international harmony of decision by overcoming the continued dichotomy between (primarily civil-law) states that traditionally apply nationality and (primarily common-law) legal systems that apply domicile as the prime connecting factor in respect of contractual capacity. Finally, application of the objective proper law would be in line with the justified expectations of the parties.[326] The South African courts should therefore consider adding the putative objective proper law as one of the legal systems that govern contractual capacity. The *Tesoriero* case is the forerunner in this process.[327]

Application of the proper law mainly provides a protection mechanism for the capable contracting party (although the result in a particular case will always depend on the content of the relevant legal systems). However, the interests of both the capable and incapable parties need to be taken into account.[328] The following limitation on the application of the putative objective proper law is therefore proposed to effect the envisaged balance: the proper law should not be applied if the capable contractant was aware of his or her counterpart's incapacity under relevant personal law(s)[329] at the time of conclusion of the contract, or was unaware thereof as a result of negligence.[330]

The proposed limitation is ultimately based on a decision of the French *Cour de cassation*, *Lizardi v Chaize*,[331] which was later accepted, in a modified form, in Article 11 of the Rome Convention on the Law Applicable to Contractual Obligations[332] and Article 13 of the Rome I Regulation on the Law Applicable to Contractual Obligations.[333] The so-called *Lizardi* rule originally featured in the context of limitation of the scope of application of the *lex loci contractus* (not the proper law) to contractual capacity.[334] No support for a *Lizardi*-like rule could be found in any common-law cases. Only one common-law author could be found (outside the context of Article 11 and Article 13 of the Rome Convention and the Rome I Regulation,

[325] Fredericks *Contractual Capacity* 5, 105, 226, 247 and 248.
[326] Fredericks *Contractual Capacity* 226–234.
[327] *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd supra* 172G–H. Also see *Guggenheim v Rosenbaum (2) supra* 29H–33A and *Powell v Powell supra.*
[328] Fredericks *Contractual Capacity* 233–234 and 243–246.
[329] See Fredericks 2019 *THRHR* 69–82.
[330] Fredericks *Contractual Capacity* 247–249.
[331] *Lizardi v Chaize* Cass req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193.
[332] Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980 (80/934/EEC) (Rome Convention). The convention applies in respect of contracts concluded before 17 December 2009.
[333] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I). The regulation applies to contracts concluded as from 17 December 2009.
[334] See Fredericks *Contractual Capacity* 116–120 and 212–225.

respectively) advocating a similar rule. According to Clarence Smith, the *lex domicilii* in principle applies to contractual capacity; the *lex loci contractus* applies in the alternative only if the capable contractant could not reasonably be expected to know that the counterpart was incapable in terms of his or her *lex domicilii*.[335] The South African author Van Rooyen has been inspired by the *Lizardi* rule to formulate a similar exception in the context of the application of the proper law. He argues in favour of the alternative application of the *lex domicilii* and the proper law of the contract. However, the proper law should not be applied where the contract assertor knew, or should reasonably have known, of his counterpart's incapacity in terms of the *lex domicilii*.[336] The proposed exception to the application of the putative objective proper law at the end of the previous paragraph is directly inspired by this idea but moulded in the terminology of Articles 11 and 13 of the Rome Convention and the Rome I Regulation.

The current author supports, both for the purposes of the common-law systems and South African private international law, the development of the putative objective proper law of the contract as one of the legal systems to govern contractual capacity as part of an alternative reference rule.[337] However, the application must be limited as suggested by the *Lizardi*-inspired rule from civil-law origin as provided above.[338] From this contribution, it is clear that comparative studies should be as wide as possible and include common-law, civil-law and mixed jurisdictions, as well as regional, supranational and international instruments, where appropriate.[339]

[335] Clarence Smith 1952 *International and Comparative Law Quarterly* 470; Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1865, referring to the Rome instruments.

[336] Van Rooyen *Die Kontrak* 126; *Kent v Salmon supra* 639–641, Forsyth *Private International Law* 340 fn 145 and Sonnekus 2002 *TRW* 146.

[337] In Belgian private international law, the proper law is the primary (sole) applicable legal system governing capacity (Belgian Private International Law Code (2004) ch II, art 34 § 2), while in Oregon the proper law of the contract and the law of habitual residence apply in the alternative (Oregon's Conflict Law Applicable to Contracts (2001) s 5). In Louisiana (Civil Code of Louisiana (1991) art 3539) and Venezuela (Venezuelan Act on Private International Law (1998) art 16), capacity is governed through the alternative application of the proper law of the contract and the *lex domicilii*. Also see the Puerto Rican *Projet* (*Projet* for the Codification of Puerto Rican Private International Law (1991) ch 2, arts 36 and 39). The alternative application of the proper law and the *lex domicilii* is also supported by authors such as Carter 1987 *British Yearbook of International Law* 24; Clarkson and Hill *The Conflict of Laws* 250; and Crawford and Carruthers *International Private Law* 437. Also see The American Law Institute *Restatement of the Law Second* § 198(2), § 187 and § 188. There is also support for the application of the proper law and the law of habitual residence (Sychold in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 185 and the Australian Law Reform Commission *Choice of Law* 101). On other possible legal systems to form part of the envisaged alternative reference rule, for instance personal legal systems, the *lex loci contractus* (in specific circumstances) and, for immovable property, the *lex situs*, see Fredericks 2019 *THRHR* 69–82, Fredericks 2018 *TSAR* 754–770 and Fredericks 2018 *THRHR* 281. See, in general, Fredericks *Contractual Capacity* ch 6.

[338] Also compare the conflicts code of Oregon (Oregon's Conflicts Law Applicable to Contracts (2001) s 5(1) and (2)) and the Puerto Rican *Projet* (*Projet* for the Codification of Puerto Rican Private International Law (1991) ch 2, arts 36 and 39).

[339] See, in general, Martinek "Comparative Jurisprudence – What Good Does It Do? History, Tasks, Methods, Achievements and Perspectives of an Indispensable Discipline of Legal Research and Education" 2013 *TSAR* 39.

ADVOCATING POSITIVE TRADITIONAL CULTURE TO ERADICATE HARMFUL ASPECTS OF TRADITIONAL CULTURE FOR GENDER EQUALITY IN AFRICA

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SUMMARY

The struggle for equality for all and the abolition of discriminatory, harmful cultural practices affecting women has been occurring in the world for some time now. Most African countries outlaw harmful, discriminatory traditional practices, although they persist, causing the violation of domestic and international human rights laws. Outside efforts to eliminate these practices are often met with suspicion or hostility from communities, because Africans generally believe that these are their valuable, traditional practices. The aim of this article is to discuss alleviating harmful traditional practices suppressing gender equality in Africa by practically supplementing the law. The study examines African culture versus gender equality historically to pinpoint colonialism's influence in current gender equality. Colonial administration influenced lives politically, economically and socially, including culture and traditions. Efforts to eradicate harmful traditional practices are most effective when originating from within the culture, as focussing on international human rights is often perceived as culturally imperialistic in African countries.

1 INTRODUCTION

Societies have certain practices reflecting their beliefs and values. Negative and positive traditional cultural aspects of any society are reflected by these practices. Many African traditions promote social cohesion and unity, while others break down a specific group (such as women, who are the focus of this article) physically, economically and psychologically. These cultures receive international attention owing to their severe, negative impact on women.[1] Some African natives are unhappy to hear that their traditional practices, passed down by their ancestors, are frowned upon,[2] feeling

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[1] Lukale "Harmful Traditional Practices: A Great Barrier to Women's Empowerment" 2014 G*irls Globe* 1.

[2] Idang "African Culture and Values" 2015 16(2) *Phronimon* 97–111.

insulted because traditions and cultural practices form their identity.[3] Many harmful traditional practices are performed for the benefit of males[4] but achieving equality between the sexes cannot be attained if the fundamental human rights of the female half of a society are continually denied.[5] Female social, economic and political subordination inhibits the structural and attitudinal changes necessary to eliminate gender inequality.[6]

Numerous regional and international human rights instruments explicitly protect and promote women's rights against all harmful practices. For example, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[7] obliges state parties to "pursue by all appropriate means and without delay a policy of eliminating discrimination against women."[8] The Convention reaffirms equality of human rights for all women and men in society and within the family. It also forces members to act against the social causes of women's inequality and eliminate laws, prejudiced stereotypes and practices impairing the well-being of women. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) defines harmful practices as "all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity".[9] Fifteen years ago, the African Union adopted the Maputo Protocol to boost the protection of women.[10] The protocol contains several innovative provisions to curb gender inequality.[11]

Various traditional practices are based upon men's superior position in African culture, causing women to suffer much cultural abuse.[12] Practices globally identified as detrimental to women include forced marriages, female genital mutilation (FGM), child marriage, virginity testing, Wahaya (fifth wife),[13] witch-hunting, widow's rituals, *trokosi* (slaves to the gods),[14] male

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3 Spencer-Oatey "What is Culture? A Compilation of Quotations" 2012 http://www.warwick.ac.uk/globalpadintercultural (accessed 2018-12-10) 6.

4 United Nations Economic and Social Council Preliminary Report submitted by the Special Rapporteur on Violence Against Women, its Causes and Consequences, in Accordance With the Commission on Human Rights Resolution 1994/45, (E/CN.4/1995/42) (22 November 1994).

5 Hannum "Reinvigorating Human Rights for the Twenty-First Century" 2016 16(3) *Human Rights Law Review* 409–451.

6 Makulele "Culture, Tradition, Custom, Law and Gender Equality" 2012 1 *Potchefstroom Electronic Law Journal* 1–22.

7 All African states in Africa have ratified CEDAW except South Sudan.

8 Article 2 of CEDAW.

9 Article 1 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2005.

10 The Protocol was adopted on 11 July 2003. Thirty-six African states have signed and ratified it so far.

11 Some of its groundbreaking provisions include the prohibition of child marriage and female genital mutilation, the responsibility to punish perpetrators of violence against women, and the allocation of budgetary resources to realise women's rights.

12 Msuya *Harmful Cultural and Traditional Practices: A Roadblock in the Implementation of the Convention on the Elimination of Discrimination Against Women and the Maputo Protocol on Women's Rights in Tanzania* (doctoral thesis, University of KwaZulu-Natal) 2017 30.

13 Wahaya or fifth wife is predominant in Muslim societies in countries like Niger that allows polygamy. The Qur'an permits a Muslim man to have up to four wives, as long as he treats them equally (Lillie) and each wife after the first four is considered to be a Wahaya or fifth

dominance, and preference for sons. These practices persist where young girls and women have unequal access to health, education, employment and wealth.[15] Culturally, women's position in society is shaped by persistent abuse.[16] Harmful cultural practices have caused women's low status within the family and society, preventing them from escaping abuse and seeking legal protection. Domestic violence is justified as discipline, and instilled in girls from an early age.[17] Women are deprived of reaching their full potential, as that would threaten men's safety, freedom and autonomy.[18] These so-called moral practices persist and are consequently not questioned sufficiently.[19]

These harmful practices have enabled extensive violence against women.[20] African states have enacted new legislation to develop a modern economy and new practices suited to a modern democracy, but they are very slow to change their attitude to women's rights.[21] This hesitation occurs as African states prefer not to interfere with cultural practices.[22] Traditions and cultures are esteemed, promoting African identity and heritage. However, there is an important question that needs an answer: what is the source of the so-called African discriminatory culture?[23] Do African traditional practices stem from their ancestors or result from the interaction between Africans and colonialists?[24] Some scholars reveal that before colonialism, African culture and traditions valued women, treating them with great respect.[25]

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wife. The fifth wife is the unofficial wife who acts as a slave to the first four wives and the husband.

14 Trokosi or slave to the gods is a traditional practice that is widespread in West African countries such as Ghana, Benin, Togo, and South-Western Nigeria. This tradition involves young virgin girls from the Ewe ethnic group who are sent to live as forced labourers in traditional shrines. Apart from being used as slave labourers, these young girls are also used as sex slaves by the priests residing in the shrines.

15 Jayachandran "The Roots of Gender Inequality in Developing Countries" 2015 7 *Review of Economics* 63–88.

16 Budoo "Next Steps to Getting Africa's Protocol on Women's Rights Implemented" (2018-01-24) *Sunday Times* 1.

17 Erez "Domestic Violence and the Criminal Justice System: An Overview" 2002 7 *Online Journal of Issues in Nursing* 1–3.

18 Raday *Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends* Working Group on the Issue of Discrimination against Women in Law and in Practice (October 2017) United Nations Human Rights Special Procedure.

19 Msuya *Harmful Cultural and Traditional Practices* 32.

20 *Ibid.*

21 UN Fact Sheet No. 23 "Harmful Traditional Practices Affecting the Health of Women and Children" (1995) https://www.ohchr.org/Documents/Publications/FactSheet23en.pdf (accessed 2018-12-10).

22 *Ibid.*

23 Molefe "Personhood and Rights in an African Tradition" 2018 45(2) *South African Journal of Political Studies* 217–231.

24 Manganyi and Buitendag "A Critical Analysis on African Traditional Religion and the Trinity" 2013 69(1) *Theological Studies* 1–13.

25 Richard, Stephen and Steiner *Perspectives on Africa: A Reader in Culture, History and Representation* (2010).

25 *Ibid.*

Mere illegalisation of harmful cultural practices has resulted in resentful resistance in Africa.[26] Women's rights abuse persists despite CEDAW and the Maputo Protocol's existence, suggesting that law alone cannot control human beings' harmful behaviour.[27] Focussing on available international human rights laws to eradicate harmful traditional cultures appears as Western pressure and is often perceived as culturally imperialistic in African countries.[28] The implementation of CEDAW and the Maputo Protocol can become more effective when integrated into comprehensive eradication strategies. This article aims to discuss numerous legal approaches to addressing harmful cultural practices to achieve gender equality. It explores the relationship from historical, current and future perspectives and is divided into four sections. The first section discusses the traditional concept of culture from a human rights perceptive. The second section explores gender equality in Africa, before, during and after colonialism, aiming to pinpoint the effect of colonialism on current African culture regarding the equality of men and women. Possible ways of safeguarding women against harmful practices and deeper insight regarding gender equality is explored in this part of the research. Section three suggests possible ways to alleviate harmful cultural practices in Africa, followed by section four which provides the concluding remarks.

2 CONCEPT OF CULTURE

Gender identities and relations are critical cultural aspects that shape daily family lifestyle, workplace behaviour, and behaviour within the broader community. Gender – unlike race or ethnicity – establishes a principle for society because of cultural connotations given to being male or female. Culture is a word scholars have found difficult to define as it has numerous different meanings. In 1952, American anthropologists Kroeber and Kluckhohn reviewed 164 different definitions of culture.[29] In 1992, another anthropologist, Ape, stated that until 1990 no agreement on the meaning of culture could be reached by anthropologists.[30] Different scholars have attempted to define traditional culture from different perspectives. The United Nations Educational, Scientific and Cultural Organisation (UNESCO) (2002) defines culture "as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group that encompass, in addition to

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25 Van-Allen "Sitting on a Man: Colonialism and the Lost Political Institutions of Igbo Women" 2014 6(2) *Canadian Journal of African Studies* 165–81; Fredoline "Women and Development in Africa: From Marginalisation to Gender Inequality" 2002 2 *African Social Science Review* 2–3; Davidson *The African Genius: An Introduction to African Cultural and Social History* (1969) 39; Akyeampong and Fofack *The Contribution of African Women to Economic Growth and Development: Historical Perspectives and Policy Implications, Part I, The Pre-Colonial and Colonial Periods* Policy Research Working Paper No. 6051 (2012).

26 *Ibid.*

27 Mapadimeng *Indigenous African Cultures and Relevance to Socio- Economic Development in the Contemporary Era* Paper presented at the 2nd International Conference on African Culture and Development in Accra, Ghana (15–18 November 2009).

28 Makulele 2012 *Potchefstroom Electronic Law Journal* 4.

29 Spencer-Oatey http://www.warwick.ac.uk/globalpadintercultural 61.

30 *Ibid.*

art and literature, lifestyles, ways of living together, value systems, traditions and beliefs".[31]

Culture refers to the lifestyle of a specific group of people, seen in people's behaviour, beliefs, values, customs, dress style, personal accessories like make-up and jewellery, and relationships. Traditional culture is passed down from one generation to the next and is called the lifestyle of an entire society. People are not born with traditions and culture, but learn them from their religion, family, the media, school and government.[32] Religious institutions, whether Christian, Muslim or others, also play a major role in introducing rituals specific to a particular culture. Nowadays, advertisements, magazines and social media guide our lives. Music and videos promote dress style, values, expressions and attitudes of teenagers and young adults, with many of them preferring slang used in pop music rather than their native language.[33]

Culture is therefore not static, but always changing as each generation contributes its experience of the world, discarding things that are no longer useful.[34] Culture is always involved with time.[35] Time is the basis upon which all cultures rest and around which all activities revolve.[36] In past centuries, time was measured in seasons, such as darkness and daylight, but it has subsequently become more complex. It depends on how culture chooses to use time which, according to Kluckholn and Strodtbeck, includes the past, present and future.[37] A "present-oriented" culture pays little attention to what happened in the past or what the future holds.[38] This kind of culture considers the past unimportant and the future vague and unpredictable. However, "past-oriented" cultures have a strong sense of the tradition of their ancestors, family and aristocracy, attempting to maintain them in the present.[39] Meanwhile, "future-oriented" cultures place a lot of value on change, favouring desirable economic and social developments.

Numerous African societies live with a past-oriented cultural type, striving to maintain their ancestors' cultures and traditions, without caring about the consequences for their fellow Africans, like women, and the development of nations as a whole.[40] It does not matter whether a cultural practices is positive or negative, harmful or dangerous, because of utmost importance is that the proponent's culture needs to be preserved at all costs.[41] Advocates for women's human rights have worked to emphasise the indivisibility of human rights, reasserting the common ground between cultural and

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31 *Ibid.*

32 Trompenaars and Hampden-Turner *Riding the Waves of Culture: Understanding Cultural Diversity in Business* 2ed (1997) 19.

33 Barger *Ethnocentrism* (Lecture discussion, Indiana University Indianapolis) (2008-07-01).

34 *Ibid.*

35 *Ibid.*

36 Idang 2015 *Phronimon* 98.

37 Otnes and Tuncay-Zayer *Gender, Culture and Consumer Behaviour* (2012) 23.

38 Spencer-Oatey http://www.warwick.ac.uk/globalpadintercultural 61.

39 *Ibid.*

40 Otnes and Tuncay-Zayer *Gender, Culture, and Consumer Behaviour* 24.

41 *Ibid.*

women's rights,[42] which can be mutually reinforced by building cultural practices and traditions supportive of the human rights framework.[43]

3 AFRICAN CULTURE AND GENDER EQUALITY IN AFRICA: BEFORE, DURING AND AFTER COLONIALISM

In explaining the relationship between African culture and gender equality historically, this research aims to identify past historical factors impinging on gender equality and how cultural practices promoted gender inequality in pre-colonial, colonial and post-colonial periods.

3 1 Pre-colonial era

History reveals that before colonialism in Africa, there was no cultural discrimination against women by men.[44] Power was based on seniority, not gender.[45] Both men and women played economic and political roles in society, each having their own unique roles within the family and society. Like men, women engaged in fishing, farming, herding and commercial activities such as making clothes, pottery and handcrafted work,[46] and enjoyed the profits of their work. Women were not stereotyped in Africa;[47] rather men's and women's responsibilities complemented each other. In some societies, women possessed power, binding society together,[48] and were depended upon for the survival of the family and marriage.[49]

Women were teachers, instilling knowledge and traditional values in children,[50] and playing a vital role in teaching moral beliefs and traditions by caring for their families. Women were also the first teachers of trapping, hunting and fishing. Older women, drawing on experience and wisdom, trained children to be respectful, thankful and gentle with animals. Women promoted African culture through dance, music, art and clothing. The survival of communities was dependent upon women, as they had a broad knowledge of herbs and traditional medicine. Women also gathered food for their families. In some areas like Kikuyu in Kenya, women were the major food producers, choosing how to cultivate the land. The African kinship system enabled women to be economically independent. Women's

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42 Asomah "Cultural Rights versus Human Rights: A Critical Analysis of the *Trokosi* Practice in Ghana and the Role of Civil Society" 2015 15(1) *African Human Rights Law* 129–149.

43 Talpade "Under Western Eyes: Feminist Scholarship and Colonial Discourses" in Talpade and Torres (eds) *Third World Women and the Politics of Feminism* (1991) 57.

44 Richard, Stephen and Steiner *Perspectives on Africa* 18.

45 *Ibid.*

46 Van-Allen 2014 *Canadian Journal of African Studies* 165–181.

47 Fredoline 2002 *African Social Science Review* 2–3.

48 Davidson *The African Genius: An Introduction to African Cultural and Social History* 39.

49 Akyeampong and Fofack Policy Research Working Paper No. 6051.

50 *Ibid.*

responsibilities of managing the home and raising children meant they were seen as heads of their households.[51]

Women were treated with great respect,[52] and were considered to be closer to the Creator than men, because of their ability to give birth, and because they had been entrusted with the responsibility of nurturing the next generation.[53] Maternal rights and privileges were a prevalent feature, key to inheritance,[54] and informally influencing decisions made in the clan.[55] The household was the smallest administrative unit in many states; leaders of each household held frequent meetings for family discussions,[56] and women were given an opportunity to express their views as well.

Evidence suggests women participated in political meetings alongside men, as political power was diffused at that time,[57] with no special offices or political bodies. The village assembly was the main political institution, and included all adults in the village who chose to attend.[58] Any member wishing to speak was given the opportunity, as long as she or he had something worthwhile to contribute.[59] Decisions were reached by consensus and enforced by individuals and groups. A good example of female leadership comes from the Igbo women of southern Nigeria who played a significant role in traditional and political life.[60] Women and men had equal leadership opportunities, as long as they possessed wealth, wisdom, generosity and eloquence.[61]

Another excellent example of a woman with great political power is the widow of the Nguni king of Mozambique, the priestess in charge of the shrine in the burial place of her deceased husband.[62] She was even consulted by the reigning king on important matters. Other women occupied positions as heads of state. In West Africa, there was a female member of the *Alaafin*'s council, a chieftainess called the *Iyalode* in Yoruba.[63] She was the spokesperson at the *Alaafin's* meetings, responsible for women's rights. By the 19th century in Sierra Leone, women were selected as heads of towns and sub-regions among the *Mende* and *Sherbro* people, one of them being Madame Yoko.[64]

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[51] Hakansson "The Detachability of Women: Gender and Kinship in Processes of Socio-Economic Change Among the Gusii of Kenya" 1994 21(3) *American Ethnologist* 516–538.

[52] Msuya *Harmful Cultural and Traditional Practices* 32.

[53] Meintjes "The Women's Suffrage Movement: The Politics of Gender, Race and Class. History of Women's Struggle in South Africa" 1996 30 *Transformation* 47–64.

[54] Msuya *Harmful Cultural and Traditional Practices* 33.

[55] *Ibid.*

[56] Ogbomo *When Men and Women Mattered: A History of Gender Relations Among the Owan of Nigeria* (1997) 18.

[57] *Ibid.*

[58] Van-Allen 2014 *Canadian Journal of African Studies* 166.

[59] *Ibid.*

[60] *Ibid.*

[61] Harris "The Position of Women in Nigerian Society" 1940 2(5) *Translation of the Network Academy of Sciences, Series II* 141–181.

[62] *Ibid.*

[63] Magbaily *Introduction to the History of African Civilisation: Pre-Colonial Africa* (1999) 23.

[64] Day "The Evolution of Female Chieftainship during the Early Nineteenth-Century War of the Mende" 1994 27 *The International Journal of African Historical Studies* 3.

A woman like the Rain Queen or Modjadji of the Balobdu of the old Transvaal had both political and religious power.[65] The most memorable roles of women with political power are that of Queen Mother or Queen Sister, the post occupied by a female member of royal blood who was the mother, sister or aunt of the king in places like Mali, Asante and Buganda.[66] These societies were aware of the influence of the Queen and, on certain occasions, the Queen Mother wielded the power, with the King a mere puppet.[67]

Although patriarchy existed before colonialism, there is no proof thereof, as stated by Sudarikasha as follows:

> "[F]rom my own reading of Africa and my research it appears that except for the highly Islamized societies in Sub-Sahara Africa, in other parts women were conspicuous in high places, they were Queen Mothers, Queen Sisters, Princesses, Chiefs, holders of other offices in towns and villages, occasionally warriors and in other societies like the Lovedu the Supreme Monarch."[68]

Writers like Paulme also confirmed that gender was a foreign concept to the pre-colonial world, not playing a meaningful role.[69] Other scholars confirmed there were elements of patriarchy in pre-colonial Africa, but generally women were allowed to manage their affairs without interference by men; there was also evidence of dual political systems in some instances.[70]

3 2 During colonialism

The main responsibilities of women in pre-colonial times were to find water, till, sow seeds, harvest, manage the home, and care for animals. These activities were badly interrupted when colonialists claimed the land that was previously cultivated by women.[71] Land defined women and their role in African societies, but colonialists alienated it.[72] The land alienation movement negatively impacted women economically, causing them to be more dependent on men.[73] Women consequently had limited access to food, available terrain, and less diversity concerning available soil types and crops that could be cultivated. This resulted in social, physical and emotional male supremacy and dominance and a loss of female identity.[74]

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65 Harris 1940 *Translation of the Network Academy of Sciences* 148.

66 *Ibid.*

67 Sudarikasa "Status of Women in Indigenous Africa Society" 1986 12(1) *Feminist Studies* 91–103.

68 *Ibid.*

69 Brokensha "Women of Tropical Africa" 1964 2(1) *The Journal of Modern African Studies* 145–146.

70 Pearce *Gender and Governance in Africa: A Conceptual Framework for Research and Policy Analysis and Monitoring.* A Draft Issues Paper presented at the African Knowledge Networks Forum Preparatory Workshop Addis Ababa, Ethiopia (17–18 August 2000).

71 Nduye *Tilling and Keeping the Earth in an Unjust Economic Order: Towards an African Eco-Theological Framework* (Master of Theology, University of KwaZulu-Natal) 2011 18.

72 *Ibid.*

73 Keet "African Women and Colonialism" (2013-05-25) *Fantastic Africa* 1.

74 Rodgers *Representations of Women, Identity and Education in the Novels of Tsitsi Dangarembga and Kopano Matlwa* (Master of English, Stellenbosch University) 2013 21.

Colonial rule introduced various values like rugged individualism, corruption, capitalism and the oppression of culture.[75] Colonialism caused disruption of traditional moral homogeneity and practice. Colonialism diminished moral inculcation, resulting in the dereliction of traditions and cultures through a systematic depersonalisation.[76] It tampered with value systems like communalism which defined African life. Colonialists imposed their religious and economic values onto Africa, evident in the economic exploitation and socio-religious verification during the colonial period.[77] Colonialist beliefs were achieved by establishing schools with curriculums designed to achieve colonialist goals. Missionary projects worked well, vitrifying the religious concept to the colonised. Colonialism created two classes, the subjugator and the subordinator, with an administrative structure intentionally favouring the former, resulting in the destruction of the culture, values and religion of the subordinates.[78]

The colonial administration in Africa excluded women from mining and the construction of roads and houses,[79] leading to the gradual displacement of women in production activities, and resulting in men controlling the cultivation of cash crops. Due to land alienation, women became dependent upon men,[80] whereas previously they were more economically active than men. Land alienation also reduced women's contributions to meeting their families' needs.[81] Colonial authorities exclusively considered men when establishing local political offices, disregarding women's pre-colonial political activity.[82] The development of legal colonialist systems established customary laws on issues of marriage and divorce, based on the testimony given by men, which led to the large number of discriminatory customary laws in post-colonial Africa.[83]

Colonialists used women and children as the main source of casual labour on their plantations,[84] which caused the destruction of the traditional family as women and children were forced to leave their daily activities.[85] Casual labour was also accompanied by sexual and physical abuse, which reduced women's productive abilities.[86] Men were also forced to migrate to jobs away from their traditional labour activities, so women had to perform these

75 Pels "The Anthropology of Colonialism: Culture, History, and the Emergence of Western Governmentality" 1997 26 *Annual Review Anthropologist* 163–182.

76 Idang 2015 *Phronimon* 98.

77 *Ibid.*

78 Global Black History "History and Outcomes of Colonial Education in Africa" (2016-07-28) https://www.globalblackhistory.com/2016/07/history-outcomes-colonial-education-africa.html (accessed 2018-12-10).

79 Chanock *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (1989) 19.

80 *Ibid.*

81 Mbilinyi "The Changing Position of Women in the African Labour Force" in Shaw and Aluko (eds) *Africa Projected From Recession to Renaissance by the Year 2000?* (1984) 175.

82 Sheldon *Women and Colonialism* (2017) 1.

83 Ndulo "African Customary Law, Customs, and Women's Rights" 2011 *Cornell Law Faculty Publications* 187.

84 Amediume *Daughters of the Goddess, Daughters of Imperialism: African Women, Culture, Power and Democracy* (2000) 78.

85 *Ibid.*

86 Mbilinyi in Shaw and Aluko (eds) *Africa Projected from Recession to Renaissance* 42.

traditionally male duties, causing ever-increasing responsibilities for women and the destruction of families.[87] Men were also forced to abandon traditional family practices such as ceremonies, rites and rituals.[88]

The migration of men from rural areas led to African patriarchy as women also started migrating to urban areas due to the heavy workload left to them and the deterioration of urban areas.[89] Men became patriarchal, concerned with controlling women's movements, in order to retain the purity of their clan, control moral decline and discipline women.[90] The colonial regime supported men in controlling women's sexuality.[91] The colonialists' concern was to resolve domestic problems as some men left their employment early owing to domestic problems arising from accusations of adultery and cases of women leaving their partners for other men.[92] Various laws were passed to assist men in controlling their women. For instance, Zimbabwe passed the Native Affairs Act of 1929, which applied to prostitutes, and the Adultery Ordinance of 1926, which applied to married women.[93] Colonialists thus destroyed women's social freedom and all the activities, such as trade, which they had previously engaged in.[94]

The male migrant movement changed the African tradition of the dowry being paid with livestock to cash, resulting in the inflation of bride-wealth and women being judged by their dowries, instead of the dowry affirming women's wealth.[95] Previously, the dowry was regarded as a symbolic exchanging of gifts between the bride and groom's families to show mutual respect and to prove that the groom was capable of providing for the daughter.[96] In some societies, brides had controlled their own dowries, so becoming economically powerful.[97] However, heavy, colonialist-imposed taxes caused men to suffer financial constraints, causing them to exert control over the dowry as a source of income.[98]

Women were also discriminated against in colonial education, with men given priority and women denied the right to study.[99] Colonial laws, customs and religion prevented women from participating in social, economic and

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87 *Ibid.*

88 *Ibid.*

89 Becker "'We Want Women to be Given Equal Chance: Post-Independence Rural Politics" in Meintjes, Pillay and Turshen (eds) *The Aftermath: Women in Post-Conflict Transformation* (2002) 118.

90 *Ibid.*

91 *Ibid.*

92 Barnes "The Fight for Control of African Women's Mobility in Colonial Zimbabwe 1900–1939" 1992 17(3) *Signs* 586–608.

93 *Ibid.*

94 Mupanduki "Gender Inequality vs Economic and Political Power under Pre-Colonial, Colonial and Post-Colonial Patriarchal State in Africa" (2 September 2007) http://politicaleconomicandsocialissues.blogspot.com (accessed 2018-12-10).

95 *Ibid.*

96 *Ibid.*

97 Mbilinyi in Shaw and Aluko (eds) *Africa Projected From Recession to Renaissance* 42.

98 *Ibid.*

99 Sheldon "Women and Colonialism" in Jean, Geiger and Musisi (eds) *Women in African Colonial Histories* (2013) 45.

political activities.[100] Colonial officers and missionaries failed to see the political power women possessed, thus resulting in women's strength being destroyed,[101] as women were prevented from any political participation. For instance, the *Igbo* women's organisation died, becoming invisible under British colonial rule.[102] The colonialists' viewpoint was that politics was a male concern, which resulted in women becoming oppressed by men. Women were also exploited by men through polygamous marriages designed to capture the labour power of women.[103]

In family dynamics, African women were more influential in the home than colonialists had anticipated,[104] whereas white colonial women had no rights, in accordance with white men's beliefs.[105] Colonialists could not allow the "inferior native races" to grant rights to women, when these were denied to white women.[106] Colonialists encouraged men to feel superior to women, something not previously prevalent in Africa.[107] The perception that women were subordinate to men, having less important roles because they were confined to the family unit, therefore became a Western-imposed value[108] It did not arise from the roots and practices of African ancestry; rather, it was imposed by Europeans during colonialism and became an invented tradition developed by colonial rules and norms.[109]

Despite all this abuse, women remained strong and powerful, mobilising themselves and resisting colonial discriminatory movements. These women included Dona Beatrice, who led a rebellion against pre-Portuguese Congo leadership, Queen Amina of Zaria, who was a prominent warrior, and the women in Eastern Nigeria who led the *Aba* revolt against British colonialists for inhuman taxation in the 1920s.[110] The protest of Mekatilili Wa Menza also forced British colonialists to create a number of positions for women in the colonial set-up. Queen Sarraounia of Azna led another powerful movement of women in 1899, managing to defend her nation from French invaders.[111] Women also succeeded in forming anti-colonial organisations such as the British West African Ladies Club of 1929, formed by a woman called

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[100] Iris "African Women's History: Themes and Perspectives" 2003 4 *Journal of Colonialism and Colonial History* 1.
[101] *Ibid.*
[102] Van-Allen 2014 *Canadian Journal of African Studies* 166.
[103] *Ibid.*
[104] Strobel "African Women" 1982 8(1) *Signs* 109–131.
[105] Commission of Canada *Honoring the Truth, Reconciling for the Future* Summary of the Final Report of the Truth and Reconciliation Commission of Canada (2015).
[106] McGrath and Stevenson "Gender, Race and Policy: Aboriginal Women and the State in Canada and Australia" 1996 71 *Labour History* 37–53.
[107] Hunt "Placing African Women's History and Locating Gender" 1989 14(3) *Social History* 359–379.
[108] Okpala *Redefining the African Woman in Contemporary African Literature: A Study of Adichie's Purple Hibiscus, Half of a Yellow Sun, and Americanah* (Master of Arts, North-West University) 2016 28.
[109] Tilley "Ethics, Medicine, Empires and Ethics in Colonial Africa" 2016 18(7) *American Medical Association Journal of Ethics* 743–753.
[110] Mbilinyi in Shaw and Aluko (eds) *Africa Projected From Recession to Renaissance* 42.
[111] *Ibid.*

Oyinkan Abayomi. Numerous African women participated in the liberation struggle.[112]

Another example of the colonialist miscalculation of women's role within African society is the Lagos Market Women's Association, which began in the mid-1920s and focused on promoting and protecting women's rights in colonial Nigeria.[113] Madam Alimotu Pelewura, a fish trader in Lagos, Nigeria, was the leader of this association. In addition, the *Ereko* market, the most prosperous meat market in Nigeria, was headed by a woman named Alaga.[114] These examples prove that women not only acted in leadership during colonialism, but were capable of organising and controlling their affairs.

3 3 Gender equality in the post-colonial era

Africa used given laws in the post-colonial era,[115] one being the general or common law. Various other laws were based on the customs and practices of many groups inhabiting the continent. Customary norms imposed during colonial times were also constructed from the different religious perspectives of Christianity, Judaism, Hinduism and Islam.[116] One scholar of customary law attempted to define African customary law as nothing more than the selective presentation of claims by African male elders and the selective understanding of these claims by male colonial officials.[117] Customary law was articulated in metropolitan state law, preventing women from ascertaining their rights, while men referred to the law they found most beneficial.[118]

During the post-independence period, most African states started correcting past gender discrimination by changing colonialist-imposed laws. Numerous African states changed their constitutions to include a provision prohibiting discrimination based upon sex and gender.[119] African societies were transformed from hunting and gathering communities to agricultural communities where people produced food. Before colonialism, numerous African societies either herded livestock like cattle, sheep or goats, or grew crops like millet and maize, or combined herding and agriculture to varying degrees. As a result, various African cultures and traditions now held so dear are not traditionally African in nature.[120] Colonialism interrupted and

112 *Ibid.*

113 Cheryl "Grass Roots Organising: Women in Anti-Colonial Activity in South-Western Nigeria" 1982 25(2/3) *African Studies Review* 137.

114 Morgan "Women, Work and Consciousness in the Mid-Nineteenth Century English Cotton Industry" 1992 17(1) *Social History* 23–41.

115 Igboin "Colonialism and African Cultural Values" 2011 3(6) *African Journal of History and Culture* 96–103.

116 *Ibid.*

117 Chanock "Neither Customary nor Legal: Africa Customary Law in an Era of Family Law Reform" 1989 7 *International Journal of Law and Family* 72–88.

118 *Ibid.*

119 Mbilinyi in Shaw and Aluko (eds) *Africa Projected From Recession to Renaissance* 42.

120 Murunga "Africa's Progress on Gender Equality and Women's Empowerment is Notable but Gender Inequality Persists" *African Up Close* (2016-12-21) https://africaupclose.wilsoncenter.org/africas-progress-on-gender-equality-and-womens-empowerment-is-notable-but-gender-inequality-persists/ (accessed 2018-12-10).

prevented Africans from passing on the cultures that existed before colonialism. Modern Africans are obliged to practise what is passed on to them by elders who have lived a colonialist lifestyle, as they can only pass on the lifestyle developed and lived during colonialism. African states, therefore, have no choice but to include colonialist norms in their laws.[121]

African state leaders, on the one hand, confirm to international institutions that they are keen to effect change in gender relations, evident in the ratification of human rights treaties and the creation of women's departments and ministries but, on the other hand, back off from implementing change because of insurmountable opposition from their people.[122] They inform their people back home that they are being pressurised into making legal and other changes by outsiders and that their hands are tied because foreigners will otherwise not fund the development of their countries.[123] Africans therefore believe that Westerners are interfering with their traditions and values, believing that the abolition of harmful traditional cultural practices and discrimination against women is a Western ideology, which they resist strongly to ensure that they do not find themselves under the rule of neo-colonialism.[124]

4 POSSIBLE WAYS TO ALLEVIATE HARMFUL CULTURAL PRACTICES IN AFRICA

The formation of gender equality in Africa has been perceived as an interference in African cultures for quite some time. Scholars who are proponents of cultural relativism believe that permitting human rights to override cultural dictates violates sovereignty.[125] These scholars interpret efforts to reform customary law as imposing Western values on African societies. One of these scholars, Cobbah, in defence of customary law, states that:

> "It is my contention that to correct injustices within different cultural systems of the world, it is not necessary to turn all people into Westerners. Western liberalism with its prescription of human rights has had a worthwhile effect not only on Westerners but on many peoples of this world. It is, however, by no means the only rational way of living human life. ... Instead of imposing the Western philosophy of human rights on all cultures one's effort should be directed to searching out homeomorphic equivalents in different cultures. In other words, we should understand that homeomorphism is not the same as equivalence and strive to discover peculiar functional equivalence in different cultures."[126]

The disruptive influence of colonialism on African culture and numerous other cultural structures in the world certainly supports the arguments in favour of cultural relativism. Customary law, however, like any other living

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[121] *Ibid.*
[122] *Ibid.*
[123] Mbilinyi in Shaw and Aluko (eds) *Africa Projected From Recession to Renaissance* 42.
[124] *Ibid.*
[125] Awolowo *Culture, Gender and Development* A report submitted to the African Institute for Economic Development and Planning (IDEP) Dakar, Senegal (October 2001).
[126] Cobbah "African Values and Human Rights Debate: An African Perspective" 1987 9(3) *Human Rights Quarterly* 309–331.

law is not meant to be static; it is a constantly changing aspect of a country's life and social fabric. Regardless of colonial influence, Africa needs to review harmful traditional cultural practices, not to comply with international regulations and the laws of the universe, but because they are hindering Africa's progress and the benefits of living in an independent state, which has been fought for since colonialism.

Africa has successfully and independently fought for political, social and economic freedom. There is thus no reason to believe it cannot also independently fight for freedom from harmful and discriminatory traditional practices. This is mainly because the most of the harmful practices did not originate in pre-colonial Africa, but are a direct result of colonial intervention in traditional lifestyles. Traditionally and culturally, many women are presently still subjugated and abused in the name of tradition and culture. However, Africa is independent and needs to break free from colonial thinking and practices,[127] and re-establish the balance and harmony that existed before colonialism, where equal value and importance were given to roles played by both men and women.

Africa can effectively restore the position of traditional African women as it existed before colonialism. It is evident that African states impose change when it suits them in public and in political spheres, but seem cautious regarding women's rights. It was aptly stated, by the feminist activist Farida Banda, that justice in Africa is applicable to men only, and that, when referring to justice, they mean "just us" because women are still living under colonialism.[128] Women have merely changed their masters from Europeans and Arabs in the nineteenth century to African culture and traditions in the twentieth century. There is a huge crevasse in Africa between those who support a return to traditional culture and those who actually live the culture that is supported.[129]

Although minimal research has been published on the positive aspects of African culture, it is believed that all societies have both negative and positive cultural aspects. All societies require a solid cultural foundation recognising the value of its members. Africans have many positive values like solidarity, tolerance, and respect for elders, caring for the needy, sharing, negotiating, discussing and mediating. These positive African cultural aspects can be used to reclaim, restore, rediscover, and reconnect with African identity and pan-Africanism to reflect African values and beliefs. An African cultural renaissance can embrace Africa's traditions and spiritual inheritance, with no need to wait for society to naturally return to the pre-colonial culture of valuing women. African traditional cultural methods can be used to eliminate harmful traditional cultural practices. It is therefore crucial to supplement the law with the practical methods discussed below.

[127] Sudarikasa 1986 *Feminist Studies* 91–103.
[128] Banda *Women Law and Human Rights: An African Perspective* (2005) 95.
[129] *Ibid.*

4 1 Involvement of community leaders

The emphasis on international human rights instruments to eliminate harmful cultural practices in Africa may appear as Western pressure for change. The West is often criticised for being heavy-handed and insensitive, and is sometimes culturally perceived as imperialistic in African communities.[130] Efforts to change harmful practices are most effective when they originate from within the culture practising them. Skirmishes to eradicate or modify harmful cultures therefore require teamwork and the involvement of local community leaders, policy-makers and people who have experienced hardships caused by harmful practices within the community. These people can assist in promoting reputable conduct and respect for human dignity. Religious and traditional leaders in Africa greatly influence customs and practices and are, therefore, vital in changing the attitudes within society. They often voice their opinions concerning community lifestyle and governance, thereby empowering local traditional leaders to eradicate harmful traditional cultural practices, and can thus lead to effective change.

It is strongly argued that if local leaders support the abolition of harmful practices, community members will follow suit,[131] effectively dissipating myths concerning ongoing discriminatory cultural practices, especially those affecting women and young girls. Other countries like South Africa have progressed well by enacting law that involves traditional leaders in the governance of several community matters.[132] Although the law is silent on harmful traditional practices, it specifically addresses the role of traditional leadership in the promotion of gender equality and the equal representation of women in traditional institutions.[133]

4 2 The use of traditional as opposed to contemporary methods

Maintaining and promoting positive traditional values, while discouraging and eliminating discriminatory ones, is another possible tool to consider in combatting harmful practices. With a better understanding of local social realities, positive traditional cultural methods can be used to abolish harmful ones. Traditional dances (*Ngoma*) and rituals can be used to discourage harmful cultural practices, thereby eradicating discrimination against women.[134] The “culture lens” approach needs to be employed in dialogues regarding human rights in different traditional systems comprising various cultures and religions, thereby exposing negative African cultural aspects within communities. Numerous native languages can also be used to strongly and positively address harmful practices and gender discrimination within African countries. Native languages can be used as an asset to

130 Sudarikasa 1986 *Feminist Studies* 91–103.

131 *Ibid.*

132 The Traditional Leadership and Governance Framework Act 23 of 2009.

133 S 16(3), 17(2)(*c*) Traditional Leadership and Governance Framework Act, 2003 demands an equal gender representation in the houses of traditional leaders, i.e. “sufficient number of women”. Provincial legislation was to provide for implementation mechanisms.

134 *Ibid.*

communicate clearly the need to eliminate biased, cultural practices.[135] This approach is an analytical indoctrination tool that assists development practitioners and policy-makers to understand and re-assess cultural values in order to diminish resistance to change.

Useful traditional practices customarily protecting women and girls should be highlighted when designing programmes to eradicate harmful cultural practices and to address gender inequality. Girls should be given the opportunity to undergo initiation if they wish to, but without involving any harmful practices. The perpetuation of human rights must be conducted in such a manner that African societies do not feel that the integrity of their culture is being compromised. Parents and society as a whole should therefore not feel they are losing their heritage, but rather that rights to gender equality are being preserved. It is significant for societies to believe that their traditions and customs are not disregarded. The community needs to be included in the process when enlightening society about harmful traditional cultures, and the focus needs to be on their negative consequences, rather than on human rights or legal aspects. Society will then be more likely to accept what they are being taught.

4 3 Empowerment of victims and at a young age

Because harmful traditional practices persist where women and girls have unequal access to education, health, wealth and employment, and are unaware of their basic rights, women need to be educated and empowered at a very young age to prevent them from becoming victims. Women are raised to believe that these harmful practices are part of the natural order of things within their societies, and thus women find it difficult to resist such practices because of their subordinate status within society. Their "emancipation" can therefore be realised by including human rights education in the junior school syllabus, which should focus deeply on women's rights. Eliminating obstacles to girls' education is also essential.[136] This can be achieved by adopting methods to retain girls in school and awareness-raising programmes to overcome stereotypes and harmful traditional attitudes. Parents need to be encouraged to ensure a comprehensive and equal education for both girls and boys.

Furthermore, African governments need to take effective measures to ensure that females have access to and control of economic resources like land, credit and employment, in order to promote self-esteem among women, which will in turn transform their social status within communities and their families. It will enable women to recuperate from oppression, and challenge them to overcome harmful practices. Young girls must be empowered to become strong women, thereby protecting future generations from harmful traditions. Empowered girls will be enabled to make their own fearless decisions about their bodies. Additionally, male household tasks within family life must be included within children's education from a very young age, which will entail a review of curricula and textbooks.

[135] Scorgie *African Studies* (2002) 55.
[136] Msuya *Harmful Cultural and Traditional Practices* 32.

4 4 Involvement of both men and women

Systematic encouragement and support of women is needed. Traditional practices excluding women from the articulation, development, implementation and enforcement of basic rights have made gender issues invisible, consequently shielding gender-based violations. A collective women's voice is essential to effect the reformulation of rights. The realisation of gender equality must include changes in both men's and women's perceptions, knowledge, attitudes and behaviour. Struggles to end harmful cultural practices impacting women must involve and address men, especially as most of the harmful traditions pinpointed are conducted for the benefit of men. In African societies, men play various roles as community leaders, heads of families and providers. It is therefore important to engage them as they are in the best position to abolish harmful practices.

Men must be involved at grassroots level regarding programmes aimed at empowering women. Men should engage in peer-to-peer learning with women to assist in reducing cultural masculine superiority that discriminates against women. It is also essential to improve communication between men and women on issues of reproductive health, sexuality and an understanding of their joint responsibilities, so both can be equal partners in private and public life. Changes need to be effected regarding the responsibilities of fathers to their female children and parents need to be educated to value a daughter. Specific public educational campaigns focusing on redefining female and male roles within the family should be considered because the family is the base from which gender biases emanate. Governments must also value the diversity of women’s conditions, appreciating that some women face certain barriers to empowerment, resulting from a patriarchal order that is deeply rooted in numerous social, economic, political and ideological foundations. Programmes promoting dialogue among men and women to challenge intimate-partner violence as an acceptable expression of masculinity should also be initiated.

5 CONCLUSION

Women participated in Africa’s struggle for liberation and therefore deserve to know that freedom was not achieved in vain. International and national laws have set standards important for change within African societies, but their implementation is impossible if Africa perceives women stereotypically and discriminates against them culturally. Just as African men are pleased to be free of colonialism, women will feel the same elation once they are free from harmful and discriminatory African traditional practices. Women need to be free and counted as part of the people of the African continent, instead of living in the shadow of practices and traditions preventing the development of Africa as a whole. Africa should stop insisting that women’s rights are a Western-imposed ideology. The abolition of harmful, traditional, cultural practices should be viewed as being for the benefit of Africa and its development. Africa’s political independence has no meaning without the social and cultural independence of women and, therefore, women’s rights cannot be treated separately from other African developmental goals. Because Africa is capable of managing its own land, wealth, lives and

development, women must be freed, because it is impossible to advocate for the independence of African development while excluding women. Embracing positive pre-colonial African traditions in proactive government and community programmes will better support the achievement of gender equality in Africa than allowing the West to drive and impose its human rights agenda on African culture.

BEYOND FOOT-DRAGGING: A REFLECTION ON THE RELUCTANCE OF SOUTH AFRICA'S NATIONAL PROSECUTION AUTHORITY TO PROSECUTE APARTHEID CRIMES IN POST-TRANSITIONAL JUSTICE

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SUMMARY

To this day, apartheid is still regarded as one of the most heinous crimes to have affected humankind. The brutality of the apartheid system and its impact not only left devastating effects in the minds of the black majority who were affected by the system, but also drew international attention. This prompted the United Nations Security Council to pass drastic resolutions to try and end the apartheid system. It is important to highlight that apartheid crime was committed at the behest of the-then National Party government at the expense of the black majority. The attainment of democratic rule in 1994 also saw the emergence of the need for transitional justice. However, after 25 years of foot-dragging, the National Prosecution Authority in South Africa has still not been fully committed to prosecute apartheid atrocities. This article examines the crime of apartheid and the impact of the transitional justice process in South Africa. The article further reflects on the National Prosecution Authority's reluctance to prosecute crimes of apartheid and examines the final report of the People's Tribunal on Economic Crimes in South Africa.

1 INTRODUCTION

Human rights are inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status.[1] Human rights include the right to life and liberty, freedom from slavery and torture, freedom

[*] The article is based on an LLM mini-dissertation that the author wrote while studying at the University of Pretoria.

[1] United Nations "Human Rights" (undated) http://www.un.org/en/sections/issues-depth/human-rights/.

of opinion and expression, the right to work and education, and many more. Everyone is entitled to these rights, without discrimination.[2]

Soon after the end of World War II, the Charter of the United Nations (UN) was adopted with the aim of promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion; and also to be at the centre of harmonising the actions of nations in the attainment of this common end.[3] To further recognise and acknowledge the significance of human rights, the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR) in 1948. The UDHR sets a common standard of achievement for fundamental human rights to be universally protected. Subsequent to the UDHR, various international conventions such as the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Elimination of All Forms of Discrimination Against Women (1979), the Convention on the Rights of the Child (1989) and the Convention on the Rights of Persons With Disabilities (2006) were adopted by the UN with a view to the prevention and elimination of gross violations of fundamental human rights. Among these international conventions is the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, which the UN adopted following the shooting in 1963 by the apartheid regime's security forces of people marching against pass laws in Sharpeville. The intention of the adoption of this Convention was for the elimination of racial discrimination in all its forms and manifestations. Furthermore, the Convention seeks to prevent and combat racist doctrines and practices in order to promote understanding between races and also to build an international community free from all forms of racial segregation and racial discrimination.

Other prominent international instruments dealing with human rights include the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights. Both these conventions were adopted in 1976. This article focuses on the International Covenant on Civil and Political Rights (ICCPR) mainly because it deals with rights such as: freedom of movement; equality before the law; the right to a fair trial and presumption of innocence; freedom of thought, conscience and religion; freedom of opinion and expression; peaceful assembly; freedom of association; participation in public affairs and elections; and protection of minority rights. The ICCPR further prohibits: arbitrary deprivation of life; torture; cruel or degrading treatment or punishment; slavery and forced labour; arbitrary arrest or detention; arbitrary interference with privacy; war propaganda; discrimination; and advocacy of racial or religious hatred. In light of the objectives that the above instruments seek to achieve, it is clear that the apartheid regime worked against the realisation of the fundamental human rights to dignity, equality, and political rights. The apartheid regime was responsible for the forced removal and displacement of black people, the disappearance of political opponents, and disregard of political

2 *Ibid.*

3 Article 3 and 4 of the Charter of the United Nations, 1945.

freedoms, thereby violating the conventions and the UN Security Council resolutions.

The attainment of the new democratic dispensation in 1994 ushered in the prospect of transitional justice for apartheid atrocities. This compromise led South Africa on a path to recovery from the brink of civil unrest and to a reconciliation process established under the Truth and Reconciliation Commission (TRC). Against this background, this article examines apartheid as an international crime under customary international law and also reflects on the concept of transitional justice. Furthermore, this article seeks to explore why the National Prosecuting Authority (NPA) has failed to prosecute perpetrators of apartheid atrocities. Finally, the article investigates why South Africa chose transitional justice over prosecution for apartheid atrocities despite apartheid being classified as an international crime.

2 APARTHEID AS AN INTERNATIONAL CRIME

The impact that the apartheid system had on the majority of South Africans drew international attention to the extent that the United Nations General Assembly decided in 1973 to adopt the International Convention on the Suppression and Punishment of the Crime of Apartheid (ICSPCA). The main objectives of this convention were to criminalise and suppress all forms of apartheid. To achieve these objectives, the convention is binding on all signatories. Furthermore, state parties ought, in terms of article 4, to adopt any legislative or other measures necessary to suppress as well as prevent any encouragement of the crime of apartheid; and also to adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish perpetrators of apartheid. This international crime was recognised for the first time in the convention, which was principally aimed at suppressing the violation of human rights under the guise of apartheid.[4] Article I of ICSPCA makes provision for the declaration of apartheid as a crime against humanity and further states that inhuman acts resulting from the policies and practices of apartheid violate the principles of international law.

In paragraph 1 of article I, apartheid was for the first time declared a crime against humanity; the article goes on to highlight the attendant individual criminal liability. Individual criminal liability comes in many forms and, according to article III (a) and (b) of ICSPCA, this applies, irrespective of the motive involved, to individuals, members of organisations and institutions and representatives of the State. Article III (a) and (b) of ICSPCA further stipulates that liability applies to perpetrators, wherever in the world they may reside.

Dugard argued that the principal features of apartheid, as was evident in South Africa, range from murder, torture and arbitrary arrest of members of a racial group to legislative measures calculated to prevent a racial group from participating in the political, social, economic and cultural life to the advantage of another domineering racial group.[5]

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[4] Dugard *International Law: A South African Perspective* (2014) 157.

[5] Dugard *International Law* 158 159.

The classification of apartheid as a crime against humanity was further confirmed in article 7 of the Rome Statute of the International Criminal Court, 1998. In this instance, a crime against humanity is defined to include the crime of apartheid when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.[6] Article 7(1)(j) should be read together with article 7(2)(h), which provides that the crime of apartheid means inhumane acts committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime. Lingaas points out that it has been argued that the inclusion of the crime of apartheid in the Rome Statute has led to an increased harmonisation of international criminal law.[7] The expansion of the status and classification of apartheid as a crime under customary international law, although not precisely certain, is also evident in the 1977 Additional Protocol 1 to the Geneva Conventions, 1949. Article 85(4)(c) of the 1977 Additional Protocol I provides that "practices of apartheid and other inhuman or degrading practices involving outrages upon personal dignity, based on racial discrimination" are grave breaches of the Protocol and shall, in terms of article 84(5) of the same Additional Protocol, be regarded as war crimes.

3 THE CONCEPT OF TRANSITIONAL JUSTICE

Under international humanitarian law, conflict is considered international when hostilities are taking place across national borders and the primary actors are sovereign states.[8] International armed conflicts have a destabilising impact on regional blocs and at times pose a risk to the maintenance of international peace and security. During such conflict, world leaders would be tempted to intervene in an effort to find peaceful solutions to the conflict. On the other hand, the International Committee of the Red Cross (ICRC) defines non-international armed conflicts (commonly known as civil wars) as those conflicts that are restricted to the territory of a single state, involving either regular armed forces fighting groups of armed dissidents, or armed groups fighting each other.[9] The end of such conflict may signal the beginning of a process of transitional justice that represents a transformation of the relationship between the warring parties.[10] However, despite an enormous amount of effort and investment, many ceasefires and

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6 Article 7(1)(j) of the Rome Statute of the International Criminal Court, 1998.

7 Lingaas "The Crime Against Humanity of Apartheid in a Post-Apartheid World" 2015 2 *Oslo Law Review* 93.

8 Babbit "The Evolution of International Conflict Resolution: From Cold War to Peacebuilding" 2009 *Negotiation Journal* 539.

9 The International Committee of the Red Cross "What is International Humanitarian Law?" 2004 07 *Advisory Service on International Humanitarian Law* 1.

10 Kelman "Conflict Resolution and Reconciliation: A Social-Psychological Perspective on Ending Violent Conflict between Identity groups" 2010 1 *Landscapes of Violence* 2.

peace agreements in civil wars may be unsuccessful or give way to renewed and often escalated violence.[11]

The process of transitional justice goes beyond a realistic view of national interests. Transitional justice gained currency towards the end of the Cold War; with the eruption of civil wars in eastern and southern Europe, and increased attention on conflicts in Africa, scholars and analysts were stimulated to explain the changing nature of war and how to end it.[12] Significantly, the concept of transitional justice, as observed by Mugagga Muwanguzi, has expanded to include several mechanisms or processes that embrace both retributive and restorative justice; it has also embraced measures that include not just peace building, but also concrete measures to address the root causes of conflicts.[13] McEnvoy agreed with Mugagga Muwanguzi's view of peace building and further asserted that developing the state's institutional capacity to deliver justice is a core element in the process of rebuilding structures of governance more generally.[14]

Teitel has defined transitional justice as being associated with periods of political change and characterised by legal responses to confronting the wrongdoings of repressive predecessors.[15] In the South African context, both the African National Congress (ANC) and the repressive National Party (NP) apartheid government had to come up with a transitional justice solution to deal with the atrocities and gross human rights violations committed during the apartheid era. Gross argued that options for solving this dilemma included an amnesty process, which implies that both the ANC and NP should leave the past behind, or rather, prosecute prior offenders strictly according to the law.[16] According to Gross, this is to create a truth and reconciliation commission (TRC), which does not ignore the past, but instead grants amnesty selectively.[17] Soon after the ANC assumed political power in 1994, it decided to establish a TRC to help deal with what happened under the apartheid system and to prevent future resurrection of apartheid. Prevention, according to Laplante, motivates the constantly evolving transitional justice movement.[18]

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[11] Newman and Richmond "Peace Building and Spoilers" 2006 6 *Conflict, Security & Development* 102.

[12] Carayannis, Bojicic-Dzelilovic, Olin, Rigterink, and Schomerus "Practice Without Evidence: Interrogating Conflict Resolution Approaches and Assumptions" 2014 11 *Justice and Security Research Programme* 2.

[13] Muwanguzi *Examining the Use of Transitional Justice Mechanisms to Redress Gross Violations of Human Rights and International Crimes in the Northern Uganda Conflict* (LLD thesis, University of the Western Cape) 2016 49.

[14] McEnvoy "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice" 2007 34 *Journal of Law and Society* 423. See also Brinkerhoff "Rebuilding Governance in Failed States and Post-Conflict Societies: Concepts and Cross Cutting Themes" 2005 25 *Public Administration and Development* 3 14.

[15] Teitel "Transitional Justice Genealogy" 2003 16 *Harvard Human Rights Journal* 68.

[16] Gross "The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel" 2004 40 *Stanford Journal of International La*w 49.

[17] *Ibid*.

[18] Laplante "Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence Through a Human Rights Framework" 2008 2 *International Journal of Transitional Justice* 331 355.

4 AN OVERVIEW OF TRANSITIONAL JUSTICE IN SOUTH AFRICA

The period between 1989 and 1994 marked a transitional phase in South Africa from the brutal apartheid era to a democratic state. This transitional period was founded on four pillars – namely, disarmament, a new constitutional dispensation, the recognition and protection of human rights, and amnesty. All four pillars constitute transitional justice from the South African perspective and it is important to now examine each of them.[19]

Muggah defines disarmament as the collection, control and the disposal and destruction of small arms and light weapons, explosives and ammunition held by civilians and the organs of regular and irregular combatants and civilians.[20] In the light of this definition, he further highlights two ways in which disarmament can be implemented the process can be administered coercively by the army, police or a peacekeeping force; or carried out voluntarily through amnesty initiatives and public collection campaigns administered by the army, police, peacekeeping forces or another designated actor and weapons can be exchanged for other goods – either cash or other incentives such as development projects.[21]

Following the unbanning of political parties and their armed wings in 1990 by the then-president of South Africa, Frederik Willem de Klerk, voluntary disarmament was effected with the assistance of the ANC, Pan Africanist Congress (PAC), Azanian People's Organization (AZAPO) and the Inkatha Freedom Party (IFP). All these political parties had military wings that had been involved in attacks against the former apartheid government interests, both people and infrastructure, inside South Africa and abroad. The ANC's *uMkhonto we Sizwe* (MK) was formed in 1961 and was later declared a terrorist organisation by the apartheid government as well as the United States of America. The MK unleashed a series of bombings in South Africa, targeting government interests; this included the bombing on Church Street in the capital city, Pretoria, resulting in the deaths of 19 people and many injured in 1983.[22] Two years later, in 1985, the MK operative Andrew Zondo detonated a bomb on the Natal South Coast, which resulted in five deaths and almost 40 injured people.[23] The following year, another MK operative, Robert McBride, detonated a bomb in 1986 at the Durban beach-front, killing three people and injuring scores. Further notable bombings were at the Johannesburg magistrates' court and the military command centre in Johannesburg, which together resulted in the deaths of four people.[24]

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[19] Inman and Rubinfeld "Understanding the Democratic Transition in South Africa" 2013 *American Law and Economics Review* 2 2.

[20] Muggah "The Anatomy of Disarmament, Demobilisation and Reintegration in the Republic of Congo" 2004 4 *Conflict, Security & Development* 30.

[21] Muggah 2004 *Conflict, Security & Development* 30; see also Jensen and Stepputat "Demobilising Armed Civilians" 2001 *Centre for Development Research Policy Paper*.

[22] Cameron-Dow *A Newspaper History of South Africa* (2007) 34.

[23] Johnson "South Africa, Black, 19, Guilty of Shopping Bombing' (1986-04-02) *The New York Times*.

[24] Weekly Mail Reporters "Blast May Be In Retaliation" (1987-07-31) *The Mail and Guardian*.

Against this backdrop, multilateral arms limitation and disarmament are seen, by Akashi and others, to offer a gateway to a more peaceful and secure country.[25] Fisher argues that arms control and disarmament are relatively effective in resolving the age-old problem of maintaining peace – by subordinating force to a rule of law.[26] Therefore, there was a commitment at the Convention for a Democratic South Africa (CODESA)[27] between both the government and political parties to avoid reigniting hostilities. Perhaps the cessation of hostilities itself was a component of transitional justice. This is arguably so because those who were held responsible in the hostilities were not going to be prosecuted once granted amnesty.

The second pillar of South Africa's transitional phase – a new constitutional dispensation – was founded on the 34 principles of the Interim Constitution.[28] These principles contain the commitment that certain features of the Interim Constitution needed to be entrenched in order to place them safely beyond the realm of ordinary politics.[29] Principle II provides:

> "Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution."[30]

Thirdly, a commitment to human rights formed part of South Africa's transitional phase. Literature on apartheid indicates that the former NP government committed gross human rights violations, which led the UN to declare it an international crime. Human rights then later formed part and parcel of the transitional justice sought during the CODESA talks. Article 5(6) of the CODESA 1 Declaration of Intent makes provision for the universal enjoyment of human rights, freedoms and civil liberties, including freedom of religion, speech and assembly. It goes without saying that these rights were to be protected by an entrenched and justiciable bill of rights and a legal system that guarantees equality of all before the law. This Declaration of Intent was signed by the majority of parties, with the exception of the IFP and the AWB, among a few others. Human rights were also acknowledged in the preamble of the Interim Constitution, which states that all citizens should be able to enjoy and exercise their fundamental rights and freedoms.

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[25] Akashi "Lessons and Prospects" in Dhanapala (ed) *The United Nations, Disarmament and Security: Evolution and Prospects* (United Nations Institute for Disarmament Research, Geneva) UNIDIR/91/46.

[26] Fisher "Arms Control and Disarmament in International Law" 1964 50 *Virginia Law Review* 1200.

[27] This was the convention that paved the way for negotiations between the former NP government, ANC and other political parties towards a democratic transitional period between 1990 and 1993.

[28] The Interim Constitution (the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993)), was a product of the CODESA negotiations settlement between the former NP government, ANC and other political parties. The Interim Constitution contains 34 constitutional principles, found in Schedule 4 and aimed at providing procedures to transition towards a democratic period from the apartheid one.

[29] Issacharoff "The Democratic Risk to Democratic Transitions" 2014 *Constitutional Court Review* 12.

[30] Schedule 4 of the Interim Constitution: Constitutional Principles.

These rights are now contained in the Bill of Rights under the Final Constitution and are regarded as the cornerstone of South Africa's democracy.

The fourth and final pillar of transitional justice in the South African context was amnesty. According to Ntoubandi, the word amnesty is derived from the Greek word *amnestia* or *amnesis*, which means forgetfulness, oblivion, or lost memory.[31] However, Villa-Vicencio and Doxtader contended that in this old definition, amnesty is less an outright forgetting than a foreclosing on the ability of individuals to use a past event as grounds for a certain behaviour.[32] Presenting a conciliatory examination of the concept of amnesty is Krapp, who argues that amnesty is neither suspension of a duty to punish, nor abolition; in fact it is the limits of amnesty that draw the implication that the past and present cases end with its declaration.[33] Therefore, the exclusion of remorse and repentance as argued by Baron are a core element in the granting of amnesty.[34]

On 19 July 1995, the first democratically elected president of South Africa, Nelson Mandela, signed the Promotion of National Unity and Reconciliation Act 34 of 1995, to provide for the investigation of, and also to establish the possible nature, causes and extent of, gross violations of human rights committed between 1 March 1960 and 27 April 1994.[35] This law also provided for the establishment of the TRC and, significantly, was adopted on 1 December 1995 as part of the amnesty and reconciliation process. The former Archbishop of the Anglican Church, Desmond Tutu, chaired the TRC and he was deputised by Dr Alex Boraine, with Dumisa Ntsebeza as the head of the TRC Investigative Unit.[36]

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[31] Ntoubandi *Amnesty for Crimes Against Humanity Under International Law* (2007) 8.

[32] Villa-Vicencio and Doxtader *The Provocations of Amnesty: Memory, Justice and Impunity* (2003) 127.

[33] Krapp "Amnesty: Between an Ethics of Forgiveness and the Politics of Forgetting" 2005 6 *German Law Journal* 192.

[34] Baron "Remorse and Repentance Stripped of its Validity: Amnesty Granted by the Truth and Reconciliation Commission of South Africa" 2015 41 *Studia Historiae Ecclesiasticae* 170.

[35] Preamble of the Promotion of National Unity and Reconciliation Act 34 of 1995 states that it is deemed necessary to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in future. Furthermore, the Constitution states that the pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society. See Truth and Reconciliation Commission *Truth and Reconciliation Commission of South Africa Report* (1998). See Van Zyl "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission" 1999 52 *Journal of International Affairs* 647 667. See also Boraine *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (2000) 281.

[36] Graybill "Assessing South Africa's Truth and Reconciliation Commission" 2002 36 *Canadian Journal of African Studies* 356 358.

5 HURDLES AND PROSPECTS OF THE TRC

According to Balia, the TRC is regarded highly, having set an international standard in the modern paradigm of restorative justice in a transitional democracy.[37] This is so because it embedded a unique combination of criminal accountability and amnesty proceedings.[38]

On the international front, the South African model of the TRC was also used in Sierra Leone and in Kenya. Soon after the ceasefire of the raging civil war between Sierra Leonean government forces and the Revolutionary United Front, the warring parties instituted a TRC to investigate the atrocities committed during the war and to grant amnesty. Many people implicated in war crimes came forward, those who told the commission the truth about the atrocities were granted amnesty, and those who either lied or neglected to participate in the commission were to be prosecuted. The same goes for the Kenyan Truth, Justice and Reconciliation Commission, which was instituted following the devastating post-election violence of 2007. Many people died and scores were injured in the violence that spread across the country.

Looking back at the South African TRC, the work of the commission was to be carried out in three committees focussing on human rights violations, amnesty, and rehabilitation and reparation respectively. All these committees were specifically tasked with functions that would enable the TRC to fulfil its mandate.[39] While the TRC has served as a good exemplar of transitional justice on the global front, its reconciliation and amnesty processes left much to be desired in two fields.

5 1 Prosecution of apartheid atrocities

The most genuinely controversial point for transitional justice in South Africa was the failure of the NPA to prosecute the perpetrators of gross human rights violations committed under the apartheid regime. The former National Director of Public Prosecutions, Advocate Pikoli, aggravated the controversy when, in 2015, he blamed political interference for the NPA's failure to prosecute apartheid-era political murders, torture and disappearances.[40] This is despite the fact that apartheid was declared a crime against humanity under international law.[41] The TRC, in its Final Report, acknowledged the impact of apartheid and that its recognition as a crime against humanity remained a fundamental starting point for reconciliation in South Africa.[42] At the same time, the TRC also acknowledged that there are those who

37 Balia "Truth and Reconciliation Commission" 2004 *Encyclopedia of Public Administration and Public Policy* 297.

38 Muwanguzi *Examining the Use of Transitional Justice Mechanisms* 40.

39 Balia 2004 *Encyclopedia of Public Administration and Public Policy*.

40 Rabkin "Political Interference Blocked TRC Prosecutions" (2015-05-22) *Business Day*.

41 Article 1(1) of the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973.

42 Truth & Reconciliation Commission *Truth and Reconciliation Commission of South Africa Report: Volume 1* (1998) Appendix to Chapter 4 par 1.

sincerely believed differently and those, too, who were blinded by their fear of a Communist total onslaught.[43]

The then-apartheid government carried the greatest responsibility for the gross human rights violations against those who were opposed to the apartheid system. However, the MK, APLA, and AZANLA armed activities also resulted in human rights violations. The TRC observed that justice of war evaluates the justifiability of the decision to go to war.[44] The two basic criteria guiding this evaluation are: first, the justness of the cause (the underlying principles for which a group is fighting), and secondly, whether the decision to take up arms was a matter of last resort.[45] The doctrine of justice in war states that there are limits to how much force may be used in a particular context, and it places restrictions on who or what may be targeted.[46]

Although the TRC was guided by the just war theory criteria, both the apartheid government and the armed liberation forces ought to have had respect and consideration for human rights. In 1996, the constitutionality of the TRC legislation was challenged in the case of *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa*[47] on the ground that the granting of amnesty to members of the apartheid security forces for killing anti-apartheid activists violated norms of international law that required prosecution.[48] Briefly, the facts of the case related to applicants who applied for direct access to the Constitutional Court and for an order declaring section 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 to be unconstitutional. Section 20 permits the Committee on Amnesty to grant amnesty to a perpetrator of an unlawful act, associated with a political objective, committed prior to 6 December 1993.[49] Upon the grant of amnesty, a perpetrator cannot be held criminally or civilly liable in respect of that act. Equally, the state or any other body, organisation or person who would ordinarily have been vicariously liable for such act, cannot be liable in law.[50]

The Constitutional Court concluded that the epilogue to the Constitution authorised and contemplated an amnesty in its most comprehensive and generous meaning so as to enhance and optimise the prospects of facilitating the constitutional journey from the shame of the past to the promise of the future.[51]

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43 *Ibid*.

44 TRC *Final Report: Volume 1* Chapter 4 par 66–67.

45 *Ibid*.

46 *Ibid*.

47 1996 (4) SA 672 (CC).

48 Dugard *International Law: A South African Perspective* 22.

49 S 20(1) and (2).

50 S 20(7)(*a*) of the Promotion of National Unity and Reconciliation Act 34 of 1995.

51 Par 50.

5 2 Amnesty and reconciliation

In the context of amnesty and reconciliation, Balia believes that a fundamental principle of the TRC process was that honest and open testimony by perpetrators could be exchanged for amnesty.[52] However, Balia also cautioned against this exchange because it sacrifices justice at the altar of truth to the detriment of apartheid's victims.[53] The TRC Final Report observed that not everyone who came before the Commission experienced healing and reconciliation.[54] However, the Final Report went further to state that extracts from testimonies before the Commission illustrate the varying ways and degrees to which people have been helped by the Commission to restore their human dignity and to make peace with their troubled past.[55] In other words, they included cases where an astonishing willingness to forgive was displayed, where those responsible for violations apologised and committed themselves to a process of restitution, and where the building or rebuilding of relationships was initiated.[56]

In light of the above observation, it is clear that reconciliation and amnesty superseded justice at the TRC. While the TRC had the obligation to pursue justice from the apartheid government, it is important to note that the former armed liberation forces were also to be held responsible for their atrocities committed during apartheid, although these were not of the same magnitude as those of the apartheid government.

The atrocities of neither the then-apartheid government actors nor the former liberation forces were justified under international law. However, it is significant to note that there have been only a handful of prosecutions for the gross violations of human rights committed under apartheid; these include the arrest and prosecution of the perpetrators of the Vlakplaas murders and the trial of Dr Wouter Basson. The case of *S v De Kock*[57] relates to the murders and other atrocities committed in the Vlakplaas area during the apartheid era. This case involved Eugene de Kock, the former colonel of the apartheid government. De Kock was found to have instructed and carried out these atrocities between the early 1980s and the early 1990s.[58] However, he was eventually arrested and convicted of 89 charges connected with apartheid atrocities and was sentenced to 212 years imprisonment, to run concurrently.[59] The other case relates to Dr Wouter Basson, who was the head of South Africa's chemical and bacterial weapons programme during the apartheid era. In *S v Basson*,[60] the accused was charged in the Pretoria High Court in 1999 on 67 counts, including

[52] Balia 2004 *Encyclopedia of Public Administration and Public Policy* 296.
[53] *Ibid.*
[54] TRC *Final Report: Volume 5* Chapter 9 par 3
[55] *Ibid.*
[56] *Ibid.*
[57] *S v De Kock* 1997 (2) SACR 171 (T).
[58] *S v De Kock supra* par 4.
[59] *S v De Kock supra* par 6. See also Ballard "The Discourse and Policies Around Sentencing and Punishment in South Africa: 1994–2014" http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Ballard.pdf (accessed 2019-10-16).
[60] *S v Basson* 2007 (3) SA 582 (CC).

murder, conspiracy to commit a variety of crimes, fraud and drug offences. Six of the charges related to conspiracy to commit murder in countries other than South Africa; these were quashed by the High Court upon application by counsel for Basson, and were therefore not prosecuted.[61] The application was dismissed and the trial proceeded. Basson was acquitted on all remaining charges in April 2002.

Significantly, there has been no prosecution following the murders of the Cradock Four. These murders occurred in 1985 and involved the killing of Matthew Goniwe, Fort Calata, Sparrow Mkhonto and Sicelo Mhlauli at the behest of the apartheid police. Former apartheid police officer Gerhard Lotz admitted at the TRC that he had carried out the murders. Unfortunately, he committed suicide in 2016.[62] Despite the death of Lotz, this contribution argues that an inquest should be opened to investigate the circumstances leading to the murders of the Cradock Four, and further that the former apartheid officials who masterminded these killings should be prosecuted.

6 THE PEOPLE'S TRIBUNAL ON ECONOMIC CRIMES FINAL REPORT: WHERE TO NOW?

On 2018 September 2018, the People's Tribunal on Economic Crimes (the People's Tribunal) released its final report to the public.[63] This followed a series of hearings between 3 and 7 February 2018 on economic crimes committed during the apartheid era. The terms of reference of the investigation were three-fold: alleged breaches of international and South African law by actors who facilitated the illegal supply of weapons to apartheid South Africa between 1977 and 1994, alleged breaches of South African and international law by corporations and individuals in the process of the 1999 Arms Deal, and alleged breaches of South African and international law in relation to current allegations of "state capture" as they relate to Denel.

Soon after issuing its interim findings, the tribunal remarked that all affected parties were given an opportunity to respond; unsurprisingly, the NPA, the ANC, and the office of the Presidency of South Africa did not respond to the allegations levelled against them.[64] At the time of the

61 *S v Basson supra* par 1E.

62 Marais, Ndamase and Kimberley "Cop Who killed Cradock 4 Commits Suicide" (2016-03-26) *Rand Daily Mail*.

63 The People's Tribunal on Economic Crime https://corruptiontribunal.org.za/about/ (accessed 2019-10-16). The People's Tribunal was organised by citizens and not by the state. Members of the public were given the opportunity to submit evidence. After hearing evidence over five days, the panel made preliminary findings and committed to writing a final report to be presented to the public. The tribunal was intended to investigate: (a) extensive violations of United Nations sanctions that amounted to serious breaches of international criminal law during the apartheid era, and in particular, in the period 1977–1994; (b) allegations of serious and punishable economic crimes in the process of the conceptualisation and the implementation of the Arms Procurement Package (Arms Deal) and the issue of the rationality of the Arms Deal itself; and (c) allegations of state capture involving Denel and its associated companies in the acquisition, distribution and manufacture of arms and ammunition.

64 The People's Tribunal *Final Report* par 1.

People's Tribunal hearings, former president Jacob Zuma was still the president of South Africa. It should be recalled that during his last years in office, he was a proponent of the prosecution of apartheid crimes.[65] However, despite his prerogative to institute an inquiry into the allegations of gross violations of fundamental human rights and crimes against humanity during the apartheid era, he did not show the bureaucratic and political will to seek accountability. It was the foot-dragging of the bureaucratic will to investigate apartheid crimes that prompted The People's Tribunal to institute its own independent inquiry.

On the economic front, The People's Tribunal stated that the UN Security Council sanctions resolutions aimed at setting back the brutality of apartheid; as such any sanctions-busting by the apartheid government and other actors equated to aiding and abetting the commission of the crime against humanity.[66] Against this backdrop, The Peoples Tribunal found that there was an abysmal failure to investigate and prosecute these crimes.[67] This failure also included the grossly negligent or deliberate lack of investigation of the role and contribution of powerful private actors as well as foreign governments in the process of propping up, helping to develop and strengthen the apartheid regime.[68]

The reluctance to investigate and prosecute continues despite overwhelming evidence of the gross violations of the crimes against humanity. There seems to be no justification for the NPA and government not to pursue those living perpetrators of apartheid crimes who did not apply for or were not granted amnesty. However, it is significant that the NPA re-opened an investigation into the death of the apartheid struggle activist Ahmed Timol in 2017.[69] It was previously believed that Timol had committed suicide[70] but the inquest found instead that Timol had been killed by the security forces: the last remaining living suspect in the case, Joao Jan Rodrigues, is now to be prosecuted.[71] This may serve as the beginning of a commitment to prosecute apartheid crimes. However, the longer it takes to prosecute these crimes, the less likely it is that justice will be brought to the victims of apartheid crimes.

In the final analysis, it must be acknowledged that prosecution of the perpetrators of crimes against humanity goes to the heart of accountability and restoration of justice. Furthermore, commitment by the NPA to prosecute these crimes would also serve to restore the public's trust and confidence in the administration of justice. Whereas the establishment of the

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65 Gerber "Zuma Warns Those Who Want State Capture Investigated" (2017-11-02) *News24* https://www.news24.com/SouthAfrica/News/zuma-warns-those-who-want-state-capture-investigated-20171102 (accessed 2018-12-08).

66 The People's Tribunal *Final Report* par 5(a) and (b).

67 The People's Tribunal *Final Report* par 5(d).

68 *Ibid*.

69 Pather "Ahmed Timol Inquest Unravels Apartheid Cover Ups That Protected Security Police" (2017-07-24) *Mail and Guardian*.

70 Lange "Judge Finds Ahmed Timol Was Pushed to Death, Did Not Commit Suicide" (2017-10-12) *The Citizen*.

71 Nicolson "Timol Inquest: He Was Murdered but Culprits Are Dead, Court Rules" (2017-10-12) *Daily Maverick*.

specialised task team dedicated to investigating and prosecuting these crimes is pivotal, there is also a need to capacitate the current criminal justice system with competent, efficient, and dedicated individuals.[72] Eventually, this would ensure a true realisation of post-apartheid transitional justice for the victims of the brutal apartheid system.

7 CONCLUSION

One clear lesson from the South African experience is that transitional justice serves as a fundamental tool in the transfer of power to a new dispensation. This article has examined the concept of transitional justice and further analysed the impact that this concept had during transition. The contribution has also examined the crime of apartheid from the customary international law perspective and analysed relevant international instruments in relation to this crime. Furthermore, it has also reflected on the overview of transitional justice from the South African perspective. In this regard, the contribution also examined The People's Tribunal's encouraging commitment towards the prosecution of apartheid crimes, and the NPA's reluctance to prosecute the perpetrators of apartheid atrocities was also examined.

Against this background, it is recommended that the State should promoted a culture of accountability irrespective of the era and the politically charged indictments in respect of which apartheid crimes were committed. The NPA has a constitutional mandate to prosecute without fear, favour or prejudice.[73] Unfortunately, the current reluctance to prosecute these crimes gives the impression that there is fear or favour in relation to prosecuting the perpetrators.

This contribution also recognises challenges in the practicality of securing the availability of witnesses. Therefore, it is recommended that the NPA and other law enforcement agencies need to trace potential witnesses for the purposes of assisting the court with evidence. However, courts are not only reliant on *viva voce* evidence, but also on documents. Evidence may also exceptionally be admitted as hearsay, provided that this would be in the interests of justice. In light of the above, it is submitted that the TRC would not have recommended that prosecution should be undertaken against perpetrators of apartheid atrocities unless there was enough evidence to prosecute successfully.

Lastly, this article weighs the possible impact of renewed prosecution on the idea of nation-building post-1994. It is submitted that nation-building forms part of the foundation of transitional justice. However, nation-building should not include uniting society with unrepentant and incorrigible perpetrators. This is so because the TRC terms of reference provided for the perpetrator or participant to receive amnesty upon making full disclosure. It

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[72] The People's Tribunal *Final Report* par 12.

[73] S 179(4) of the Constitution of the Republic of South Africa provides that "national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice."

is submitted that those who either did not participate or did not make full disclosure should not be seen as contributors to nation-building. In conclusion, it is safe for this contribution to highlight the fact that they did not comply and further recommend that they should be investigated and prosecuted.

ELECTRICITY THEFT IN SOUTH AFRICA: EXAMINING THE NEED TO CLARIFY THE OFFENCE AND PURSUE PRIVATE PROSECUTION?

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SUMMARY

Electricity theft is one of the challenges with which South African government-owned power-distribution company Eskom is grappling. Eskom has lost billions of rands in annual revenue owing to electricity theft. Different strategies are in place to combat electricity theft. However, in South Africa, electricity theft is not a statutory offence. This contrasts with the approach adopted in countries such as China, Canada, India, Australia and New Zealand, where legislation provides for such an offence. Although electricity theft is not a statutory offence, prosecutors would like electricity thieves to be punished. In this context, there are conflicting High Court decisions on whether electricity theft is a common-law offence or indeed an offence at all. The purposes of this article are: to highlight the problem of electricity theft in South Africa and the conflicting jurisprudence from the High Court on whether electricity theft is an offence; to recommend that Parliament amend legislation to criminalise electricity theft specifically; and also to empower Eskom to institute prosecutions against those who are alleged to have stolen electricity.

1 INTRODUCTION

Electricity theft is a huge challenge in South Africa. It has led to the loss of billions of rands in annual revenue by the government-owned, power-distribution company Eskom. Electricity theft is also one of the contributors to load-shedding in South Africa, which threatens the country’s development prospects. Eskom is putting in place measures to combat electricity theft. However, unlike in countries such as China, Canada, India, Australia and New Zealand where legislation provides for the offence of electricity theft, electricity theft is not a statutory offence in South Africa. There are also conflicting High Court decisions on whether electricity theft is a common-law offence or an offence at all. The Constitutional Court, the highest court in South Africa, is yet to decide the question. The purposes of this article are: to highlight the problem of electricity theft in South Africa as well as the conflicting jurisprudence from the High Court on whether electricity theft is an offence; to recommend that Parliament amend legislation to criminalise

electricity theft specifically; and to empower Eskom to institute prosecutions against those who are alleged to have stolen electricity.

2 THE PROBLEM

South Africa is struggling with a huge electricity problem, evidenced by a heavily indebted power producer and supplier (Eskom) and frequent load-shedding.[1] Eskom attributes its problems to many issues and one is electricity theft. Eskom estimates that it loses billions of rands every year through electricity theft. For example, in July 2018, Eskom "warned consumers against infrastructure and electricity theft that it says costs some R20bn per year and are a 'leading cause' of blackouts."[2] Eskom is putting various measures in place to address the issue of electricity theft. These have included "educating the public about the consequences of infrastructure and electricity theft, including illegal connections"[3] and installing smart prepaid meters. Eskom states that one of the advantages of the smart prepaid split meter is that it leads to "reduced theft and fraud" because "smart meters have anti-tampering technology and tamper alarms which are linked to the Eskom system to report malfunctions and detect meter bypassing."[4] Eskom is also working with the business community to end electricity theft. For example, Eskom launched an electricity-saving campaign:

> "The electricity-saving campaign known as Operation Khanyisa (isiZulu for 'enlighten' or 'light up') has the support of Business against Crime of South Africa (BACSA), Business Unity South Africa (BUSA), Primedia Crime Line, Proudly South African and the South African Local Government Association (SALGA).[5]

Eskom "asked the Justice Department and the National Prosecuting Authority to change the law to make electricity theft a form of sabotage."[6] However, it is evident that Eskom is yet to consider private prosecution as a means to combat electricity theft. One purpose of this article is to suggest ways in which Eskom could use private prosecutions to combat electricity theft. Before dealing with the issue of private prosecutions, it is important to discuss the offence of electricity theft in South Africa.

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1 Khumalo "Eskom Unbundling Will Result in More Debt, Job Losses – NUM" (14 February 2019) https://www.fin24.com/Economy/Labour/eskom-unbundling-will-result-in-more-debt-job-losses-num-20190214 (accessed 2020-02-11). It is reported that Eskom's debt stands at over R430 billion.

2 Van der Merwe "Electricity Theft Causes Power Cuts – Eskom" (3 July 2018) https://www.fin24.com/Economy/Eskom/electricity-theft-causes-power-cuts-eskom-20180703 (accessed 2020-02-11).

3 Van der Merwe https://www.fin24.com/Economy/Eskom/electricity-theft-causes-power-cuts-eskom-20180703.

4 See Eskom Smart Prepaid Split Meters Programme http://www.eskom.co.za/CustomerCare/SmartPrepayment/Pages/default.aspx (accessed 2020-02-11).

5 Baloyi "Operation Khanyisa STOP Electricity Theft – The POWER is in YOUR HANDS" (January/February 2011) https://www.vukuzenzele.gov.za/operation-khanyisa-stop-electricity-theft-%E2%80%93-power-your-hands (accessed 2020-02-11).

6 Baloyi https://www.vukuzenzele.gov.za/operation-khanyisa-stop-electricity-theft-%E2%80%93-power-your-hands.

3 UNDERSTANDING ELECTRICITY THEFT IN SOUTH AFRICA

It has been argued that there are four types of electricity theft that "are prevalent in all power systems" – namely, fraud, stealing electricity, billing irregularities and unpaid bills.[7] These types of electricity theft have also been reported in South Africa. For example, it is reported that the "revenue lost by Eskom through unbilled electricity theft was 'very significant', adding to the problem of non-payment by both Eskom direct … customers and municipal distributors."[8] A report by the Auditor General indicates, among other things, that in the City of Johannesburg, "for the 2016–17 financial year, non-technical electricity losses amounted to over R1-billion, which was due to theft, bypass of meters, illegal de-calibration of meters and damaged meters."[9]

Unlike in some countries such as China,[10] Canada,[11] India[12] and Australia,[13] where national legislation provides for the offence of electricity theft, South African national legislation does not provide for this offence. This does not mean that there was no South African legislation on the basis of which a person could have been prosecuted for one of the kinds of electricity theft mentioned above. Section 27(2) of the Electricity Act[14] provided:

> "Any person who without legal right (the proof of which shall be upon him) abstracts, branches off or diverts or causes to be abstracted, branched off or diverted any electric current, or consumes or uses any such current which has been wrongfully or unlawfully abstracted, branched off or diverted, knowing it to have been wrongfully or unlawfully abstracted, branched off or diverted, shall be guilty of an offence and liable on conviction to the penalties which may be imposed for theft."

The Electricity Act was repealed by the 2006 Electricity Regulation Act.[15] However, it is important to highlight section 27 here because of the cases that emerged from courts interpreting it. Section 27(2) of the Electricity Act had two weaknesses. First, it did not address all the kinds of electricity theft. For example, it was silent on fraud and on stealing of electricity. The second weakness was that it would have been unconstitutional, and therefore invalid, because it created a reverse onus; it required the suspect to prove the existence of a right if he or she was to escape a conviction, which is contrary to the constitutional right to be presumed innocent and to remain

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7 Smith "Electricity Theft: A Comparative Analysis" 2004 32 *Energy Policy* 2067–2076.

8 Van der Merwe https://www.fin24.com/Economy/Eskom/electricity-theft-causes-power-cuts-eskom-20180703.

9 Jordaan "Six Arrests During Johannesburg Blitz On Power Theft" (09 January 2018) https://www.timeslive.co.za/news/south-africa/2018-01-09-six-arrests-during-johannesburg-blitz-on-power-theft/ (accessed 2020-02-11).

10 Article 31 of Regulations on Supply and Utilization of Electricity, 1996-09-01 (Laws of the People's Republic of China).

11 S 326(1) of the Criminal Code, RSC 1985, c C–46.

12 S 135 of the Indian Electricity Act 2003.

13 S 49(1)(*c*) and 69(1)(*f*) of the Electricity Act 1996 provides that an authorised officer may enter any premises to investigate a suspected theft or diversion of electricity.

14 Electricity Act 41 of 1987.

15 Act 4 of 2006.

silent. There are many cases in which the South African Constitutional Court has found reverse-onus sections to be unconstitutional.[16] On the basis of these cases, it would have been to successfully challenge constitutionality of section 27(2) of the Electricity Act. When the Electricity Act was repealed by the Electricity Regulation Act, the latter did not create an offence similar to that under section 27(2) of the repealed Act.

The lack of a specific statutory offence to deal with electricity theft does not mean that people have not been prosecuted, convicted and sentenced in relation to electricity theft. There have been conflicting decisions from the High Court on the issue of whether a person can be convicted of stealing electricity. A few illustrative cases are now discussed in the order of year in which they were decided (from oldest to most recent).

The first case in which the issue of whether electricity could be stolen was that of *S v Mintoor*.[17] In this case, the accused had been convicted by the magistrate of "theft of 901 units of electricity". The question that the High Court had to decide was "whether electricity was capable of being stolen at common law". The court held:

> "[A]ccording to the common law, only tangible or corporeal things were capable of being stolen. Electricity is not a physical thing but a form of energy... The common law rule that only a tangible or corporeal thing was capable of being stolen had not been expanded by any South Africa [sic] court. The only expansion of this basic rule had occurred in respect of the theft of money. In the instant case, it was unnecessary to extend the common law rule as the legislature had specifically provided (in section 27(2) of the Electricity Act 41 of 1987) that anyone who unlawfully 'abstracts, branches off or diverts' electric current was guilty of an offence. The Court held that it was clear that electricity was not a tangible or corporeal thing. It therefore declined to find that electricity could be the object of the common law crime of theft. The conviction and sentence of the accused were accordingly set aside."[18]

The court added that several European courts had held that electricity could not be stolen, whereas some courts in certain states of the United States had held that electricity could be stolen, although these decisions were based on legislation that specifically provided for the offence of electricity theft. The court referred to section 27(2) of the Electricity Act in order to hold that the legislature had deliberately decided to create offences other than electricity theft by providing that a person convicted of an offence under that section "shall be guilty of an offence and liable on conviction to the penalties which may be imposed for theft". The court held that it did not have the power to extend common law to create the offence of electricity theft.[19] The court thus made it clear that electricity cannot be stolen at common law and that section 27(2) of the Electricity Act did not criminalise electricity theft.

The issue of whether electricity could be stolen also arose in the case of *S v Olivier*.[20] In October 1997, a magistrate had convicted the accused of

[16] Schwikkard and Van der Merwe *Principles of Evidence* (2015) 553–561.
[17] [1996] 1 All SA 451 (C).
[18] *S v Mintoor supra* 514.
[19] *S v Mintoor supra* 451.
[20] [1998] JOL 4023 (T).

contravening section 27(2) of the Electricity Act, and in February 1998 he was convicted of theft of electricity. The magistrate was of the view that "a contravention of section 27(2) of Act 41 of 1987 is not a similar offence to a charge of theft." However, on appeal, the High Court held:

> "It is clear that the offence, of which the accused was found guilty on 21 October 1997, is exactly the same offence which he committed on 20 February 1998. The fact that the accused was convicted of a statutory offence on 21 October 1997 and of a common law offence on 20 February 1998 seems to me to be of no significance."

This judgment shows that the court was of the view that theft of electricity could be prosecuted as both a common-law offence and a statutory offence. In effect, the court held that electricity could be stolen. However, the court in this case does not refer to the case of *S v Mintoor*, which, as discussed, is to the effect that electricity could not be stolen.

The issue also arose in the case of *S v Ngomane*.[21] In this case, the magistrate convicted the accused of contravening "section 27(2) of Act 41 of 1987 in that he unlawfully tapped electrical current from the municipal network. He was also convicted of the theft of electricity at the same time and place". The High Court referred to the case of *S v Mintoor* to set aside the accused's conviction for stealing electricity because "appropriating electricity is not regarded as theft". It is clear that the High Court in this case takes us back to the starting point, which is that electricity cannot be stolen. However, it does not refer to the case of *S v Olivier*, which, as we have seen above, came to a different conclusion.

The issue of whether electricity can be stolen arose also in the case of *S v Ndebele*.[22] In this case, the accused faced different charges including manipulating electricity vending machines and theft of electricity. The accused's lawyer referred to the case of *S v Mintoor* and argued, *inter alia*, that the charges of theft of electricity should be quashed because "electricity was not capable of theft".[23] The State argued that the court should develop the common law and rule that theft of electricity was an offence at common law. The court ultimately held that it was not necessary to develop the common law. The court considered that if it were "to find that theft of electricity was a crime, this might result in me creating a new offence. This new offence may have come into being after the accused had performed the acts complained of".[24] In order to resolve the issue of whether electricity could be stolen, the court first discussed the law relating to theft in Roman-Dutch law.[25] It then went on to illustrate the process that was followed to create electricity, before holding that electricity could be stolen.[26] It concluded that:

> "If electricity is not capable of being stolen, then anyone would be entitled without permission of the owner to attach a load to his batteries and deplete

21 [2004] JOL 12943 (T).

22 *S v Ndebele* 2012 (3) SA 226 (GSJ).

23 *S v Ndebele supra* 229.

24 *S v Ndebele supra* 229.

25 *S v Ndebele supra* 235–236.

26 *S v Ndebele supra* 236–237.

> the energy within them, thereby rendering the batteries useless. Yet nothing will have been stolen. Nothing physically has been taken from the battery; however, its characteristics have changed. It appears to me that modern-day society has already advanced and accepted that there can be theft of this nature … It has long been recognised that the abstract and incorporeal nature of a right, which has been taken in the context of notes and coins, is a loss … The same reasoning applies to the submissions made in relation to electricity credits. It was submitted that I should consider developing the common law to encompass energy as a thing capable of theft. In my view, I do not have to do so and I do not deal further with this issue."[27]

In this case, the court held expressly that electricity is capable of theft at common law. The court did not refer to section 27(2) of the repealed Electricity Act although it was in force at the time of the judgement. This is explained by the fact that none of the activities of the accused amounted to a crime under that section. The court also refused to follow the reasoning in the case of *S v Mintoor.* Since then, there has been no reported case in which a person has been prosecuted for electricity theft. However, there are cases where people have been found guilty of electricity theft by employment committees and dismissed from work.[28] All the cases dealing with the issue of whether the common law provides for the offence of electricity theft have been decided by the High Court. The Supreme Court of Appeal and the Constitutional Court, the latter being the highest court in South Africa, have not yet dealt with the issue of whether, at common law, a person can be convicted of electricity theft especially in the light of the fact that section 27(2) of the Electricity Act, which was sought by some quarters to have created a statutory offence, was repealed and a similar offence not reintroduced in the Electricity Regulation Act. This means that there is a possibility that in the future the Constitutional Court could answer this question either in the negative or in the positive. It is argued that the national legislature would have to amend the Electricity Regulation Act or another piece of legislation such as the Criminal Procedure Act[29] to provide expressly for the offence of electricity theft. This offence should then address all types of electricity theft. In doing so, the South African parliament could refer to legislation from different countries on this issue.

4 PROSECUTING ELECTRICITY THEFT: EMPOWERING ESKOM TO PROSECUTE

One of the measures that could be invoked by Eskom in its fight against electricity theft is the prosecution of those who have committed such offences. In all the cases in which people have been prosecuted for electricity theft, the prosecutions were instituted by public prosecutors. Put differently, Eskom has never itself instituted a prosecution against a person for stealing electricity. This is understandable in light of the fact that the repealed Eskom Act, of 1987,[30] although empowered Eskom to carry out

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[27] *S v Ndebele supra* 238.

[28] See *SAMWU obo Theunissen/Theewaterskloof Municipality* (2013) 23 SALGBC 8.8.5; *SAMWU obo Plaatjies Applicant and Swellendam Municipality Respondent* Case No: WCP071213 (The South African Local Government Bargaining Council).

[29] Act 51 0f 1977.

[30] Act No.40 of 1987.

many activities (section 12), did not expressly allow it to institute a prosecution. In 2001, the Eskom Act was repealed by the Eskom Conversion Act.[31] As with the Eskom Act, the Eskom Conversion Act 2001 does not empower Eskom to institute a private prosecution. All it does is to convert Eskom into a public company. According to South African law on private prosecutions, this means that Eskom does not have a right to institute a prosecution for any offence committed against it. There is therefore a need to amend that the Eskom Conversion Act to expressly empower Eskom to prosecute electricity thieves. In South Africa, there are two types of private prosecutions: private prosecutions by natural persons (who are victims of crime) under section 7 of the Criminal Procedure Act[32] and private prosecutions by statutory bodies under section 8 of the Criminal Procedure Act. The discussion in this article is limited to section 8 of the Criminal Procedure Act. For Eskom to be able to institute a private prosecution, the Eskom Conversion Act would need to be amended; also, in accordance with section 8 of the Criminal Procedure Act, Eskom could only prosecute if the Director of Public Prosecutions has declined to prosecute. Section 8 provides:

> "(1) Any body upon which or person upon whom the right to prosecute in respect of any offence is expressly conferred by law, may institute and conduct a prosecution in respect of such offence in any court competent to try that offence.
>
> (2) A body which or a person who intends exercising a right of prosecution under subsection (1), shall exercise such right only after consultation with the attorney-general concerned and after the attorney-general has withdrawn his right of prosecution in respect of any specified offence or any specified class or category of offences with reference to which such body or person may by law exercise such right of prosecution.
>
> (3) An attorney-general may, under subsection (2), withdraw his right of prosecution on such conditions as he may deem fit, including a condition that the appointment by such body or person of a prosecutor to conduct the prosecution in question shall be subject to the approval of the attorney-general, and that the attorney-general may at any time exercise with reference to any such prosecution any power which he might have exercised if he had not withdrawn his right of prosecution."

Electricity theft in South Africa is committed not only by poor people but also by very rich companies. It is therefore fair that, should Eskom be empowered to prosecute electricity theft, the law should also expressly allow it to recover from the offender the expenses it has incurred in the prosecution. This should also include the costs it has incurred in conducting the investigations. Examples from other countries, such as Ireland, show that electricity companies incur expenses in investigating electricity theft.[33] The challenge with private prosecutions under section 8 of the Criminal Procedure Act is that, should the accused be convicted of an offence, Eskom would not be able to recover from the accused the expenses it has incurred in prosecuting the accused. This is because section 15(2) of the Criminal Procedure Act provides:

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[31] 13 of 2001.

[32] 51 of 1977.

[33] *Morgan v Electricity Supply Board* [2018] IEHC 357 (10 May 2018) par 1.

> "[t]he court may order a person convicted upon a private prosecution to pay the costs and expenses of the prosecution, including the costs of any appeal against such conviction or any sentence: Provided that the provisions of this subsection shall not apply with reference to any prosecution instituted and conducted under section 8."

It is submitted that, in order to overcome this challenge, a law empowering Eskom to institute prosecutions should be enacted to expressly empower it to recover from the offender the expenses it has incurred in the prosecution. By empowering Eskom to institute prosecutions against electricity thieves, South Africa would be following the example of other countries. For example, in Malaysia, a public company can institute a prosecution for the theft of electricity[34] and in Singapore, the Electricity Authority has prosecuted those who have contravened the Electricity Act.[35] In India, the High Court held that it is only the Electricity Board, and not any other person, that is empowered under the Electricity Act to prosecute electricity theft.[36]

5 THE OFFENCE OF ELECTRICITY THEFT: COMPARATIVE LEGISLATION

As mentioned above, various countries have provided in their legislation for the offence of electricity theft. These countries have taken three different approaches; South Africa, should it choose to enact legislation to this effect, may find it useful to consider the legislation from these countries in deciding which approach to adopt. The first approach is the one adopted in Canada and Australia (New South Wales), where legislation criminalises a few types of electricity theft. The second approach is the one taken in China, where legislation provides for various types of electricity theft but the list is open-ended to accommodate future developments or new types of electricity theft, should they arise. The third approach is the one taken in India, where legislation provides for a detailed but exhaustive (closed) list of the different types of electricity theft. In this part of the article, the author examines legislation from these countries and recommends which of these approaches should be adopted in South Africa.

Section 326 (1) of the Canadian Criminal Code (1985) provides:

> "[e]very one commits theft who fraudulently, maliciously, or without colour of right, (a) abstracts, consumes or uses electricity or gas or causes it to be wasted or diverted."

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34 *Wrp Asia Pacific Sdn Bhd v Tenaga Nasional Berhad* – W-02-647-2010 [2011] MYCA 36 (28 February 2011).

35 In *Khian Heng Construction (Pte) Ltd v Public Prosecutor* [2012] SGHC 141 par 2, it is reported that "CS Geotechnic was charged under s 80(4)(*a*) of the Electricity Act (Cap 89A, 2002 Rev Ed) ('Electricity Act') for failing to comply with all reasonable requirements of SPPG to prevent damage to high voltage electricity cables. The appellant was charged by way of private prosecution (initiated by the Energy Market Authority) on 16 January 2009 under s 85(2) of the Electricity Act for suffering to be damaged a high voltage electricity cable on 11 November 2006 in the course of carrying out earthworks at Block 129 of the Worksite." See also *Public Prosecutor v Fonda Global Engineering Pte Ltd (formerly known as Fonda Construction Pte Ltd)* [2012] SGDC 117 (10 April 2012) par 1; *Public Prosecutor v Hexagroup Pte Ltd* [2013] SGDC 154 (13 May 2013) par 1.

36 *State of Madhya Pradesh v Ramcharan* - CRA-279/2000 [2007] INMPHC 513 (31 August 2007).

Likewise, section 64(1) of the Electricity Supply Act (New South Wales) provides:

> "[a] person must not abstract, cause to be wasted or diverted, consume or use any electricity from a generating, transmission or distribution system unless authorised to do so under a wholesale supply arrangement or customer retail contract."

It is clear that sections 326 of the Canadian legislation and 64(1) of the Australian legislation criminalise a few different types of electricity theft.

Section 135 of the Indian Electricity Act provides:

> "(1) Whoever, dishonestly, (a) taps, makes or causes to be made any connection with overhead, underground or under water lines or cables, or service wires, or service facilities of a licensee or supplier as the case may be; or (b) tampers a meter, installs or uses a tampered meter, current reversing transformer, loop connection or any other device or method which interferes with accurate or proper registration, calibration or metering of electric current or otherwise results in a manner whereby electricity is stolen or wasted; or (c) damages or destroys an electric meter, apparatus, equipment, or wire or causes or allows any of them to be so damaged or destroyed as to interfere with the proper or accurate metering of electricity, (d) uses electricity through a tampered meter; or (e) uses electricity for the purpose other than for which the usage of electricity was authorised, so as to abstract or consume or use electricity shall be punishable with imprisonment for a term which may extend to three years or with fine or with both."

Section 135 of the Indian Electricity Act is more detailed than the Canadian and Australian provisions and includes conduct that is not considered to be electricity theft in Canada and Australia – for example, tampering with a meter and destroying or damaging a meter and other relevant electricity equipment. However, the list of the prohibited conduct is exhaustive.

In China, Article 31 of Regulations on Supply and Utilization of Electricity, (1996) provides:

> "It shall be forbidden to steal electricity. The following acts shall be deemed as stealing electricity: (1) without authorization, connect wires with and use electricity from the supply facilities of the electricity supply enterprise; (2) use electricity by evading the electricity metering apparatus of the electricity supply enterprise; (3) use electricity by forging or opening seals on the electricity metering apparatus put by the metrological inspection authorities or its authorized organization; (4) intentionally damage the electricity metering apparatus of the electricity supply enterprise; (5) intentionally cause the inaccuracy of the electricity metering apparatus of the electricity supply enterprise or make the apparatus lose efficiency; and (6) steal electricity by other means."

Unlike the Canadian and Indian pieces of legislation, which provide for exhaustive lists of conduct that amounts to electricity theft, the Chinese legislation is open-ended when it provides in Article 31(6) that it is an offence to "steal electricity by other means". This enables the prosecution to prosecute a suspect for any conduct that amounts to electricity theft but which is not expressly mentioned in Article 135.

The New Zealand Crimes Act (1961) does not expressly provide for the offence of theft of electricity. However, people have been convicted of theft of electricity under the general provision criminalising theft or stealing.[37]

In the author's opinion, the Chinese approach is the best alternative because it is detailed, but, most importantly, because it enables the prosecutor to deal with new types of electricity theft that were not known at the time the legislation was passed.

6 CONCLUSION AND POLICY IMPLICATIONS

In this article, the author has highlighted the problem and types of electricity theft in South Africa, the measures being implemented by Eskom to combat electricity theft, the conflicting High Court decisions on the issue of whether electricity is capable of being stolen at common law, and the limitations under the repealed section 27(2) of the South African Electricity Act. The author has recommended that legislation (in particular the Eskom Conversion Act) be amended to empower Eskom to institute prosecutions against electricity thieves. It is further recommended that South Africa amend its legislation to provide specifically for the offence of electricity theft so that the ambiguity reflected in the High Court decisions is brought to an end. In providing for the offence of electricity theft, South Africa may find legislation from other countries on this issue to be relevant. However, when amended, legislation should not follow the repealed section 27(2) of the Electricity Act which created reverse onus. Otherwise its constitutionality could be challenged.

The implication of the suggestions is that Eskom needs to put in place measures to lobby government to amend the relevant legislation (the Eskom Conversion Act). Once legislation is amended, Eskom would have to employ a team of lawyers for the purpose of conducting the prosecutions in question, or would have to set aside a budget to do that and engage the services of private lawyers who should prosecute on behalf of Eskom. This is an approach that is followed, for example, by the Singapore Energy Market Authority, to prosecute those who have committed offences under the Electricity Act.

[37] S 219 of the New Zealand Crimes Act (1961). See for e.g., *Hockly v Police* [2012] NZHC 2938 (7 November 2012); *R v Spencer* HC TAU CRI 2009-070-9161 [2010] NZHC 42 (5 February 2010).

UNDERSTANDING THE LAW ON SEXUAL HARASSMENT IN THE WORKPLACE (THROUGH A CASE LAW LENS): A CLASSIC FOOL'S ERRAND

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SUMMARY

Sexual harassment at the workplace has become commonplace in South Africa, as is the case elsewhere in the world. International study that investigated the prevalence of sexual harassment at workplaces points that although it affects both men and women, most reported incidents portray women as more prone than men. Similar outlook is reflected in South Africa. The author is of the view that these numbers provide an opportunity to reflect and review the status quo insofar as regulation of sexual harassment is concerned. While this article acknowledges the general will to combat sexual harassment in South Africa, it raises concerns about both the regulation of and the interpretation of the sexual harassment regulatory framework. These two components do not seem to complement one another as they should. This is evident from a reading of the Code of Good Practice on the Handling of Sexual Harassment Cases, both in its original and amended form, which have leanings towards a subjective and guilt-presuming inquiry in the determination of what constitutes sexual harassment. Irreconcilable CCMA and court decisions bear testimony to this claim. First, the article argues that a subjective approach is susceptible to abuse and provides a breeding ground for more inconsistencies in sexual harassment jurisprudence. Moreover, individual perception cannot be determinative. Secondly, it bemoans the pattern by courts and the CCMA of overlooking the grammatical meaning of the words used in the Code of Good Practice. This article argues for the adoption of a pragmatic and objective approach based on facts and logic when dealing with sexual harassment at the workplace.

1 INTRODUCTION

Statistics on sexual assaults in South Africa reveal a rate of 142 reports a day in the 2015/16 financial year.[1] Excluding unreported incidents, simple arithmetic shows that about 51 830 sexual offences are committed in South Africa annually. Notwithstanding that courts have mostly responded with the

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[1] TIMESLIVE "#MeToo – SA Women Share Stories of Sexual Assault, Harassment" (17 October 2017) https://www.timeslive.co.za/news/south-africa/2017-10-17-watch--metoo-sa-women-share-stories-of-sexual-assault-harassment/ (2019-03-08).

sanction of dismissal on sexual harassment cases, that educational drives to combat sexual harassment continue, and that pressure groups[2] and social media influence are also used to bring about awareness of this scourge, the numbers continue to increase. It thus begs the question as to whether there are statutes, Codes and activism in place to deal with sexual harassment. Do we understand sexual harassment? Perhaps, we do not. Are the laws properly constructed to deal with sexual harassment? Are the courts' pronouncements clear enough to help us understand sexual harassment? This article tries to answer all these questions in the wake of the alarming number of cases of sexual harassment at workplaces.

Naturally, there must be a link between the regulation and the status quo – a simple cause-and-effect logic attests to that. The spiralling number of cases or statistics on sexual harassment should be seen in that light.[3] South Africa has taken steps aimed at curbing sexual harassment at the workplace from as far back as 1989 in the case that has become commonly known as the *J v M* case.[4] Subsequently, laws, codes and policies were introduced to deal with harassment of a sexual nature. Furthermore, courts and the CCMA have pronounced on sexual harassment matters.

Notwithstanding all these interventions, cases of sexual harassment at the workplace are reportedly at an all-time high.[5] Of particular interest is the fact that "sexual harassment" as a concept has yet to attract one determinative and meaningful definition that can be used as a yardstick in all cases of sexual harassment. Courts and the CCMA have to date not offered certainty with regard to an effective approach to be adopted when dealing with cases of sexual harassment. The use of the Code[6] too has not contributed anything considerable towards finding a workable approach, leaving us with the legacy of jurisprudential differences and inconsistencies when it comes to what qualifies as harassment of a sexual nature.

Instead, as is demonstrated in this article, the concept of "sexual harassment" has been through an unstable period of gaining, dropping and regaining meanings in every dispute resolution platform entertaining it. The absence of a stable meaning has created confusion for users. This article humbly suggests the adoption of an objective and pragmatic approach based on reasons for the determination of issues pertaining to harassment of a sexual nature. It is submitted that the battle to develop a working and meaningful definition of the concept "sexual harassment" cannot be won on

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[2] #MenAreTrash, #Metoo, #NotInMyName, The Silence Breakeakers, #BalanceTonPorc or "Out your pig" and so on.

[3] See statistics in Minhas https://www.opinium.co.uk/one-in-five-women-have-been-sexually-harassed-in-the-workplace/; Smit https://www.fin24.com/Economy/dismaying-level-of-sexual-harassment-in-corporate-sa-survey; TIMESLIVE https://www.timeslive.co.za/news/south-africa/2017-10-17-watch--metoo-sa-women-share-stories-of-sexual-assault-harassment/.

[4] (1989)10 ILJ 755 (IC).

[5] Yende https://www.news24.com/SouthAfrica/News/sexual-harassment-complaints-ignored-for-eight-years. See also Snyman-Van Deventer, Du Plessis and Du Bruin "Seksuele Teistering in Werkplek: 'n Suid Afrikanse Perspektief" 2014 29(1) *TRW* 28.

[6] The Code of Good Practice on the Handling of Sexual Harassment Cases, in both its original (1998) and amended form (2005), published and gazetted in GN 1367 in *GG* 19049 of 14 July 1998, and GN 1357 in *GG* 27865 of August 2005 respectively. The original was withdrawn in 2018 by GNR 1394 in *GG* 42121 of 19 December 2018.

the basis of the emotional expediency inherent in the subjective approach courts seem to support.[7] This article deals with this subject in five sections: an introduction; a review of sexual harassment cases; the legislative framework; comments; and a conclusion.

2 CASE LAW REVIEW

In *SA Metal Group (Pty) Ltd v CCMA*,[8] the (male) alleged perpetrator had asked the complainant, a female colleague, whether she was "offering to play with me (him)" and had further mentioned that he "can't wait for summer to see you (her) strut your stuff". The complainant, for her part, had on one occasion sent a "Little Love" card to the alleged perpetrator as a birthday wish.[9] The commissioner did not find the alleged perpetrator's statements to be sexually harassing but instead regarded the claim for sexual harassment to be nothing other than a fabrication. The commissioner found that the comments did not contain any explicit sexual connotations and that the complainant did not make the proposer aware that the verbal banter was "unwelcome".[10] This decision did not survive the review by the Labour Court, which found sexual harassment to have happened and ordered dismissal.

Lessons should also be learnt from the *Maepe* matter, which was first heard internally. The chairperson found that sexual harassment had occurred and recommended dismissal, which the employer effected. Aggrieved by this, the alleged perpetrator (a senior commissioner of the CCMA) referred the matter to the CCMA. The arbitrating commissioner gave an award to the effect that the dismissal of Maepe was too harsh a sanction and ordered his reinstatement with a final written warning. Unsurprisingly, this was referred for review to the Labour Court, and eventually to the Labour Appeal Court.[11] The complaints included the "blowing of a kiss", and the statement "I love you and/or that I wanted to kiss you and or I want to keep your photograph to put on my chest when I sleep at night", allegedly made to the female colleague. The commissioner did not find these to constitute sexual harassment. In support thereof, the commissioner reasoned that the complainant had not indicated that the advances towards her were unwelcome, and nor had she at any point reported these incidents as required by law.[12] Unsatisfied with this, the complainant referred the matter for review to the Labour Court. The Labour Court overturned the commissioner's decision and found that sexual harassment had taken place and ordered dismissal.

Maepe appealed. The Labour Appeal Court set aside the Labour Court's decision but ordered the CCMA to pay compensation to Maepe as opposed to reinstatement.[13] The court did not order reinstatement as requested by

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7 A movie entitled "Disclosure" (1994) explains this very well.

8 C350/13) [2014] ZALCCT 15.

9 Par 3.

10 Par 4.

11 *Maepe v Commission for Conciliation, Mediation and Arbitration* (JA 48/04) [2008] ZALAC 2; [2008] 8 BLLR 723 (LAC); (2008) 29 ILJ 2189 (LAC).

12 Par 26. See also par 12 as per Jappie JA decision.

13 Par 26–28 and 51.

Maepe, citing that, although it could not find he had committed sexual harassment, he had been a dishonest witness and could therefore not be a fit and proper person to occupy an office at the CCMA. In essence, the Labour Appeal Court confirmed the commissioner's order. Simply put, the accused was not found guilty of sexual harassment.

In *Rustenburg Platinum Mines Ltd v United Association of SA on behalf of Pietersen*,[14] a male colleague suggested that he stay with Ms Kgole and help her pay expenses and on several occasions proposed to have sex with her. She consistently rebuffed these advances but never reported them as required by law. Internal disciplinary processes found his actions to amount to sexual harassment and dismissal was recommended. The aggrieved Pietersen referred the matter to the CCMA and was vindicated by the commissioner who ordered reinstatement and compensation.[15] In support of the decision, the commissioner held that the conduct appeared to be a love proposal and that the docile conduct displayed by the complainant was inviting; at no point did she raise or report the incident as required by law.[16] The Labour Court dismissed this line of reasoning and held that sexual harassment had taken place. The court took a swipe at the commissioner's approach in this matter, which it described as misogynistic, patriarchal and insensitive … and that … the commissioners require urgent training.[17]

Meanwhile, in *Campbell Scientific Africa (Pty) Ltd v Simmers,*[18] Mr Simmers, a 48-year-old installation manager employed by the appellant was dismissed following a disciplinary hearing for unprofessional conduct and sexual harassment. According to the evidence led, Mr Simmers said to Ms Markides something along the lines of: "Do you need a lover tonight?" and when she did not reciprocate, he said, "in case you change your mind, just knock at my door". The CCMA found Mr Simmers' conduct to be harassment of a sexual nature. Mr Simmers took the matter on review to the Labour Court where it was found that sexual harassment had not taken place. In the view of the Labour Court, as per Steenkamp J, Mr Simmers's conduct did not cross the (Rubicon) line, as it had been a single unreciprocated sexual advance. In this regard, the Labour Court took the view that it was a once-off thing and that Mr Simmers had backed off when Ms Markides made it plain that his advances were not welcome.[19]

In *Bandat v De Kock Consulting Engineering CC*,[20] the alleged perpetrator is said to have behaved inappropriately on three different occasions – namely:

- taken off his underpants in full view of the complainant (female colleague) while swimming, in the result, allegedly laying bare his genitals;

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14 (2018) 39 ILJ 1330 (LC).
15 Par 2.
16 Par 9 and 39.
17 Par 2 and 3.
18 (CA 14/2014) [2015] ZALCCT 62.
19 Par 13.
20 (JS832/2013) [2014] ZALCJHB 342; (2015) 36 ILJ 979 (LC).

- offered her money (R1 000.00) for sex, to which she responded jokingly, according to her evidence, by saying her rate is R10 000.00; and
- invited her to Teazers where they watched strippers dancing.[21]

The court found the case not to be one of sexual harassment given, first, the relationship that the parties had had, and secondly, that as much as the complainant claimed to have been victimised, she never at any point or occasion expressed her discomfort.

None of these incidents were ever reported, and nor did the complainant express her disapproval to the alleged perpetrator at any point until after she was issued with a written warning for poor work performance by the alleged perpetrator.[22]

In another case, *Liberty Group Limited v M*,[23] the accused had touched the complainant, rubbed his manhood against her body, and forced a kiss, despite clear disapproval from her. She lodged a complaint in terms of section 60 of the Employment Equity Act[24] (EEA), and then resigned in desperation when it was clear that her complaint was not receiving any attention.

In *Vodacom Service Provider Company (Pty) Ltd v Phala*,[25] the alleged perpetrator was said to have:[26]

- exposed her artificial breast to the complainants (allegedly after they requested her to do so);
- called the complainants to her office to measure the size of their manhood, something which it is alleged arose from a conversation between the complainants and the accused;
- pinched the complainants' bottoms;
- grabbed one of the complainants by his crotch and tried to pull off his belt; and
- grabbed one of their cellular telephones, placed it under her skirt, took a picture of her private parts and showed it to one of them.

She was dismissed in the disciplinary hearing but the commissioner reinstated her with compensation equivalent to six months' remuneration. The commissioner condemned the exposure as being merely unacceptable conduct from a person in a senior position. The matter was then referred for review to the Labour Court, which ordered a *de novo* hearing.[27]

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21 Par 27, 28 and 29.
22 Par 32, 62, 63, 87, 88 and 91.
23 (2017) 38 ILJ 1318 (LAC); [2017] 10 BLLR 991 (LAC).
24 55 of 1998.
25 (JR2178/05) [2007] ZALC 13.
26 Par 4–6.
27 Par 31.

3 THE LEGAL FRAMEWORK ON SEXUAL HARASSMENT IN SOUTH AFRICA

In South Africa, the safety of employees is guaranteed both at common law and in a number of statutes. In terms of the common law, employers are duty-bound to ensure the safety of employees at the workplace.[28] In this sense, safety means much more than physical security. It also means freedom from sexual harassment and its psychological effects.

3 1 The Constitution of the Republic of South Africa, 1996

The Constitution ushered in a new South Africa founded on, among other principles, human dignity and the achievement of equality and supremacy of the Constitution and the rule of law.[29] Section 9 of the Constitution provides for the right to equality and condemns any form of unfair discrimination. The Constitution also guarantees every employee the right to fair labour practices.[30] Courts are enjoined to promote the spirit, purport and objects of the Bill of Rights when conducting interpretational responsibilities.[31] It follows that constitutional values and principles are central to the development of laws in South Africa. Although the Constitution does not explicitly provide the right to a safe workplace, it does so by implication if regard is had to the provisions of section 24, which provides that everyone has the right to an environment that is not harmful to their health or well-being. In addition, the Constitution clearly provides for everyone's right to security in terms of section 12 and to dignity in terms of section 10. Nowhere does the Constitution define or regulate the concept "sexual harassment". However, it warns the courts to promote the values that underlie an open and democratic society based on human dignity, equality and freedom in the Bill of Rights.[32] According to courts' pronouncements, sexual harassment discriminates unfairly and violates a person's dignity.[33]

3 2 The Employment Equity Act, 1998

As the title suggests, the EEA aims to ensure equity and justice in the employment environment, thus giving effect to equality as a founding value and a right in terms of the Constitution.[34] Section 6 of the EEA condemns and discourages any form of harassment. Subsection 3 provides that harassment of an employee is a form of unfair discrimination and is

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28 Van Niekerk, Smit, Christianson, McGregor and Van Eck *Law@work* (2015) 93. See also *Nicholson v East Rand (Pty) Mines Ltd* 1910 WLD 235; *Lahrs v SAR&H* 1931 CPD 289; *SAR&H v Cruywagen* 1938 CPD 219; *Van Heerden v SA Pulp & Paper Industries Ltd* 1946 AD 385.

29 S 1 of the Constitution.

30 S 23 of the Constitution.

31 S 39 of the Constitution.

32 S 7 of the Constitution.

33 *Campbell Scientific Africa (Pty) Ltd v Simmers supra* par 21; *Motsamai v Everite Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC) par 19; s 6(1) of the EEA.

34 S 1 and 9 of the Constitution.

prohibited on any one ground, or a combination of grounds, of unfair discrimination listed in subsection 1. Furthermore, section 51(1), read with section 60 of the EEA, protects employees from discrimination, by anyone (including the employer), for exercising any right conferred by the Act. Section 51 reads:

> "(1) No person may discriminate against an employee who exercises any right conferred by this Act.
> (2) Without limiting the general protection conferred by subsection (1), no person may threaten to do, or do any of the following:
> (*a*) prevent an employee from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act; or
> (*b*) prejudice an employee because of past, present or anticipated–
> (i) disclosure of information that the employee is lawfully entitled or required to give to another person;
> (ii) exercise of any right conferred by this Act; or
> (iii) participation in any proceedings in terms of this Act.
> (3) No person may favour, or promise to favour, an employee in exchange for that employee not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act.
> (4) Nothing in this section precludes the parties to a dispute arising out of an alleged breach of any right conferred by this Part, from concluding an agreement to settle the dispute.
> (5) For the purposes of this section 'employee' includes a former employee or an applicant for employment."

These sections were made in view and anticipation of the possibility that some employers may wish, for whatever reason and given the disciplinary powers they have, to retaliate against an employee for reporting harassment at a workplace. Good examples in this regard are the cases of *Christian v Colliers Properties*[35] and *Makoti v Jesuit Refugee Service SA.*[36] In these cases, employers embarked on disciplinary actions to punish an employee for not reciprocating sexual advances and the courts later found their actions to be retaliatory. The dismissals were found to be automatically unfair. In effect, the law provides protection and encourages victims of sexual harassment to report without fear. The EEA also makes a commitment to penalise employers who retaliate or fail to act on reported complaints.[37]

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35 C323/2004 [2005] ZALC 56.

36 (2012) 33 ILJ 1706 (LC).

37 S 60 of the EEA provides:

> "(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.
> (2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.
> (3) If the employer fails to take the necessary steps referred to in subsection (2), and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.
> (4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act."

In addition to the protection given in terms of section 60, the subsequent section, being section 61, provides:

What this means is that, for section 60 liability to trigger, the employer must have known about the alleged conduct.

Legislation has provided for the issue of any code of good practice.[38] In the context of the subject of discussion in this article, the Code of Good Practice on the Handling of Sexual Harassment Cases ("the Code") was issued in 1998, publicised and later amended in 2005.[39] The Code encourages employers to develop policies that would deal with sexual harassment and to publicise them to their employees. The legal position has been that employers who fail to act against sexual harassment complaints will be liable vicariously.[40]

What the EEA does not do is define "sexual harassment". However, this aspect is covered in the original Code of Good Practice on the Handling of Sexual Harassment Cases. This Code remained operational alongside the amended version until 2018.[41] The original version provided quite a loaded and open-ended definition in the following terms:

> "[u]nwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual."[42]

Item 3 (2) of the Code also provides that sexual attention becomes sexual harassment if:

> "(a) The behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or
> (b) The recipient has made it clear that the behaviour is considered offensive; and/or
> (c) The perpetrator should have known that the behaviour is regarded as unacceptable."

"(1) No person may–

(*a*) obstruct or attempt to improperly influence any person who is exercising a power or performing a function in terms of this Act: or

(*b*) knowingly give false information in any document or information provided to the Director-General or a labour inspector in terms of this Act.

(2) No employer may knowingly take any measure to avoid becoming a designated employer.

(3) A person who contravenes a provision of this section commits an offence and may be sentenced to a fine not exceeding R10 000,00.

(4) The Minister may, with the concurrence of the Minister of Justice and by notice in the *Gazette,* amend the maximum amount of the fine referred to in subsection (3) in order to counter the effect of inflation."

[38] Section 54 of the EEA.

[39] The Code of Good Practice on the Handling of Sexual Harassment Cases was issued in 1998 and amended in 2005. These versions were gazetted in GN 1367 in *GG* 19049 of 14 July 1998, and GN 1357 in *GG* 27865 of August 2005 respectively, and the original was withdrawn by GNR 1394 in *GG* 42121 of 19 December 2018.

[40] Section 60 of the EEA. See also *Ntsabo v Real security CC* [2004] 1 BLLR 58; *Liberty Group Ltd v M* [2017] 38 ILJ 1318 (LAC); *Potgieter v National Commissioner of the SAPS & another* [2009] 2 BLLR 144 (LC) and more.

[41] *Campbell Scientific Africa (Pty) Ltd v Simmers* [2016] 37 ILJ 116 (LAC) par 24. See also Collier; Cohen; Le Roux; Fergus; Du Plessis; Singlee and Godfrey *Labour Law in South Africa: Context and Principles* (2018) 219 and 457.

[42] Item 3(1) of the Code.

Item 4 of the Code provides the following examples as forms of sexual harassment:

> "(1) Sexual harassment may include unwelcome physical, verbal or non-verbal conduct, but is not limited to the examples listed as follows:
>
> a) Physical conduct of a sexual nature includes all unwanted physical contact, ranging from touching to sexual assault and rape, and includes a strip search by or in the presence of the opposite sex.
>
> b) Verbal forms of sexual harassment include unwelcome innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults or unwelcome graphic comments about a person's body made in their presence or directed toward them, unwelcome and inappropriate enquiries about a person's sex life, and unwelcome whistling directed at a person or group of persons.
>
> c) Non-verbal forms of sexual harassment include unwelcome gestures, indecent exposure, and the unwelcome display of sexually explicit pictures and objects.
>
> d) Quid pro quo harassment occurs where an owner, employer, supervisor, member of management or co-employee, undertakes or attempts to influence the process of employment, promotion, training, discipline, dismissal, salary increment or other benefit of an employee or job applicant, in exchange for sexual favours.
>
> (2) Sexual favouritism exists where a person who is in a position of authority rewards only those who respond to his/her sexual advances, whilst other deserving employees who do not submit themselves to any sexual advances are denied promotions, merit rating or salary increases."

It should be noted that in 2005 some amendments were effected to the 1998 Code. Notable in the amended version and relevant to this discussion is that, unlike its predecessor, the 2005 version introduced a test for sexual harassment in place of the definition provided in the original version. Also notable is the exclusion of the requirement that the alleged conduct be repeated in order to constitute sexual harassment. In terms of the test, the conduct will amount to sexual harassment if it is:

> "unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:
>
> 4.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
> 4.2 whether the sexual conduct was unwelcome;
> 4.3 the nature and extent of the sexual conduct; and
> 4.4 the impact of the sexual conduct on the employee."[43]

Except for what is mentioned above, the 2005 version is not materially different from its predecessor. It remains the recipient's call whether the conduct is deemed sexual harassment.[44] It is also not clear why the requirement that conduct be repeated or persistent has been removed in the Amended Code. The implication is that unreciprocated love proposals may amount to sexual harassment if the recipient deems it so and this is arguably not what the drafters of the Code envisaged. This, it is argued, is prone to

[43] Item 4 of the Code.

[44] Item 4.4 of the Amended Code.

abuse, cruel and unfair. The core of the law should be to educate and not penalise.

In addition, the Amended Code requires not only confidentiality in the handling of sexual harassment cases, but also encourages victims of sexual harassment to report incidents immediately.[45] This requirement speaks to a reliability issue. It is based on the view that an immediate report not only stimulates an immediate reaction from the employer but also presents an opportunity for the victim to relate the experience while still fresh in his or her mind and to secure available evidentiary material if it exists. As an example, one can imagine possible make-up marks on a harasser's clothing, skin or lips in case of a forced kiss.

3 3 The Occupational Health and Safety Act, 1993

The issue of the protection and promotion of employees' health and safety is taken further in terms of the Occupational Health and Safety Act[46] (OHSA). Section 8 of OHSA provides that the employer must as far as is reasonably practicable provide and maintain a working environment that is safe and without risk to the health of employees. Implicit in this protection is protection against sexual harassment.

3 4 The Labour Relations Act, 1995

Just as with the EEA, the Code of Good Practice on the Handling of Sexual Harassment Cases finds application under the LRA. The LRA takes the protection against sexual harassment a little further by providing that a dismissal is automatically unfair if the reason for the dismissal is that the employee made a report of sexual harassment.[47] Moreover, the LRA provides that employees may resign and claim constructive dismissal in terms of section 186(1)(*e*) where the employer fails to act on a reported case of sexual harassment.[48]

3 5 The Protection From Harassment Act, 2011

The Protection From Harassment Act[49] does little more than confirm the definition of the term "sexual harassment" in the EEA and the Code. Going further than the EEA and the Code, the Act provides and regulates some other forms of harassment.

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45 Items 7 and 8 of the Code.

46 85 of 1993.

47 S 187(1) of the LRA provides: "A dismissal is automatically unfair … if the reason for the dismissal is– … (*d*) that the employee took action, or indicated an intention to take action, against the employer by– (i) exercising any right conferred by this Act; or (ii) participating in any proceedings in terms of this Act".

48 Constructive dismissal is defined as an instance in which an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee.

49 17 of 2011.

4 COMMENTS

The EEA, read with the Code, regulates sexual harassment and provides guidelines. Courts, the CCMA and the internal disciplinary processes are urged by the LRA to use the Code when determining cases of sexual harassment.[50] The LRA uses emphatic language, stating that any person interpreting or applying the Act "must take into account" any relevant code of good practice.[51] The purpose is to eliminate sexual harassment in the workplace. The Code and the Acts read together state that any person applying or interpreting any employment law must take into account any code issued by the Act.

The original Code went on to define "sexual harassment" as unwanted conduct of a sexual nature while the Amended Code uses the word "unwelcome".[52] It is submitted that, these two words in the context used have logically the same meaning. Effectively, this means the guidelines can only be used if the conduct constitutes sexual harassment as perceived by the complainant. In essence, it becomes the complainant's call whether the conduct is unwelcome or unwanted.

A similar view is echoed in *Reed and Bull Information Systems Ltd v Stedman*.[53] In this case, it was held that it is for the complainant to decide what is regarded as offensive and therefore as sexual harassment.[54]

This reliance on the complainant begs to be challenged. It is bad law that is susceptible to abuse and cannot pass the legality test.[55] If behaviour that objectively constitutes sexual harassment is received without complaint by an employee, does that behaviour transform itself simply because it does not bother the recipient? The author disagrees and argues that this was not the intention of the drafters of the Code. It is submitted that an individual's feelings or perception cannot be the determinant of what constitutes sexual harassment. The author does not know of any functioning legislature that delegates law-making powers to private persons. To rely on a complainant's perception is at least an abdication of the legislature's constitutional mandate to make the law – at worst, a recipe for anarchy. The legislature

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50 S 203 of the LRA. See also *Masemola v CCMA* (JR 1025/2013) [2016] ZALCJHB 183 par 23.

51 S 138(6) read with s 203(3) and (4) of the LRA. See also *SA Metal Group (Pty) Ltd v CCMA supra* par 8.

52 Items 4 and 5.4 of the Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace as published under GN 1357 dated 4 August 2005.

53 (1999) IRLR 299 (EAT).

54 302. *Reddy v University of Natal* (1998) 1 BLLR 29; (1998) 19 *ILJ* 49 (LAC). See also Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie and Steenkamp *Labour Relations Law: A Comprehensive Guide* (2015) 701; Ramsaroop and Brijball Parumasur "The Prevalence and Nature of Sexual Harassment in the Workplace: A Model for Early Identification and Effective Management Thereof" 2007 33(2) *SA Journal of Industrial Psychology* 25; Botes "Identifying Sexual Harassment in the Workplace? Do Not Forget to Remember the Code of Good Practice" 2015 36 *ILJ* 1719.

55 Specifically, *ius certum* and *ius strictum.* Read together these principles of legality loosely mean that the law must be certain, clear and unambiguous.

has a duty to pass reasonably clear and precise legislation to enable consumers to understand what is expected of them.[56]

The observations made in the case of *Johnson v Rajah NO*[57] are relevant, although the case was about constructive dismissal. In this case, an employee claimed that intolerable conditions caused by the employer were the condition *sine qua non* for her resignation as an employee. The court held that intolerability is not established by an employee's say-so, perception or state of mind. What is relevant is the conduct of the employer viewed in an objective sense.[58]

Du Toit *et al* argue that the problem with using a subjective approach is that forms of conduct that an overly sensitive person would deem to be harassment could then be included for sanction.[59]

According to Brassey,[60] sexual harassment denotes more than just an act by which the perpetrator seeks some sexual or similar gratification from an unwilling victim.

In order for an act to qualify as sexual harassment, the Code states that the conduct in question should be unwelcome.[61] Logically, this requirement creates a corresponding obligation on the complainant to warn the accused if the conduct is unwelcome. In essence, there is conduct that may be welcomed and that which is not. Notably, the Code's words further require that there be an indication or warning from the recipient.[62] The reading together of these guidelines in this light makes sound and practical sense of the Code. It is unimaginable that the EEA would make an employer's liability dependent on the employer's knowledge while the same is not required for the "liability" of the employee responsible for the conduct.[63] The legislature

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56 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re Hyundai Motors Distributors (Pty) Ltd v Smit NO* (2001) 1 SA 545 (CC) par 24. See also the principle of legality.

57 (JR33/15) [2017] ZALCJHB 25.

58 Par 50 and 51.

59 Du Toit *et al Labour Relations Law: A Comprehensive Guide* 700–701. For the same reasons, the reliance on a subjective approach was heavily criticised in constructive dismissal cases. See *Smithkline Beecham (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* (2000) 21 ILJ 988 (LC) par 38*; see also Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen* (2012) 33 ILJ 363 (LC) par 38; *Bandat v De Kock supra* par 74.

60 Brassey *Employment and Labour Law* (1998) Vol 1 at E.4 26–27. [Loose leaves]. See also *Nehawu obo Jantjes v Department of Health: Western Cape* PSHS592-11-12 par 37.

61 Item 4 of the Code. See also *Potgieter v National Commissioner of the SA Police Service* (2009) 30 ILJ 1322 (LC) par 46; *Rustenburg Platinum Mines Ltd v UASA obo Pietersen supra* par 39, S*A Metal Group (Pty) Ltd v CCMA supra* par 23 and 24.

62 Item 5.1 of the Amended Code. See *Rustenburg Platinum Mines Ltd v UASA obo Pietersen supra* par 39; *Grobler v Naspers Bpk* [2004] 5 BLLR 455 (C).

63 S 60 of the LRA reads–

"(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.

(2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.

would not have conceived of the proposer as a prophet armed with foreknowledge of the response to his or her proposition.

In *Reed*,[64] the court recommended a partially subjective approach. This approach, according to Monti, has two dimensions. Although it empowers the victim by allowing her (or his) reality to be incorporated into legal norms on the one hand, it generates a number of uncertainties and is doctrinally odd on the other.[65] While this approach respects the complainant's perception regarding the proposition, it requires the complainant to express the unwelcomeness of the conduct to the proposer.

To "harass" is to annoy or worry somebody by putting pressure on them or to make repeated attacks.[66] To be "persistent" is to continue to do something in spite of … opposition or to repeat frequently, especially in a way that is annoying and/or cannot be stopped.[67] The word "repeat" seems to be operative in both dictionary meanings. This may suggest that the drafters of the Code may have intended to make sexual harassment dependent on repeated, yet unwelcome, conduct except for the single, yet serious, instances referred to in item 5.3.3 of the Amended Code. Item 5.3.3 says a "single incident of unwelcome sexual conduct may constitute sexual harassment". The latter part sounds more of an exception than a rule.

As they say, forewarned is forearmed. If a would-be complainant receives potentially unwanted attention, he or she should decide on the offensiveness or otherwise of the conduct and then warn or indicate to the proposer whether he or she welcomes the same. This is the most sensible way in which the guidelines should be read and understood. It is in the fibre of fairness that a proposer be made aware of resistance to his or her intentions. This goes a long way to ensuring that a wrongdoer's rights to fair labour practices are also protected.[68] It is *ubuntu*-like: as much as the law condemns sexual harassment, it also continues to respect the perpetrator as a human being whose case should be dealt with humanely. It is humane to communicate. It resonates with common sense, as expressed in the African idiom that says, *"ngwana a sa lleng o swela tharing"*, which loosely translated means "a child who does not cry dies in the shawl".[69] It is held that crying (complaining) is a sign of hope that someone will hear and come to

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(3) If the employer fails to take the necessary steps referred to in subsection 2, and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.

(4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act."

See also Monti "Understanding Sexual Harassment a Little Better: *Reed and Bull Information Systems Ltd v Stedman"* 2000 8(3) *Feminist Legal Studies* 369.

[64] *Supra*.

[65] Monti 2000 *Feminist Legal Studies* 372.

[66] Hornby *Oxford Advanced Learners Dictionary of Current English* (2000). See also https://dictionary.cambridge.org/dictionary/english/harass.

[67] Item 3(2)(b) of the Code.

[68] S 9, 10, 16 and 23 of the Constitution. Henagen "False Claims of Sexual Harassment in Education: The Path to an Appropriate Remedy for the Wrongly Accused" 1998 76(4) *Washington University Law Review* 1432.

[69] See Hopkins and Lewis *Another World is Possible: Spiritualties and Religions of Global Darker Peoples* (2014) 177.

one's rescue.[70] The law could never have intended the alleged perpetrator to divine what the response would be to his or her advances. A clear warning is therefore crucial. An expression of a "yes" or a "no" by the recipient of sexual attention seems to be contemplated in terms of the Code. Once a warning has been issued as envisaged by the Code, then the ball is in the court of the warned person, who may decide to desist or be persistent.

Grogan observes correctly so and thus launching an attack on the original Code that item 3(2) of the Code provides that sexual harassment is not merely any "sexual attention", but only (a) that which is persistent, (b) that which the recipient has clearly indicated is offensive and (c) that which the perpetrator should have known is unacceptable.[71]

In *Simmers*,[72] the Labour Court found that the employee's conduct did not amount to sexual harassment because the employee did not persist in the behaviour after the complainant told him that his overtures were unwelcome.[73]

However, a single serious incident may amount to a sexual harassment.[74] A clear-cut example would be where the perpetrator forcefully kisses, looks up a person's skirt, gropes or pinches or touches someone sexually, as occurred in the historical case of *J v M*[75] and in the case of *Naptosa obo Makhaphela Khayalethu v South West Gauteng TVET & Department of Higher Education & Training*,[76] or where conduct constitutes objective sexual harassment.

Victims of sexual harassment should inform the perpetrator directly that his or her conduct is unwelcome and must stop.[77] In the *Simmers* case, Steenkamp J referred to a US Supreme Court decision relating to sexual harassment, where it was held:

> "the prohibition of sexual harassment only relates to behaviour so objectively offensive as to alter the conditions of the victim's employment. This, it is held is done to ensure that Courts and juries do not mistake ordinary socializing in

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70 Hopkins and Lewis *Another World is Possible* 177. See also Diale who defines "*Ngwana o a sa lleng, o swela tharing*! In other words if you don't seek help you will not find help and you will suffer in silence" https://www.mediaupdate.co.za/publicity/43808/angie-diale-stands-up-against-abuse-of-women-and-children.

71 Grogan *Workplace Law* (2017) 111.

72 *Campbell Scientific Africa (Pty) Ltd v Simmers supra.*

73 Par 31.

74 Item 3(2)(a) of the Code.

75 *Supra.* In this case, the alleged perpetrator is said to have caressed, slapped buttocks and fondled the complainant's breast.

76 Case NO: ELRC97-16/17GP. In this case, the harasser was charged with sexual harassment in that the harasser called the complainant into his room, tried to kiss her, fondled, touched her private parts and breast, even when she was crying out for help (par 24–27). In *University of Venda v Maluleke* (2017) 38 ILJ 1376 (LC), the harasser made it clear that the complainant would not pass the paper he was teaching unless she submitted to his sexual advances (par 29). This is a clear case of *quid pro quo* – a single yet serious incident.

77 Monti 2000 *Feminist Legal Studies* 369; Pluta "Harassment in the Workplace: Problems and Solutions" *https://academic.oup.com/labmed/article-pdf/32/2/67/24958059/labmed32-0067.pdf.* This is in accordance with the South African Code of Good Practice in the Handling of Sexual Harassment Cases. See also *Campbell Scientific Africa (Pty) Ltd v Simmers supra* par 27.

> the workplace … such as intersexual flirtation … for discriminatory conditions of employment."[78]

In the *Bandat* case, the court made the following observation, with which the author agrees for the reasons indicated above:

> "How does one then go about in objectively determining whether the kind of conduct as set out in clause 5 of the Code is unwelcome? In my view, the first question that has to be asked is whether the conduct was ever complained about by the employee. This can be done by the perpetrator being informed that the employee considered the conduct to be unwelcome and the perpetrator then being called on to cease the conduct. Or the employee can formally pursue a complaint with more senior management using relevant harassment policies that may be applicable, or raising a grievance. I therefore accept that it is not the be all and end all for an employee to have raised a grievance but at least the employee must make it clear to the perpetrator that what is happening is not acceptable and must stop."[79]

While it would be foolhardy to underestimate the devastating effect of sexual harassment and the sophistication with which it has manifested itself in the employment spaces, it would be equal folly to describe, in desperation, any conduct with sexual undertones as sexual harassment. It is trite that a proposal for a sexual relationship carries sexual undertones just as a winery smells of wine. Zondo JP (as he then was) made this crystal clear in the *Maepe* case. Although the judge acknowledged the presence of sexual advances, he found the conduct was not sexual harassment because the complainant encouraged it by not objecting to it. This, the judge stated, was informed by the fact that the complainant never objected to the advances until she was rated poorly in a performance appraisal, following negative reports made to the registrar by Maepe.[80] The reporting by the complainant was opportunistic conduct, which fits well with the description of what Snyman AJ calls "unwanted after the fact".[81]

Creating relations is human nature, an innate thing, but the art of creating sexual relations is seldom straightforward. Quite correctly, Tlhotlhalemaje J observed that human beings are "part of *Homo sapiens* with feelings and emotions".[82] The judge also acknowledged the possibility of happily-ever-after unions emanating from workplaces. Besides, there is no law prohibiting workplace romance. It is from this score that the author argues for a great circumspection when dealing with sexual harassment cases to avoid the risk of confusing a genuine attempt to propose a love relationship, or workplace flirtations or ordinary socialising, with sexual harassment. Surely, there is a fine line.

There is only one way a proposer can make the proposed aware of a sexual proposition. That is through an expression, which may be welcomed or not welcomed by the recipient. It does not follow that if a recipient does not reciprocate, he or she has been harassed sexually – except where a

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78 *Campbell Scientific Africa (Pty) Ltd v Simmers supra* par 32.

79 *Bandat v De Kock Consulting Engineering CC supra* par 74. See also *University of Venda v Maluleke supra* 65.

80 Par 26.

81 *Bandat supra* par 87.

82 *Rustenburg Platinum Mines Ltd v UASA obo Pietersen supra* par 40.

single yet objectively serious incident is at issue.[83] Law that is in touch with reality requires the recipient to make it clear to the proposer when behaviour is unwelcome or offensive.[84] Naturally, an expression of a "yes" or a "no" will be sufficient. If a "no" is expressed and the proposer persists, then the conduct becomes sexual harassment.[85]

The *Maepe* decision (as per Jappie JA) raised a logically important question as to how the appellant would have known that advance(s) made were unwelcome if the complainant did not express that.[86] To walk away or push the harasser away (as occurred in the *Maluleke* case) seems to be a clear, though non-verbal, way of showing discomfort or indicating disapproval of the advance.[87] Yet, being docile or sharing sexual experiences or sending a "Little Love" card as a birthday wish to the harasser cannot by any stretch of the imagination be described as disapproval.[88] The latter conduct seems, to the author, to be probable actions from a willing participant. Similar would be to say "I will think about it", as was the case in *Maluleke*.[89]

On the other hand, there is a devoted voice that argues against a complainant's obligation to inform a perpetrator of the unwelcomeness of the advances. Proponents of this view argue that power differentials may play a role. In this regard, it is argued that junior employees, who are the most likely victims of sexual harassment by influential senior colleagues, are less likely to report for fear of victimisation.[90] This is arguably a preposterous view and should not be sustained. First, the Amended Code offers comprehensive protection to the victims of sexual harassment.[91] In terms of item 6, a climate should be created and maintained in which victims of sexual harassment do not feel that their grievances are ignored or trivialised for fear of reprisal; and that employees will be protected against victimisation, retaliation for lodging grievances and from false accusations. Secondly, the Amended Code encourages victims to report sexual harassment while guaranteeing protection to the victim against employers who may want to frustrate processes that deal with sexual harassment.[92] The third reason is evidence of forethought by the drafters of the code. Realising the sensitivity of sexual harassment, tailor-made processes are provided to deal with sexual harassment cases in terms of item 8 of the Amended Code, which says that sexual harassment is a sensitive issue and a victim may feel unable to approach the perpetrator, lodge a formal grievance or turn to colleagues for support. To cure this, the Code urges

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83 *Campbell Scientific Africa (Pty) Ltd v Simmers supra* par 31. See also Item 3(2)(a) of the Code and item 5.3.3 of the Amended Code.

84 Item 3(2)(b) of the Code. See Hopkins and Lewis *Another World is Possible* 177. Grogan *Workplace Law* 111.

85 Item 3(2)(a) of the Code.

86 Par 12.

87 *University of Venda v Maluleke* (2017) 38 *ILJ* 1376 (LC) par 30.

88 *SA Metal Group (Pty) Ltd v CCMA supra* par 3. See also *Vodacom Service Provider Company (Pty) Ltd v Phala supra* par 5.

89 *University of Venda v Maluleke supra* 73.

90 *Rustenburg Platinum Mines Ltd v UASA obo Pietersen supra* par 47.

91 Items 5, 6, 7, 8 and 9 of the Amended Code.

92 Item 7 read with 9 of the Amended Code.

employers to designate a person outside of line management whom victims may approach for confidential advice. This person could be a trained trade union representative, a co-employee with appropriate skills and experience, or be properly trained and armed with adequate resources.

In addition to that, more support is provided in terms of section 60 of the EEA, which penalises employers who fail to deal with reported sexual harassment cases. Subsection 3 provides that if an employer fails to take the necessary steps referred to in subsection 2, and it is proved that an employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision. Cases in point are *Ntsabo v Real Security CC,*[93] *Media 24 Ltd v Grobler,*[94] *Liberty Group Limited v M*,[95] *K v Minister of Safety & Security,*[96] *Christian v Colliers Properties and Makoti v Jesuit Refugee Service SA.*[97] What is glaringly obvious is that victims of sexual harassment are relatively well protected – enough to allay fears about reporting owing to power dynamics. As demonstrated, there are laws and codes that provide all kinds of support to the victims of sexual harassment.

5 CONCLUSION

South Africa has developed a network of legal interventions, as discussed above, to deal with sexual harassment at workplaces. Legislation and codes of good practice have gone so far as to create accessible procedures (formal or informal) and advice desks to enable complainants to report their grievances, while also guaranteeing them protection against vengeance and the promise of confidentiality. Employee victims may even resign and claim constructive dismissal.[98]

What is glaringly obvious from the case law discussed is that most victims are women who are occupationally in the lower ranks. If this is correct, then the solution is to start taking the women empowerment agenda more seriously. There is also a view (which the author with much due respect, doubts) that there is a prevailing misogynistic culture in society.[99] The latter view cannot be reconciled with the statistical reports at the time of writing of this article.[100]

It is the author's humble view that existing regulatory interventions in South Africa on sexual harassment are sufficient and that the only problem is the overly subjective approach the courts and CCMA have adopted. This approach incorrectly expects the proposer to foresee what the recipient's response to a proposition would be. The result of that exercise should not be the law but explains why there is a certainty crisis insofar as conduct constituting sexual harassment is concerned. Lessons should be taken from

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93 (2004) 1 BLLR 58 (LC).

94 (2005) 7 BLLR 649 (SCA).

95 *Supra.*

96 (2007) 8 BLLR 749 (CC).

97 *Supra.*

98 Section 186(1)(*e*) of the LRA.

99 *Rustenburg Platinum Mines Ltd v UASA obo Pietersen supra.*

100 Smit https://www.fin24.com/Economy/dismaying-level-of-sexual-harassment-in-corporate-sa-survey.

the decision of *Reed*, where a so-called partially subjective approach is used. This approach is not only sensible but is in touch with reality. It is practical and resonates with common sense. It is submitted that the concerns raised in this article, although historical, remain valid as they are not addressed in the Amended Code. Therefore, changes introduced in the Amended Code have taken us nowhere and, if anything, contribute to more uncertainty as to what conduct constitutes sexual harassment.

Alternatively, a law prohibiting sexual relationships in the workplace and/or related conducts should be enacted. This would not be a new thing. For example, basic educational institutions in South Africa have in place a policy prohibiting educator-learner relationships.[101]

Lastly, the courts are courts of law and not of emotions – and courts should apply the law all the time if legal certainty is to be realised. An individual's say-so cannot be the law and will never offer the legal certainty we so much need.

[101] S 17(1)(*g*) of the Employment of Educators Act 76 of 1998 provides that an educator is guilty of misconduct if the educator … commits sexual or any other form of harassment. See items 3.8, 3.9, 3.10 and 3.11 of the South African Council for Educators Code of Professional Ethics https://www.sace.org.za/assets/.../sace_58684-2018-11-22-Ethics%20 brochure.pdf. See also Coetzee "Law and Policy Regulating Educator-on-Learner Sexual Misconduct" 2012 1 *Stell LR* 76 76.

TEACHING HUMAN RIGHTS IN COMMONWEALTH UNIVERSITY LAW SCHOOLS: APPROACHES AND CHALLENGES, WITH PASSING REFERENCES TO SOME SOUTH AFRICAN EXPERIENCES*

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SUMMARY

There have been a number of international commitments by members of the United Nations, including Commonwealth countries, to include human-rights education in their formal and informal education programmes. In addition, the Commonwealth Legal Education Association (CLEA), under the auspices of the Commonwealth Secretariat, has produced a Model Human Rights Curriculum for Commonwealth countries. Despite these initiatives, there appears to have been no systematic programme for introducing human-rights education at Commonwealth universities. An increasing number of Commonwealth law schools, however, have introduced human-rights law by integrating it into existing law courses as a "stand-alone" optional or core course, or as a combination of both. In addition, university-based centres for human rights have been established. The importance of the role that universities can play in advancing human rights in countries transitioning from autocracy to democracy is illustrated with passing references to the South African experience.

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1 INTRODUCTION

The inclusion of human-rights education is a comparatively recent addition to the curriculum of many law schools in the world. This is despite allusions to it in the Universal Declaration of Human Rights[1] as long ago as 1948:

> "Everyone has the right to education … Education should be directed to the full development of the human personality and to strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups … for the maintenance of peace."[2]

Subsequently, the United Nations Decade for Human Rights Education[3] (the Decade) was introduced to encourage more widespread implementation of human-rights education in both formal and informal education programmes. The Decade was adopted by all UN member states that also affirmed the Plan of Action for the United Nations Decade for Human Rights Education, 1995–2004[4] (Plan of Action**)**. The Plan of Action stated:

> "Education for the purpose of the Decade shall be conceived to include the equal participation of women and men of all age groups and all sectors of society both in formal learning through schools and vocational and professional training, as well as in non-formal learning through institutions of civil society, the family and the mass media."[5]

The Plan of Action also imposed a duty on governments, *inter alia*, to:

> "[P]lay an active role in the implementation of the programme of the Decade through the development of national plans of action for human rights education [and] the introduction or strengthening of national human rights curricula in their formal educational systems."[6]

In 2000, the Commonwealth Education Ministers issued a joint statement in which they observed:

> "The use of education to promote values of democracy, human rights, citizenship, good governance, tolerance … as espoused by the Commonwealth in its key declarations of principles, should be strengthened."[7]

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1 Universal Declaration of Human Rights (1948).

2 Art 26.

3 Adopted by the UN General Assembly, Resolution 49/184, A/RES/49/184, 23 December 1994. This was in line with the 1991 Harare Declaration adopted by the Commonwealth Heads of Government, in which they pledged "to work with renewed vigour" *inter alia*, "concentrating especially in the following areas: … fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief; [and] equality for women, so that they may exercise their full and equal rights" (The Harare Commonwealth Declaration (1991) (Issued by Heads of Government in Harare, Zimbabwe); http://thecommonwealth.org/sites/default/files/history-items/documents/Harare%20Commonwealth%20Declaration%201991.pdf (accessed 2019-04-24)).

4 UN General Assembly, A/51/506/Add.1, 12 December 1996.

5 Par 5.

6 Par 11.

7 "Joint Statement" 14th Conference of Commonwealth Education Ministers, Halifax, Nova Scotia, Canada (30 November 2000).

Despite these international commitments by Commonwealth governments, human rights still does not appear to be a core academic course in all Commonwealth law schools. Nonetheless, research and teaching of human rights has grown exponentially in the last half-century. Human rights has become a subject on its own in many university curricula:

> "It also constitutes a vital component of courses in other fields, figuring ever more significantly in research and writing, in advocacy-oriented clinical work, and in programs or centres within different faculties (schools) or at the university level."[8]

Although, by its nature, human rights is both interdisciplinary and multi-disciplinary, most of the research and teaching of human rights takes place in the field of law. It is for this reason that law schools have an important role to play in the teaching of human rights.

This article discusses the various approaches adopted by law schools in the Commonwealth, with passing references to the role of South African law schools during apartheid, and the country's subsequent transition to democracy. These approaches include integrating human rights into the curriculum, using moots based on human-rights cases, introducing clinical legal education in the context of social justice, providing research on human-rights issues and establishing university-based human-rights centres The challenges faced by law schools in teaching human rights are highlighted and analysed before conclusions and recommendations are made.

2 THE ROLE OF LAW SCHOOLS

For the purposes of this article, the reference to "law schools" is a generic term that refers to schools of law, faculties of law and colleges of law where students acquire legal education that generally leads to an undergraduate or postgraduate legal qualification. Other short courses and programmes may also be offered. Law schools are usually attached to a university or higher education institution. However, they may also be independent institutions, such as those that run a one- or two-year professional programme, the passing of which is a prerequisite to join the legal profession as an attorney or advocate.[9]

The role of law schools in teaching human rights must be seen in the context of the place of universities generally in human-rights movements. In determining this role, a number of questions come to mind. Should the university be part of the human-rights movement advocating for transformative change and the realisation of human rights? Or, should the university be a mere participant in the human-rights debate? Should the university's approach towards human rights be different from their approach to other fields and disciplines? What is the relevance of a university's human-rights curriculum and scholarship to the human-rights movement?

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8 Steiner "The University's Critical Role in the Human Rights Movement" 2002 *Harvard Human Rights Journal* 317.

9 Examples of such independent Commonwealth institutions are the College of Law in Australia and New Zealand, the law schools in Nigeria and Kenya, the Law and Development Centre in Uganda and the School for Legal Practice in South Africa.

These and other questions were addressed by a project organised by the Harvard Law School Human Rights Programme in 1999, which concluded:

> "A fundamental task of the universities should be to systemize the text of human rights – to critically examine the corpus, to identify conceptual gaps and inconsistencies, to clarify and expand the scope of the text, and to critique institutions that participate in the production and promotion of human rights norms."[10]

The project further concluded that "the university should not be directly involved in advocacy, except to act as a forum for clinical hands-on training for students."[11]

This "hands-off" approach to activism by universities in human-rights movements might be appropriate for a stable democracy, which the United States may have been at the time, but is inappropriate for transitional Commonwealth countries where law schools can play an invaluable part in shaping and leading the struggle for human rights. For instance, during the apartheid era in South Africa, some legal academics provided a valuable leadership role in the pursuit of a just society based on fundamental human rights.[12] In addition, the universities themselves were able to provide protection for numerous civil society organisations that would otherwise have been exposed to threats by the apartheid regime.[13] However, many of the law schools remained silent and did not publicly condemn the apartheid-era human-rights violations. This prompted the President and Vice-President of the-then Society of University Teachers of Law (SUTL) to appear before the Truth and Reconciliation Committee and apologise that law schools did not do more publicly to protect and promote human rights during apartheid.[14]

Human rights should be taught in law schools because protecting human rights should be a foundational principle of law teaching. Law schools have an obligation and a responsibility to ensure that their students are exposed to the basic principles of human rights. This is because of the link between human rights and other legal subjects such as constitutional law, administrative law, criminal law and labour law.

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[10] See "Human Rights@Harvard Law" http://hrp.law.harvard.edu/academic (accessed 2019-04-26).

[11] *Ibid.*

[12] See, for instance, some of the academics referred to in McQuoid-Mason "Access to Justice and the Role of Law Schools in Developing Countries: Some Lessons From South Africa: Part 1: Pre–1970 Until 1990" 2004 *Journal for Juridical Science* 28–51; McQuoid-Mason "Access to Justice and the Role of Law Schools in Developing Countries: Some Lessons From South Africa: Part 2: 1990 Until the Present" 2005 *JJS* 1–16. See also McQuoid-Mason "Teaching Human Rights in a Hostile Environment: A Lesson From South Africa" 2003 *Windsor Yearbook of Access to Justice* 213–238.

[13] *Ibid.*

[14] The second author was President of SUTL at the time and requested all law deans to give an account of why their law schools did not publicly promote or protect human rights: see Society of University Teachers of Law "Truth and Reconciliation Commission Submissions by the Society of University Teachers of Law and Certain Law Schools" 1997 *SALJ* 101–110.

3 APPROACHES OF LAW SCHOOLS IN THE COMMONWEALTH

The most common methods of accommodating human-rights education in law schools are to integrate human rights into the curricula of other courses, to teach human rights as a "stand-alone" course, or to offer a combination of both.

3 1 Integrating human rights into the law curriculum as part of other courses

Traditionally, law schools in the Commonwealth have taught human rights by integrating human-rights law into the core curriculum. Here, human rights is included as part of other courses delivered through lectures, seminars and tutorials. In order to do this effectively, law teachers should design their courses to ensure that the human-rights components form an essential part of their curriculum, and are not regarded merely as a peripheral "add-on" component. In many countries, this has led to the revision of core law courses to ensure an infusion of human-rights concepts throughout the curriculum. This usually happens as a result of a transition from an autocratic regime to a democratic dispensation.

An example of such a transition is the integration of an understanding of human rights into LLB degrees in South African law schools following the commencement of the post-1994 democratic order[15] and the adoption of a new constitution that for the first time contained a bill of rights.[16] Section 7(2) of the 1996 Constitution requires the State, *inter alia*, to "promote … the rights in the Bill of Rights", which clearly includes human-rights education. Likewise, section 24 of the Equality Act[17] provides that both the State and "all persons" have "a duty and a responsibility to promote equality". This is a duty that falls on both state-funded and private law schools and can best be done by including human rights in the curriculum.

Integrating human-rights concepts into university courses and programmes helps students understand societal and global problems through a human-rights lens, thereby inculcating a sense of social responsibility. As a result, students become better positioned to integrate human rights into their lives, their families, their communities and their future careers. The other important link between law schools and an embedding of human-rights values in society is through university law teachers and scholars.[18] Through their scholarship, law academics can influence the

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[15] For instance, during 1994, the second author, as Dean of the Faculty of Law at the University of Natal, Durban arranged for a series of workshops whereby all faculty law teachers were required to revise their courses to incorporate relevant sections from the interim Constitution that would impact on their disciplines (personal knowledge of the second author).

[16] First, in terms of Chapter 3 of the interim Constitution of the Republic of South Africa Act 200 of 1993, and subsequently in Chapter 2 of the final Constitution of the Republic of South Africa, 1996.

[17] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

[18] See Steiner 2002 *Harv Hum Rts J* 317.

thinking and practice of human rights in society. Such influences potentially have a direct impact on the way human rights are understood and protected in any society within which those scholars and academics operate.[19]

3 2 Including human rights as a separate course in the curriculum

Another method of integrating human rights into law schools curricula is to make it a subject on its own, dealing specifically and exclusively with human-rights issues. This enables students to acquire more specialised theoretical and practical knowledge about human rights. It was with this in mind that the Commonwealth Legal Education Association (CLEA) developed a Model Human Rights Curriculum for the Commonwealth Secretariat Human Rights Unit.[20] Initially developed in 1999 and revised in 2006, the Model Curriculum was intended "to provide a model for Commonwealth Law Schools…in offering a course on human rights to their undergraduate students (or in developing and strengthening existing courses)."[21] It was also meant to facilitate the establishment and development of specific courses in human rights throughout the Commonwealth, in addition to assisting "in integrating human rights components, perspectives and principles into other subject courses."[22]

The Commonwealth Model Human Rights Curriculum covers the following topics: (i) an overview of human-rights education in the Commonwealth; (ii) considerations in constructing a course in human rights; (iii) a model human-rights curriculum for Commonwealth universities and schools; and (iv) further course materials, links and research resources.[23] A detailed discussion and analysis of the Commonwealth Model Human Rights Curriculum is beyond the scope of this article. The Model Curriculum is "intended as a teacher's resource, to suggest and describe what might be possible components of a notional course in human rights." It recommends a structure, provides reading lists and suggests ideas on methodology and leaves "the teacher to plan and provide the substance and content."[24]

It is not clear to what extent the Model Curriculum has been adopted or used by law schools in the Commonwealth. What is clear is that the existence of such a resource is testimony to the significance that the Commonwealth places on the role of law schools in human-rights education.

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19 *Ibid.*

20 See Commonwealth Secretariat "Model Human Rights Curriculum for Commonwealth Universities and Law Schools" http://www.clea-web.com/wp-content/uploads/2014/10/Commonwealth_Model__International_Human_Rights_Curriculum.pdf (accessed 2019-04-25).

21 *Ibid.*

22 *Ibid.*

23 *Ibid.*

24 *Ibid.*

3 3 Combining integrating human rights into other curricula and offering it as a separate course

It is possible for law schools to integrate human rights into the curricula of other courses and simultaneously to offer human rights as a separate course. For instance, core substantive courses can incorporate the effect of fundamental human-rights provisions in a country's constitution on the interpretation and development of the common law. In addition, a self-contained human-rights course can deal historically and holistically with relevant broad human-rights principles.

4 MOOTS ON HUMAN-RIGHTS ISSUES

There is no shortage of literature on the pedagogical value of moot courts in the curriculum of law schools.[25] In the context of human-rights education, it has been argued that moots play an important role in "assisting students to learn the substantive principles of human rights law as well as their practical application."[26] Through undertaking research and preparing to argue a particular human-rights position, students are able to increase their knowledge of human rights. They are also able to embrace the fundamental principles of human rights and understand the legal principles mentioned in international human-rights instruments such as the Universal Declaration of Human Rights,[27] the International Covenant on Civil and Political Rights,[28] the International Covenant on Social Economic and Cultural Rights,[29] and numerous other conventions and treaties.

Moots are usually conducted as competitions. Such competitions can take various forms – from internal (to the school), to national (between institutions in a particular country), to international competitions. International moot court competitions are particularly important as they expose students to different legal and human-rights systems. Such competitions also involve "researching international sources and gaining new perspectives on complex legal problems that affect everyone."[30]

There are numerous national and international moot court competitions in the Commonwealth. The following are some examples of international moot competitions with a specific human-rights focus:

- Commonwealth Moot Competition, organised by the Commonwealth Legal Education Association (CLEA) for the Commonwealth Lawyers Association (CLA) biennial conferences;[31]

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[25] See Gerber and Castan "Practice Meets Theory: Using Moots as a Tool to Teach Human Rights" 2012 *Journal of Legal Education* 298. See also Dickerson "In re: Moot Court" 1999 *Stetson Law Review* 1217.

[26] See Gerber and Castan 2012 *J Legal Educ* 298.

[27] United Nations Universal Declaration of Human Rights (1948).

[28] United Nations International Covenant on Civil and Political Rights (1966).

[29] United Nations International Covenant on Social Economic and Cultural Rights (1966).

[30] Spillane *International Moot Court: An Introduction* (2008) 7.

[31] See CLEA "2019 Commonwealth Student Moot" http://www.clea-web.com/events-conferences/zambia-2019/2017-moot/ (accessed 2019-04-25).

- Henry Dunant Memorial Moot Court Competition, organised by the International Committee of the Red Cross (ICRC) in collaboration with the Indian Society of International Law;[32]
- African Human Rights Moot Competition, organised by the Centre for Human Rights, University of Pretoria;[33] and
- Nelson Mandela World Human Rights Moot Court Competition, also organised by the University of Pretoria Centre for Human Rights in partnership with the Academy on Human Rights, Washington College of Law, American University and the United Nations Human Rights Council Branch (HRCB) of the Office of the High Commissioner for Human Rights (OHCHR).[34]

Such competitions provide a useful tool for the promotion of human-rights education in law schools in the Commonwealth.

While national and international moot court competitions tend to be in the limelight, it is important to acknowledge the value of moots organised in law schools as part of professional training programmes or as stand-alone courses. For example, at Nelson Mandela University, "Moot Court" is an elective stand-alone course that focuses on human-rights cases.[35] Such moots provide an opportunity for law students to learn about human rights in a dynamic and practical way at their own institutions.

5 CLINICAL LEGAL EDUCATION AND HUMAN RIGHTS

Clinical legal education has been referred to as "a course of study combining a classroom experience with representation by students of clients with real cases or projects, under the supervision of a full-time faculty member".[36] It has also been defined as "a method of teaching practical legal skills to law students using interactive, reflective learning methods in a social justice environment".[37] Clinical legal education is usually provided through law clinics, which ordinarily are attached to law schools.[38] There are a wide variety of law clinics operating at law schools in different parts of the

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32 Indian Society of International Law "Henry Dunant Memorial Moot Court Competition" http://moot_court_compt.htm (accessed 2020_04_09).

33 Wikipedia "African Human Rights Moot Court Competition" http://www.en.wikipedia.org/wiki/African_Human_Rights_Moot_Competition (accessed 2019-04-25).

34 Centre for Human Rights, University of Pretoria "Nelson Mandela World Human Rights Moot Court Competition" http://www.chr.up.ac.za/moot-courts/nelson-mandela-world-human-rights-moot-court-competition/english-site (accessed 2020_04_09).

35 Nelson Mandela University *Faculty of Law Prospectus* (2019) 29.

36 Wilson "Clinical Legal Education for Human Rights Advocates" in Andreopoulos and Claude (eds) *Human Rights Education for the Twenty-First Century* (1997) 261.

37 McQuoid-Mason "Introduction to Clinical Law" in Mahomed (ed) *Clinical Law in South Africa* 3ed (2016) 1.

38 See, generally, Bloch (ed) *The Global Clinical Movement: Educating Lawyers for Social Justice* (2010); Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* (2018).

Commonwealth, including general practice clinics, specialist clinics, public-interest law clinics and Street Law-type public legal awareness clinics.[39]

The importance of law clinics in legal education generally, and human-rights education in particular, cannot be overemphasised, considering that they are established with two main aims: first, to provide training and practical legal skills for law students; and, secondly, to provide free legal services to poor and marginalised clients.[40] As a result of the socio-economic circumstances of such clients, the matters that come to law clinics often have human-rights dimensions.[41]

Live-client law clinics provide law students with the opportunity to give legal assistance and advice, and in the process, to reflect on how law operates in society and how best to help poor and marginalised clients.[42] Street Law-type clinics enable students to visit institutions like schools, prisons and community-based organisations to provide the participants with information about the law and legal processes, and to learn at first hand of the challenges faced by ordinary people when they come into conflict with the law.[43] By handling such matters, students are able to engage practically with real human-rights issues in a practical and participatory way:

> "Human rights cannot be adequately taught through classroom lectures … [S]tudents need to feel the problem marginalized communities face by working directly with them. They can then understand, appreciate, and personalize these problems. They become real, not classroom theories."[44]

In summary, it is not only students who acquire human-rights education from law clinics. Ordinary people who access the clinics' services also benefit by being provided with legal assistance and advice on human-rights

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[39] See, generally, Giddings, Burridge, Gavigan and Klein "The First Wave of Modern Clinical Legal Education: The United States, Britain, Canada and Australia" in Bloch (ed) *The Global Clinical Movement* 3–22; McQuoid-Mason, Ojukwu and Wachira "Clinical Legal Education in Africa: Legal Education and Community Service" in Bloch (ed) *The Global Clinical Movement* 23–36; Lasky and Prasad "The Clinical Movement in South East Asia and India: A Comparative Perspective and Lessons to be Learned" in Bloch (ed) *The Global Clinical Movement* 37–51; Sarker (ed) *Clinical Legal Education in Asia: Accessing Justice for the Underprivileged* (2015); McQuoid-Mason "Law Clinics at African Universities: An Overview of the Service Delivery Component With Passing References to Experiences in South and South East Asia" *Special Issue on Clinical Legal Education* 2008 *JJS* 1–23; Mubangizi and McQuoid-Mason "The Role of University Law Clinics in Public Interest Litigation, with Specific Reference to South Africa" 2013 *JJS* 47.

[40] McQuoid-Mason "Teaching Social Justice to Law Students Through Clinical Legal Education and Community Service: A South African Experience" in Qafisheh and Rosenbaum (eds) *Experimental Legal Education in a Globalized World: The Middle East and Beyond* (2016) 333–343.

[41] See McQuoid-Mason in Qafisheh and Rosenbaum (eds) *Experimental Legal Education* 334–339.

[42] See Giddings, Burridge, Gavigan and Klein in Bloch (ed) *The Global Clinical Movement* 3–22; McQuoid-Mason, Ojukwu and Wachira in Bloch (ed) *The Global Clinical Movement* 23–36; Lasky and Prasad in Bloch (ed) *The Global Clinical Movement* 37–51.

[43] See Grimes, McQuoid-Mason, O'Brien and Zimmer "Street Law and Social Justice" in Bloch (ed) *The Global Clinical Movement* 225–251.

[44] Ezer, Deshko, Clark and Kameni "Promoting Public Health Through Clinical Legal Education: Initiatives in South Africa, Thailand, and Ukraine" 2010 *Human Rights Brief* 32.

issues during consultations in live-client clinics, or learning about human rights when participating in Street Law-type legal literacy programmes.[45]

6 RESEARCH ON HUMAN RIGHTS

The term "research" is used broadly here to refer to all forms of knowledge production and associated activities, such as academic scholarly publications, conferences, colloquiums, round-table discussions, symposia and workshops. Through these research activities, human-rights education can be enhanced, particularly in countries that are subject to oppressive regimes[46] and hostile to human rights.[47] Indeed, there is no doubt a close link between human-rights education, research into human rights, and human-rights practice. This is because each of these contributes to the advancement of the others. It is for this reason that the United Nations Plan of Action for the Second Phase of the World Programme for Human Rights Education highlighted the importance of human-rights research as follows:

> "Higher education institutions develop new knowledge and advance critical reflection in the area of human rights, which in turn inform policies and practices in human rights and in human rights education. Through an assessment of existing experiences and comparative studies, research can support the identification and dissemination of good practices as well as the development of innovative methodologies and tools based on those practices; research can also guide lesson-learning and evaluation exercises."[48]

Law schools play an important role in legal research generally, including research into human rights. As a result of the doctrine of academic freedom, which, for example, is enshrined in the South African Constitution,[49] academics are able to pursue fields of research and lines of inquiry without control or restraint or any fear of retribution from their institutions, although a repressive government may sometimes have other ideas, as occurred in apartheid South Africa. For instance, during apartheid, the more liberal English-speaking "open" universities tolerated their law academics engaging directly in confrontations with the apartheid government over human-rights violations, but the law teachers concerned were sometimes prosecuted by

[45] See McQuoid-Mason in Qafisheh and Rosenbaum (eds) *Experimental Legal Education* 339–343.

[46] See, for instance, during the apartheid era in South Africa, a few academic works were published that sought to promote human rights, such as Mathews *Law, Order and Liberty in South Africa* (1971); Van Niekerk "The Warning Voice from Heidelberg: The Life and Thoughts of Gustav Radbruch" 1973 90 *SALJ* 234; Dugard *Human Rights and the South African Legal Order* (1978); and the publication in 1986 of the first volume of the *South African Journal on Human Rights*: 1986 *SAHJR*, published by the Centre for Applied Legal Studies at the University of the Witwatersrand.

[47] McQuoid-Mason in Qafisheh and Rosenbaum (eds) *Experimental Legal Education* 213–238.

[48] United Nations, Plan of Action for the Second Phase of the World Programme for Human Rights Education 2012, (HR/PUB/12/3) http://www.ohchr.org/Documents/Publications/WPHRE_Phase_2_en.pdf (accessed 2019-04-26).

[49] S 16(1)(*d*).

the State.[50] In such cases, law teacher associations can provide moral and professional support for their embattled colleagues.[51]

Academic research into human-rights issues, like other research, is usually subject to peer review and critical analysis. Through publications, conferences, workshops and other platforms, research findings and new knowledge in human rights can be disseminated broadly to society and the general public. Studies have shown that good researchers make good teachers.[52] It is therefore not only students and their lecturers that benefit from human-rights research. The legal profession also benefits as law firms, judges and other legal practitioners make use of the new knowledge produced in books and articles published by leading academics in the field of human rights. Moreover, research about human rights also informs policy formation and the development and application of the relevant law in courts and legislatures. For instance, academics played an important role on the technical committees that drafted the fundamental rights chapters in the interim[53] and final[54] South African constitutions during the transition from apartheid.[55]

7 CENTRES OF HUMAN RIGHTS

A significant approach adopted by many Commonwealth law schools is the establishment of centres of human rights. Such centres play an important role in human-rights education. The establishment of these centres is part of the growing realisation that human-rights education has a significant place in legal education – a role that goes beyond teaching and research – and marks a philosophical change in legal education. Such an approach has policy implications nationally, and seeks to make law schools responsive to the needs of students, educators and society in general.[56] In doing so, the centres usually provide space for human-rights work intended to benefit marginalised and underprivileged members of society. Such centres also contribute to the intellectual climate of their law schools and universities by formulating cutting-edge programmes such as postgraduate human-rights

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[50] For instance, Professor Barend van Niekerk at the University of Natal, was prosecuted for (but not convicted of) contempt of court for showing statistically that black South Africans were sentenced to death more often than white citizens for the same types of crime: *S v Van Niekerk* 1970 (3) SA 655 (T). See also Rhadamanthus “Contempt of Court: The Trial of Barend van Dyk van Niekerk” 1970 *Acta Juridica* 77.

[51] In addition to academic colleagues providing material and other support for Professor van Niekerk, the Society of University Teachers of Law issued a strong statement condemning the violation of academic freedom by the State in prosecuting him: “Statement by the Council of the Society of University Teachers of Law” 1970 *SALJ* 467.

[52] Sutherland and Wolhuter “Do Good Researchers Make Good Teachers?” 2002 *Perspectives in Education* 77–83.

[53] Chapter 3 of the Constitution of the Republic of South Africa Act 200 of 1993.

[54] Chapter 2 of the Constitution, 1996.

[55] See Technical Committee on Fundamental Rights During the Transition *Ad Hoc Committee Minutes of the Technical and Ad Hoc Committees of the Multi-party Negotiating Forum Relating to the Chapter on Fundamental Rights in the New Constitution (Chapter 3 of the Republic of South Africa Constitution Bill 1993)* (1993).

[56] See Wildman “Democracy and Social Justice: Founding Centers for Social Justice in Law Schools” 2005 *J Legal Educ* 257.

law courses, and sponsoring high-level multiple extracurricular human-rights activities, such as moots and law clinics.

Several Commonwealth law schools have centres of human rights. The following are some examples:

- Centre for Human Rights Education at Curtin University in Perth, Australia;[57]
- Castan Centre for Human Rights at Monash University, Australia;[58]
- Australian Human Rights Institute, University of South Wales, Australia;[59]
- Human Rights Research and Education Centre, University of Ottawa, Canada;[60]
- Centre for the Study of Human Rights, London School of Economics, United Kingdom;[61]
- Centre for Human Rights in Practice, Warwick University, United Kingdom;[62]
- Human Rights Centre, University of Durham, United Kingdom;[63]
- Human Rights Centre, University of Essex, United Kingdom;[64]
- Human Rights Centre, University of Nottingham, United Kingdom;[65]
- Human Rights Centre, Queen's University, Belfast, Northern Ireland, United Kingdom;[66]
- Centre for Human Rights, University of Pretoria, South Africa;[67]
- Human Rights and Peace Centre (HURIPEC), Makerere University, Uganda;[68]
- Human Rights Centre, University College Lahore, Pakistan;[69] and

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[57] See Curtin University "Centre for Human Rights Education" http://humanrights.curtin.edu.au/ (accessed 2019-04-26).

[58] See Monash University "Castan Centre for Human Rights Law" http://www.monash.edu/law/research/centres/castancentre (accessed 2019-04-26).

[59] See UNSW Sydney "Australian Human Rights Institute" http://www.humanrights.unsw.edu.au/ (accessed 2019-04-26).

[60] See uOttawa "Human Rights Research and Education Centre" http://cdp-hrc.uottawa.ca/en/about_us (accessed 2019-04-27).

[61] See The London School of Economics and Political Science "LSE Human Rights" http://www.lse.ac.uk/sociology/human-rights (accessed 2019-04-26).

[62] See School of Law, University of Warwick "Centre for Human Rights in Practice" http://www.warwick.ac.uk/fac/soc/law/research/centres/chrp (accessed 2019-04-26).

[63] See Durham University "Human Rights Centre" http:// www.dur.ac.uk/hrc (accessed 2019-04-26).

[64] See University of Essex "Human Rights Centre" http://www.essex.ac.uk/hrc (accessed 2019-04-26).

[65] See University of Nottingham "Human Rights Law Centre" http://www.nottingham.ac.uk/hrc/ (accessed 2019-04-26).

[66] See Queen's University Belfast "The Human Rights Centre" http://law.qub.ac.uk/schools/SchoolofLaw/research/ (accessed 2020-04-13).

[67] See Centre for Human Rights, University of Pretoria "Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa" http://www.chr.up.ac.za (accessed 2019-04-26).

[68] See Human Rights & Peace Centre, School of Law, Makerere University "Welcome to HURIPEC" http://www.huripec.mak.ac.ug/ (accessed 2019-04-26).

[69] See University College Lahore "University College Lahore Human Rights Centre" http://www.ucl.edu.pk/hrc.html (accessed 2019-04-26).

- Centre for Human Rights and Duties, Panjab University, India.[70]

The list is not exhaustive, but indicates that there are many centres of human rights in law schools spread across the Commonwealth.

Some human-rights centres located at law schools, such as the Centre for Human Rights at the University of Pretoria (CHRUP) in South Africa, were originally established to combat a repressive regime – in CHRUP's case, to deal with apartheid through human-rights education and other means. Subsequently, CHRUP has attained a continental reach and engages in "the wide dissemination of publications on human rights in Africa and the improvement of the rights of … disadvantaged or marginalised persons or groups across the continent."[71] Such centres may also establish human-rights law clinics, undertake research and advocacy, provide post-graduate and advanced human-rights courses, and organise international human-rights moot court competitions.[72]

Centres located in other faculties, such as the Centre for Human Rights Education at Curtin University (CHRECU) in Australia, based in the Faculty of Humanities, might specifically focus on human-rights education and have a more multi-disciplinary approach. They may also engage in "research, education and advocacy in human rights".[73] For example, as a multi-disciplinary centre, CHRECU "draws on scholarship, research and expertise from a variety of disciplines and professions, including philosophy, political science, sociology, education, health sciences, social work, law, international relations, psychology, anthropology, business and media studies."[74]

8 CHALLENGES WHEN INTRODUCING HUMAN RIGHTS INTO THE LAW CURRICULUM

Law schools face several challenges in the Commonwealth and elsewhere, when introducing human rights into the law curriculum. Mention was made earlier of the Model Human Rights Law Curriculum developed by CLEA for the Human Rights Unit of the Commonwealth Secretariat.[75] In developing the Model Curriculum, it was acknowledged that due to the nature and structure of legal studies generally, most Commonwealth law schools have no systematic programme for the teaching of human rights. As a result, human-rights issues are often dealt with piecemeal in other courses, such as constitutional law, public international law or criminal law. Official statistics

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70 See Panjab University "Centre for Human Rights & Duties (U.I.E.A.S.S)" http://humanrights.puchd.ac.in (accessed 2019-04-26).

71 See Centre for Human Rights, University of Pretoria "Overview" http://www.chr.up.ac.za (accessed 2020-04-13).

72 Centre for Human Rights, University of Pretoria http://www.chr.up.ac.za

73 See Fleay and Briskman "Human Rights Education at Curtin University: The Interconnections of Education, Research and Advocacy" in *Human Rights Education in Asia-Pacific* (2011) 227.

74 See Curtin University "Centre for Human Rights Education" http://humanrights.curtin.edu.au/about/ (accessed 2019-04-26).

75 See Commonwealth Secretariat http://www.clea-web.com/wp-content/uploads/2014/10/Commonwealth_Model__International_Human_Rights_Curriculum.pdf.

are not available but, anecdotally, it seems that not many Commonwealth law schools have adopted the Model Curriculum.[76]

Another challenge is the teaching methodology. As a result of the principles of academic freedom and institutional autonomy, different law schools and academics adopt different methods of teaching human rights. Studies have shown that the most effective way of teaching law, including human-rights law, is to use interactive teaching methods,[77] and that lecturing is one of the least effective methods of learning for students.[78] Hence the move towards clinical legal education.[79] However, the reality is that the majority of law teachers in the Commonwealth probably still rely on the lecture method.

A further challenge is that while some law schools require human rights as a core course in their programme, others prefer to offer it as an elective, while yet others might only offer it at the post-graduate level. The result is that students at certain law schools, where human-rights law is not compulsory, may choose not to take it as an optional or post-graduate course, and receive no education about human rights.

There is also the challenge of a lack of law teachers who specialise in human-rights education. This can result in the assumption that human rights is the type of course that can be taught by any legal academic. This may be a false assumption in light of evidence gleaned from a large-scale three-country survey on democracy education conducted on behalf of the United States Agency for International Development (USAID). The survey was in respect of democracy education, which included the role that human rights plays in underpinning democracy, and found that one of the most important factors influencing the effectiveness of such education was whether the teachers were knowledgeable and inspiring.[80] This may not be the case where the law teacher is not an expert in the field of human-rights law.

Another issue is apathy on the part of both students and institutions, particularly after some time has elapsed since changes from repressive

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76 The first author undertook a web search of several Commonwealth law schools and found that very few referred to the CLEA Model Human Rights Law-.

77 For step-by-step examples of a variety of interactive teaching methods, see McQuoid-Mason (ed) *Street Law: Practical Law for South Africans: Educator's Manual* 3ed (2015) 7–27. These include brainstorming, ranking exercises, small group discussions, case studies, role-plays, questions and answers, simulations, debates, games, hypothetical problems, moots, mock trials, open-ended stimulus, opinion polls, participant presentations, "taking a stand", the "PRES formula", problem solving, values clarification, "fishbowl", "jigsaw", "each one teach one", visual aids, inviting experts and field trips.

78 A survey on the effectiveness of civic and democracy education funded by the United States Agency for International Development (USAID) in the 1990s in the Dominican Republic, Poland and South Africa indicated that participatory, interactive teaching and learning methods were much more effective than the traditional lecture method. The study found that small group discussions, dramatisations, role-plays, problem-solving activities, simulations, and mock political or judicial activities led to far greater levels of positive change than more passive teaching methods such as lectures or the distribution of materials: USAID *Democracy Education Survey* (2002).

79 See, generally, Stuckey (ed) *Best Practices for Legal Education: A Vision and a Roadmap* (2007).

80 USAID *Democracy Education Survey* (2002); McQuoid-Mason "Introduction" in Council for a Community of Democracies *Democracy Education Best Practices Manual* (undated) 7–8.

regimes to democratic governments. As time passes, there is a tendency to to feel that the subject is no longer necessary because there will be fewer human-rights issues to deal with. This is usually reflected in a fall in the number of students who register for the human-rights course if it is optional, as happened in Nigeria after 1999.[81]

A particular challenge facing human-rights law clinics and centres is their sustainability at universities where they are not mainstreamed into law-school budgets. Even though their activities are useful to a university, because they satisfy the university's mission statement regarding community engagement, such bodies may still be dependent on outside funding that may not be forthcoming.[82] A lack of funding may result in capacity problems that negatively affect a clinic's or centre's ability to meet its objectives regarding human-rights education.

Another important challenge relates to the need for centres of human rights and law clinics to balance teaching and training of students with the desire to provide free legal services to indigent people.[83] Human-rights centres also need to maintain a proper balance between teaching and research, and activism and advocacy, and between classroom commitments and community service demands on students in law clinics. In both instances, the human-rights educational objectives of the programmes must be properly met, and not undermined by excessive caseloads involving activism and advocacy or the provision of free legal services.

9 CONCLUSION

Despite various challenges, the important role of law schools in human-rights education in the Commonwealth cannot be overemphasised. There is a need to continue expanding the scope of human-rights education in law schools and in universities. One method of achieving this is a "rights-based approach" to legal education that "transforms the law schools in a particular way, favouring a more profound consciousness about how a university can foster or erode the egalitarian ethos that makes human rights possible."[84]

There is also a need to secure more funding from the universities and elsewhere in order to support the expansion and mainstreaming of human-rights education. Judicial support and curriculum development are other mechanisms of support.[85] The presence of practising judges presiding in human-rights moot competitions is a good example of judicial support. This was done in South Africa during the apartheid era when judges sat in Street

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81 See Agbebaku and Akhigbe "Teaching Human Rights in Law Schools: The Nigerian Perspective" in *Key Issues in Teaching Human Rights in Law Schools: IALS 2013 Annual Meeting Papers* (2013) http://www.ialsnet.org/wordpress/.../Papers-Key-Issues-in-Teaching-Human-Rights-in-Law-Schools.pdf (accessed 2019-04-26).

82 See Mubangizi and McQuoid-Mason 2013 *JJS* 62.

83 *Ibid.*

84 See Alegre "Law Schools as Human Rights Institutions" in *The Role of Law Schools and Human Rights: IALS 2013 Meeting* (2013) http://www.ialsnet.org/.../Papers-Law-Schools-as-Contributors-to-Public-Policy-on-Human-Rights.pdf (accessed 2019-04-26).

85 See Hatchard "Developing Legal Education in the Commonwealth: Linking the Judiciary with the Law Schools" http://www.supremecourt.gov.pk/ijc/Articles/6/4.pdf (accessed 2019-04-26).

Law mock trials and moots, and also helped to deflect the attention of the security police.[86] In respect of supporting curriculum development, the initiative of CLEA and the Commonwealth Secretariat's Human Rights Unit in developing the Model Human Rights Curriculum is a step in the right direction and one that needs to be publicised more widely. CLEA representatives in the different regions of the Commonwealth should ensure that law schools in their regions are aware of the Model Curriculum. It is hoped this will encourage Commonwealth law schools to play a more meaningful role in human-rights education, particularly in transitional Commonwealth countries.

86 See McQuoid-Mason 2003 *WYAJ* 219.

COMPARING THE APPLICATION OF THE ISLAMIC LAW OF SUCCESSION AND ADMINISTRATION OF ESTATES IN SINGAPORE AND SOUTH AFRICA

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SUMMARY

This article investigates how the Islamic law of succession and administration of estates is applied in Singapore and South Africa with regard to the "Islamic will". This kind of will includes a provision where the testator or testatrix states that his or her estate must be distributed in terms of the Islamic law of succession. This requires an Islamic law expert or an Islamic organisation to draft an Islamic distribution certificate stating who the beneficiaries of the person are. The distribution certificate is drafted after the testator or testatrix has died. An Islamic distribution certificate within the Singaporean context is specifically compared with one in the South African context. This article looks at whether features found in the Singaporean model can be applied to the South African context. An overview of the Muslim population in Singapore and South Africa is presented by way of introduction. This is followed by an examination of the constitutional and international obligations of the two countries in light of their equality provisions, and a comparative analysis of the Islamic law of succession and administration of estates in the two countries. The focus areas looked at are liability claims, testate succession claims and intestate succession claims. A brief analysis of the findings and concluding remarks are made at the end of the article.

1 INTRODUCTION

This article investigates how the Islamic law of succession and administration of estates is applied in Singapore and South Africa. It compares the Singaporean model with the South African model with regard to the "Islamic will", which includes a provision where the testator or testatrix states that his or her estate must be distributed in terms of the Islamic law of succession. This requires an Islamic law expert or an Islamic organisation to draft an Islamic distribution certificate stating who the beneficiaries of the

person are.[1] The distribution certificate is drafted after the testator or testatrix has died. The Islamic distribution certificate in the Singaporean context is specifically compared with one in the South African context. This paper looks at whether features found in the Singaporean model can be applied to the South African context. Singapore has been chosen as a comparative country as it is quite similar to South Africa in the following respects: South Africa and Singapore are both Muslim-minority countries;[2] both countries have a large group of Muslims who follow the *Sunnee*-based *Shaafi'ee* school of law;[3] both countries are governed by constitutions that include equality provisions; and lastly, both countries have ratified the Convention on the Elimination of All Forms of Discrimination Against Women **(**CEDAW).[4]

An overview of the Muslim population in Singapore and South Africa is presented by way of introduction. This is followed by an examination of the constitutional and international obligations of the two countries in light of their equality provisions. This is followed by a comparative analysis of the Islamic law of succession and administration of estates in the two countries. The focus areas looked at are liability claims, testate succession claims and intestate succession claims. A brief analysis of the findings and concluding remarks are made at the end of this article.

2 MUSLIM POPULATION

Singapore is a Muslim-minority country where Muslims constitute 15 per cent of the total population. The dominant school of law followed by Singaporean Muslims is the Sunnee-based *Shaafi'ee* school of law.[5] This is

1 The Muslim Judicial Council (SA) is an Islamic organisation based in the Western Cape, South Africa. It provides the service of drafting Islamic distribution certificates based on Islamic wills, at a minimal charge of R300. See Dante "Distribution Certificates (Estates)" (2016) http://mjc.org.za/2016/06/14/distribution-certificates-estates/ (accessed 2017-10-20).

2 South Africa is a multicultural society comprising Black Africans (who constitute 80,7 per cent of the population), Coloureds (8,8 per cent), Indians and Asians (2,5 per cent), and Whites (8 per cent). See Statistics South Africa "Mid-Year Population Estimates 2017" http://www.statssa.gov.za/ (accessed 2017-12-18). Singapore is also a multicultural society comprising Chinese (who constitute 74,1 per cent of the population), Malays (13,4 per cent), Indians (9,2 per cent) and others (3,3 per cent). The "others" category comprises Eurasians, Caucasians, Arabs and Japanese. See Steiner "Governing Islam: The State, the Administration of Muslim Law Act (AMLA) and Islam in Singapore" 2016 16(1)(6) *Australian Journal of Asian Law* 1.

3 This school of law find its basis in the *Sharee'ah*, which comprises two primary sources known as the *Quraan* and *Sunnah*. The interpretation of these sources has resulted in the introduction of various schools of law. The four dominant schools of law followed by Muslims are the *Sunnee*-based *Ḥanafee*, *Shaafi'ee*, *Maalikee*, and *Ḥanbalee* schools of law. See Abduroaf "Islamic Law Mode of Estate Distribution in South Africa" 2016 *International Survey of Family Law* 458–461 for a further discussion on this issue.

4 CEDAW was adopted by the United Nations General Assembly Resolution 34/180 of 18 December 1979.

5 See Musawah "Thematic Report on Article 16, Muslim Family Law and Muslim Women's Rights in Singapore: 68th CEDAW Session Geneva, Switzerland" (2017) https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwjxhPucrenXAhWGXBoKHctfCLkQFgg4MAE&url=http%3A%2F%2Fwww.musawah.org%2Fsites%2Fdefault%2Ffiles%2FSingapore%2520-%2520Musawah%2520Thematic%2520Report%2520for%252068th%2520CEDAW.compressed.pdf&usg=AOvVaw2KkkEJ0fjBALC6PmDj2Pgo (accessed 2017-12-01).

similar to the South African position where the Sunnee-based *Shaafi'ee* school of law is one of the two dominant schools of law followed by Muslims living in South Africa. Muslims constitute approximately 1,5 per cent of the South African population.[6]

3 CONSTITUTIONAL OBLIGATIONS

Application of the Islamic law of intestate succession could be problematic in countries that promote equality and prohibit discrimination between males and females. In terms of the Islamic law of intestate succession, a daughter always inherits half the share of a son. Singapore and South Africa are bound by equality provisions in terms of their constitutional and international law obligations. Article 12(1) of the Constitution of the Republic of Singapore (the Singaporean Constitution) states:

> "All persons are equal before the law and entitled to the equal protection of the law."

Section 9(1) of the Constitution of the Republic of South Africa (the South African Constitution) states:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

The provisions found in the two constitutions are almost identical in this regard. Article 12(2) of the Singaporean Constitution states:

> "Except as expressly authorised by this Constitution, there shall be no discrimination against citizens of Singapore on the ground only of religion, race, descent or place of birth in any law and guarantees equal protection of all before and of the law and prohibits discrimination on the grounds of religion, race, descent or place of birth."[7]

Section 9(3) of the South African Constitution prohibits unfair discrimination based on "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth." While the Singaporean Constitution does not specifically prohibit discrimination based on sex and/or gender, the South African Constitution expressly prohibits discrimination based on sex and/or gender. The application of the Islamic law of intestate succession can therefore be constitutionally challenged in terms of the South African Constitution on the basis of discrimination on the grounds of sex and gender, whereas it cannot be specifically challenged on these grounds in

6 Moosa *Unveiling the Mind: The Legal Position of Women in Islam: A South African Context* 2ed (2011) 146. These are the latest population census figures regarding religion. The Muslim Judicial Council (SA), based in the Western Cape, "raised concerns regarding the exclusion of religious questions from the census [2011] questionnaire, [but] they still pledged their support" (Mangxamba "Stats SA meets Faith Based Organisations on Census 2011" (2011) http://www.statssa.gov.za/?page_id=3970 (accessed 2017-12-18)).

7 See also Bin Abbas "The Islamic Legal System in Singapore" 2012 21(1) *Pacific Rim Law & Policy Journal* 163.

terms of the Singaporean Constitution. Section 36(1) of the South African Constitution states:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."[8]

The right to freedom of religion is expressly listed in the Singaporean Constitution. Article 15(1) states:

> "Every person has the right to profess and practise his religion and to propagate it."

Section 15(1) of the South African Constitution states:

> "Everyone has the right to freedom of conscience, religion, thought, belief and opinion."

The right to freedom of religion is found expressly in both the Singaporean and South African Constitutions. It could be argued that the right to freedom of religion should include the right to execute an Islamic will. This has been confirmed in Singaporean legislation, where article 110 of the Administration of Muslim Law Act[9] (AMLA) states:

> "Nothing in this Act shall be held to prevent any Muslim person directing by his or her will that his or her estate and effects shall be distributed according to the Muslim law."[10]

There is no legislation regulating the Islamic law of succession in South Africa. The South African Law Reform Commission has advised that South African Muslims can execute wills in order to ensure that the Islamic law of succession applies to their estates.

Article 153 of the Singaporean Constitution states:

> "The Legislature shall by law make provision for regulating Muslim religious affairs."

It could therefore be said that there is an indirect constitutional obligation on the Singaporean legislature to enact legislation governing the Islamic law of succession in terms of article 153 as this would be included in Muslim religious affairs.[11] Article 12(3) of the Singaporean Constitution further permits different personal laws based on religious belief.[12] The South African

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[8] S 36(1) of the South African Constitution goes on to state that rights may only be limited "taking into account all relevant factors, including – (*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". Subsection 2 states: "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."

[9] 27 of 1966.

[10] See also Bin Abbas 2012 *Pacific Rim Law & Policy Journal* 177.

[11] See Bin Abbas 2012 *Pacific Rim Law & Policy Journal* 165.

[12] Art 12(3) of the Singaporean Constitution states: "This Article does not invalidate or prohibit – (a) any provision regulating personal law; or (b) any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a

Constitution does not prevent the enactment of legislation governing religious law. However, legislation must be consistent with the Constitution of South Africa.[13] The wording found in the South African Constitution is less demanding on the legislature than the wording found in the Singaporean Constitution with regard to the enactment of legislation regulating Muslim religious affairs. This could, however, be based on historical and political factors. The enactment of the Islamic law of succession in the South African context would be subject to the equality provisions in section 9(3) of the South African Constitution, which specifically prohibits unfair discrimination based on sex and/or gender.[14] Discrimination based on the grounds of sex and/or gender is presumed to be unfair.[15]

4 INTERNATIONAL LAW OBLIGATIONS

Singapore ratified CEDAW on 5 October 1995.[16] South Africa ratified CEDAW approximately two months later on 15 December 1995.[17] Article 2 of CEDAW states that States Parties to the Convention "agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women".[18] Article 16(1) of CEDAW specifically provides that States Parties to the Convention:

group professing any religion, to persons professing that religion." See also Bin Abbas 2012 *Pacific Rim Law & Policy Journal* 165.

[13] S 15(3)(*a*) of the South African Constitution states: "This section does not prevent legislation recognizing – (i) marriages concluded under any tradition, or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion." S 15(3)(*b*) states: "Recognition in terms of paragraph *(a)* must be consistent with this section and the other provisions of the Constitution."

[14] See s 9 of the South African Constitution: "(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination."

[15] See s 9(5) of the South African Constitution: "Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[16] See United Nations Treaty Collection https://treaties.un.org/Pages/ViewDetails.aspx?src =TREATY&mtdsg_no=IV-8&chapter=4&lang=en#58 (accessed 2017-11-21).

[17] CEDAW was adopted by the United Nations General Assembly Resolution 34/180 of 18 December 1979, signed by South Africa on 29 January 1993, and ratified on 15 December 1995.

[18] Art 2 of CEDAW states further that States Parties "to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person,

> "shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: … (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration."

The fact that a daughter inherits half the share of a son in terms of the Islamic law of intestate succession if they inherit collectively could be problematic with regard to articles 2 and 16 of CEDAW, which prohibits discrimination against women.[19] Singapore made a few reservations regarding articles 2 and 16 of CEDAW in the following terms:

> "In the context of Singapore's multi-racial and multi-religious society and the need to respect the freedom of minorities to practise their religious and personal laws, the Republic of Singapore reserves the right not to apply the provisions of articles 2 and 16 where compliance with these provisions would be contrary to their religious or personal laws."[20]

This is also the situation in many Muslim countries where Islamic reservations to Human Rights Conventions have been made.[21] To date, South Africa has not made any reservations to CEDAW.

The South African government ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African WR Protocol) on 17 December 2004.[22] Article 21(2) of the African WR Protocol states:

> "Women and men shall have the right to inherit, in equitable shares, their parents' properties."

South Africa has further enacted the Promotion of Equality and Prevention of Unfair Discrimination Act[23] (PEPUDA), which is in line with CEDAW and the African WR Protocol.

It can be seen from the above that Singapore places more importance on the right to freedom of religion than on the right to equality. This can clearly be seen by the reservations made by the Singaporean government with regard to articles 2 and 16 of CEDAW. The South African government, on

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organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women."

19 It should be noted that a daughter would indirectly inherit more favourably than a son in the event where, for example, X dies leaving behind a mother, a father, a widower, and a child as the only intestate beneficiaries. The child would inherit more favourably if female and less favourably if male.

20 UN Women "Declarations, Reservations and Objections to CEDAW" http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm (accessed 2017-01-08). See also Steiner 2016 *Australian Journal of Asian Law* 11.

21 See Mayer "Islamic Reservations to Human Rights Conventions" 1998 15 *Recht van de Islam* 25–45 for a discussion on this issue.

22 South Africa deposited the instrument of ratification on 14 January 2005.

23 4 of 2000.

the other hand, has enacted legislation that is in line with the human-rights requirements in terms of CEDAW and the African WR Protocol. The South African government might have to make reservations to the international and regional treaties and amend PEPUDA if it intends enacting legislation that regulates the Islamic law of succession and administration of estates in the South African context.

5 REGULATION OF THE ISLAMIC LAW OF SUCCESSION AND ADMINISTRATION OF ESTATES

There are two Acts that regulate the law of succession in Singapore. They are AMLA[24] and the Intestate Succession Act (ISA).[25] AMLA governs the administration of estates of deceased Muslims whereas ISA governs the administration of estates of deceased non-Muslims. It can be seen that Singaporean law has specific legislation that governs the Islamic law of succession.

There are also two Acts that regulate the law of succession in South Africa. They are the Intestate Succession Act[26] and the Reform of Customary Law of Succession and Related Matters Act.[27] There has (to date) been no legislation governing or recognising aspects of Islamic law in the South African context despite many attempts in the past to enact such legislation.[28] The most recent attempt was made in 1999 when the then-Minister of Justice established a committee

> "[t]o investigate Islamic marriages and related matters."[29]

The committee was referred to as the Project 59 Committee (the Project Committee) and functioned under the re-named South African Law Reform Commission (the Commission).[30] The investigation started in 1999 and concluded in 2003.[31] The investigation led to the publication of an Islamic Marriages Bill in 2001 (2001 IMB) and a Muslim Marriages Bill in 2003 (2003 MMB). These marriage bills do not specifically deal with the "Islamic" law of succession. The Commission was of the opinion that the issues concerning the Islamic law of succession are complex and manifold.[32] It was of the

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24 Administration of Muslim Law Act 27 of 1966.

25 Intestate Succession Act 7 of 1967.

26 81 of 1987.

27 11 of 2009.

28 See Moosa *Unveiling the Mind* 154.

29 The Project Committee was established in terms of s 7A of the South African Law Commission Act 19 of 1973: "(1) The Commission may, if it deems it necessary for the proper performance of its functions … (b) establish such other committees as it may deem necessary, and which shall consist of … (ii) such members of the Commission as the Commission may designate and the other persons appointed by the Minister for the period determined by the Minister."

30 The Commission was previously referred to as the South African Law Commission (SALC).

31 See Moosa *Unveiling the Mind* 154.

32 The Institute of Islamic Shari'ah Studies suggested to the Commission that "[p]aragraph (g) … [should] be added to section 4 of the Intestate Succession Act [81 of 1987 and] should

opinion that it could not satisfactorily deal with the issues within the scope of its investigation. The Commission noted that there was nothing preventing a Muslim person from ensuring that his or her estate would devolve in terms of Islamic law by executing an Islamic will.[33]

The position is quite similar to the statement in article 110 of AMLA that

> "[n]othing in this Act shall be held to prevent any Muslim person directing by his or her will that his or her estate and effects shall be distributed according to the Muslim law."[34]

The Commission made provision to amend the Intestate Succession Act[35] by broadening the definition of "spouse" to include a spouse or spouses of a Muslim marriage in the event of the enactment of the 2003 MMB. The Intestate Succession Act is currently not in conformity with Islamic law. The Commission was of the opinion that amending the Act would alleviate the hardships endured by Muslim spouses who in the past had not enjoyed such recognition.[36] The South African position is thus quite different to the provision in AMLA for a surviving spouse or spouses to inherit in terms of the Islamic law of intestate succession and not in terms of ISA. The definition of a spouse in terms of the South African Intestate Succession Act[37] has since been developed through the case law. "Spouse" now includes a spouse or spouses from a Muslim marriage.

The 2003 MMB was submitted to the Minister of Justice and Constitutional Development in July 2003 as part of the Commission's report on Islamic Marriages and Related Matters.[38] The 2003 MMB was subsequently adapted by the Department of Justice and Constitutional Development. It was then presented to Cabinet on 8 December 2010 (2010 MMB).[39] The provisions in the adapted 2010 MMB regarding succession were no different from the 2003 MMB as neither version deals directly with the Islamic law of succession. However, the provisions in the 2010 MMB do deal with certain liability claims against the deceased estate. Notably, there are a number of South African religious bodies who are pushing for the 2010 MMB to be enacted into legislation. The provisions are noted here for this reason.

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read as follows: An estate of a deceased Muslim, whether he or she left a written Will or not and if such a deceased person was married in terms of Islamic law, then such a deceased estate of such a deceased person shall devolve compulsorily upon his or her Muslim heirs and in such shares as prescribed in the Islamic law of Succession. The Master of the High Court is obliged to consult with a proven qualified Muslim Shari'ah jurist therein and obtain a written and duly dated and signed certificate of distribution of such a deceased estate and execute its instructions." See South African Law Reform Commission Project 59 Islamic Marriages and Related Matters Report (2003) 88 www.justice.gov.za/salrc/reports/r_prj59_2003jul.pdf (accessed 2017-12-23).

33 See South African Law Reform Commission www.justice.gov.za/salrc/reports/r_prj59_2003jul.pdf.

34 See art 110 of AMLA.

35 81 of 1987.

36 See South African Law Reform Commission www.justice.gov.za/salrc/reports/r_prj59_2003jul.pdf.

37 81 of 1987.

38 See SALRC www.justice.gov.za/salrc/reports/r_prj59_2003jul.pdf.

39 See Moosa *Unveiling the Mind* 159.

6 ISLAMIC LAW OF SUCCESSION AND ADMINISTRATION OF ESTATES

Article 112(1) of AMLA states:

> "In the case of any Muslim person domiciled in Singapore dying intestate, the estate and effects shall be distributed according to the Muslim law as modified, where applicable, by Malay custom."[40]

The wording of the section is broad enough to include a South African Muslim who is domiciled in Singapore. The person who will be administering the estate must apply to the civil courts (not the Islamic courts) for probate or letters of administration. A grant for probate is

> "a grant under the seal of the court issuing the same, authorising the executor or executors expressly or impliedly appointed by a testator's will, or one or more of them, to administer the testator's estate in compliance with the directions contained in his will, and in accordance with law."[41]

A grant for letters of administration means "a grant under the seal of the court issuing the same, authorising the person or persons therein named to administer an intestate's estate in accordance with law".[42] The grant for probate and grant for letters of administration could be compared in South Africa to the letters of executorship and letters of authority issued by the Master of the High Court for an Islamic will in which persons were nominated as executors.

The majority of Muslims in Singapore follow the *Shaafi'ee* school of law. There are, however, other schools of law followed by Singaporean Muslims. Article 113 of AMLA states:

> "In all applications for probate or letters of administration the affidavit supporting the application shall, in the case of a deceased Muslim, state the school of law (Mazhab) which the deceased professed in addition to the particulars required by any other written law."

This is quite useful as there are a number of instances where the schools of law differ. Article 114 of AMLA lists a number of books that could be used by the courts in order to decide on matters of succession and inheritance.[43] This is a good approach as it promotes legal certainty.

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40 See also Bin Abbas 2012 *Pacific Rim Law & Policy Journal* 177. See also IRB Law LLP Advocates and Solicitors "What You Should Know About Muslim Will in Singapore" https://irblaw.com.sg/ 2017/08/08/what-you-should-know-about-muslim-will-in-singapore/ (accessed 2017-01-08).

41 See s 2 of the Probate and Administration Act 24 of 1934. See also Black "Replicating 'A Model of Mutual Respect': Could Singapore's Legal Pluralism Work in Australia?" 2012 *Journal of Legal Pluralism* 80.

42 See s 2 of the Probate and Administration Act 24 of 1934.

43 See art 114 of AMLA: "(1) In deciding questions of succession and inheritance in the Muslim law, the court shall be at liberty to accept as proof of the Muslim law any definite statement on the Muslim law made in all or any of the following books: (a) The English Translation of the *Quaran*, by A. Yusuf Ali or Marmaduke Pickthall; (b) *Mohammedan Law*, by Syed Ameer Ali; (c) *Minhaj et Talibin* by Nawawi, translated by E. C. Howard from the French Translation of Van den Berg; (d) *Digest of Moohummudan Law*, by Neil B. E. Baillie; (e)

The Islamic will (in the South African context) requires an Islamic law expert to issue an Islamic distribution certificate. The Islamic law expert has quite wide powers as to what opinions should be used when issuing the distribution certificate.

The position could be quite problematic, for example, where X dies leaving an intestate estate of R600 000.00 and also leaves behind a widower, a mother, a uterine brother, a uterine sister, a full brother, and a full sister as the only intestate beneficiaries. The widower would inherit half (equal to three sixths),[44] and the mother would inherit one sixth.[45] The widower would thus inherit R300 000.00 and the mother R100 000.00. The position of the siblings in the above scenario is complicated.[46]

The *Shaafi'ee* school of law is of the opinion that the uterine brother, the uterine sister, the full sister, and full brother must all share the one third equally. Each of the four siblings would then inherit R50 000.00.[47] The *Ḥanafee* school of law is of the opinion that the uterine brother and uterine sister must share the third equally to the exclusion of the full siblings.[48] Each of the uterine siblings would then inherit R100 000.00.

The author suggests that a Muslim testator or testatrix (in the South African context) should indicate in his or her will which school of law should be applied when the distribution certificate is drafted by the Islamic law expert. The author would further suggest that an Islamic will should include a clause stating that the same school of law should be applied with regard to repudiation or disqualification of persons in terms of the will. This would ensure that Islamic law consequences would apply in these instances, not South African law consequences.

Anglo-Muhammadan Law, by Sir Roland Knyvet Wilson, 6th Edition Revised by A. Yusuf Ali; (f) *Outlines of Muhammadan Law*, by A. A. Fyzee; (g) *Muhammadan Law*, by F. B. Tyabji. (2) The Minister may on the advice of the Majlis by notification in the *Gazette* vary or add to the list of books set out in subsection (1)."

[44] See Khan *The Noble Qur'an: English Translation of the Meanings and Commentary* (1404H) ch 4 verse 12 where it states: "In that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts."

[45] See Khan *The Noble Qur'an* (4) 11: "For 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. (The distribution in all cases is) after the payment of legacies he may have bequeathed or debts."

[46] See Khan *The Noble Qur'an* (4) 12: "If the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies he (or she) may have bequeathed or debts, so that no loss is caused (to anyone). This is a Commandment from Allah; and Allah is Ever All-Knowing, Most-Forbearing."

[47] The opinion of the *Shaafi'ee* school of law is based on independent reasoning. This question is referred to as the mushtarikah case as the one third is shared between the various classes of siblings. A full brother is generally a residuary beneficiary. See Al Khin and Al Bughaa *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee vol 2* (2000) 400–401.

[48] See Al Fawzaan *Al Taḥqeeqaat Al Marḍiyyah Fil Mabaaḥith Al Farḍiyyah* (1999) 132–133.

6 1 Liability claims

Article 112 of AMLA states:

> "In the case of any Muslim person domiciled in Singapore dying intestate, the estate and effects shall be distributed according to the Muslim law as modified, where applicable, by Malay custom."[49]

The claims against the estate would therefore include the liability claims that should be deducted in terms of Islamic law. The default marital system for Muslims living in Singapore is that the parties to the marriage retain their separate estates. Article 124 of AMLA states:

> "No Muslim person shall, by any marriage contracted in accordance with the provisions of the Muslim law, acquire any interest in the property of the person whom he or she marries nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried."

This is similar to a provision found in section 8(1) of the South African 2010 MMB, which states:

> "A Muslim marriage to which this Act applies is deemed to be a marriage out of community of property excluding the accrual system, unless the proprietary consequences governing the marriage are regulated by mutual agreement of the spouses, in an ante-nuptial contract which must be registered in the Deeds Registry."

The exception to the marital system is found in Malay custom. Article 112(3) of AMLA states:

> "In the case of a Malay dying intestate, the court may make an order for the division of the *harta sepencarian* or jointly acquired property in such proportions as to the court seems fit."

The widow(s) or widower of a Malay deceased would be eligible to claim from the *harta sepencarian* and would also be eligible to inherit from the intestate estate in terms of the Islamic law of intestate succession.

The issue of *harta sepencarian* was raised in the South African context in *Ryland v Edros* (*Ryland*).[50] The case dealt with the claim of *harta sepencarian* subsequent to divorce. A share of the same joint property would be claimed subsequent to one of the parties dying. This is also how it applies in terms of article 112(3) of AMLA and why the case should be noted here. The court held that the evidence presented in the case "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."[51] The court held (in 1996) that the custom has not been incorporated into the practices of South African Muslims. It has not been confirmed as to whether the Malay

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[49] See also Bin Abbas 2012 *Pacific Rim Law & Policy Journal* 177.

[50] 1997 (2) SA 690 (C).

[51] See *Ryland v Edros supra* 717. It should be noted that the Malay adat refers to customary law of the indigenous people of Malaysia and Indonesia. See The Editors of Encyclopaedia Britannica "Adat Malayan and Indonesian Traditional Law" https://www.britannica.com/topic/adat (accessed 2019-06-22).

custom prevails among the Muslim Community in the Western Cape today.[52] The author would recommend that a testator or testatrix should clearly identify in his or her Islamic will which items (if any) in the estate form part of the joint property. This could alleviate any problems faced by South African Muslims who follow Malay custom in the event that a claim is made against the estate in this regard.

6 2 Testate succession claims

Article 110 of AMLA states:

> "Nothing in this Act shall be held to prevent any Muslim person directing by his or her will that his or her estate and effects shall be distributed according to the Muslim law."[53]

Article 111(1) of AMLA states that the will is "subject to the restrictions imposed by the school of Muslim law professed" by the testator or testatrix.[54] The provision imposes a limitation on freedom of testation, as a testator or testatrix, in terms of the Islamic law of testate succession, is generally not allowed to bequeath more than a third of his or her net estate. This limitation is imposed in terms of legislation. It is interesting to note that a South African Muslim testator or testatrix who executes an Islamic will in terms of the *Shaafi'ee* or *Ḥanafee* (or any other) school of law does so as a matter of choice and not as a matter of compulsion as under AMLA. A will of a South African Muslim is not restricted by Islamic law. It is for this reason that even clauses in a will that are not compliant with Islamic law would be enforceable. It should be noted that a testator or testatrix may not know what the Islamic law rules are. The author therefore suggests that a testator or testatrix, in the South African context should consult with an Islamic law expert in this regard. He or she can then incorporate provisions in his or her will that are compliant with Islamic law.

6 3 Intestate succession claims

Article 115 of AMLA states that a civil court may refer a set of facts to the *Syariah* Court for a legal opinion as to who the intestate beneficiaries of a deceased estate are.[55] The *Syariah* Court would then issue an Islamic

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52 Islam was introduced into the Western Cape by Muslims from Indonesia. It is interesting to note that these Muslims were also referred to as Cape Malays. See Moosa *Unveiling the Mind* 146.

53 See also Bin Abbas 2012 *Pacific Rim Law & Policy Journal* 177.

54 See art 111(1) of AMLA: "Notwithstanding anything in the provisions of the English law or in any other written law, no Muslim domiciled in Singapore shall, after 1st July 1968, dispose of his property by will except in accordance with the provisions of and subject to the restrictions imposed by the school of Muslim law professed by him."

55 The *Syariah* Court is one of the organs established in terms of AMLA. See art 34 of AMLA: "The President of Singapore may by notification in the Gazette constitute a *Syariah* Court for Singapore." See also Steiner 2016 *Australian Journal of Asian Law* 12. See also Syariah Court Singapore "Inheritance Certificate" https://www.syariahcourt.gov.sg/Syariah/front-end/Default.aspx?pid=M03.01 (accessed 2018-01-08).

distribution certificate.[56] The provision also permits the beneficiary of a deceased estate to apply for an Islamic distribution certificate. There is a prescribed fee that must be paid.[57] South Africa has (to date) not enacted any legislation governing the Islamic law of intestate succession. A case concerning an Islamic distribution certificate was heard in the Western Cape Division of the High Court of South Africa in 2017.[58] The certificate came about as a result of a clause found in an Islamic will that directed that the estate should devolve in terms of Islamic law and that an Islamic distribution certificate issued by the Muslim Judicial Council (SA) or any other recognised Muslim judicial authority shall be final and binding in this regard. The Muslim Judicial Council (SA) is based in the Western Cape, South Africa, and primarily follows the *Shaafi'ee* school of law. The Muslim Judicial Council (SA) issued the Islamic distribution certificate in terms of the clause. It should be noted that the South African law of intestate succession would have applied if the deceased had not left behind an Islamic will.

The process followed in order to obtain an Islamic distribution certificate by the *Syariah* Court in Singapore is quite similar to the process followed to obtain an Islamic distribution certificate issued by the Muslim Judicial Council (SA) based in the Western Cape. The difference between Singapore and South Africa is that the inheritance certificate in Singapore is based on AMLA and a request made to the *Syariah* Court, whereas the Islamic distribution certificate in South Africa is based on freedom of testation and a clause in the will of the testator or testatrix requiring an organisation like the Muslim Judicial Council (SA) to issue an Islamic distribution certificate. The difference between the position in Singapore and South Africa is that Singapore requires that the school of law followed by the deceased should be followed. It is submitted that South Africa should follow the same approach as far as the Islamic will is concerned.

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[56] It should be noted that the term "inheritance certificate" is used in the Singaporean context whereas the term "Islamic distribution certificate" is used in South Africa.

[57] See art 115 of AMLA:"(1) If, in the course of any proceedings relating to the administration or distribution of the estate of a deceased person whose estate is to be distributed according to the Muslim law, any court or authority shall be under the duty of determining the persons entitled to share in such estate or the shares to which such persons are respectively entitled, the *Syariah* Court may, on a request by the court or authority or on the application of any person claiming to be a beneficiary and on payment of the prescribed fee, certify upon any set of facts found by such court or authority or on any hypothetical set of facts its opinion as to the persons who are, assuming such facts, whether as found or hypothetical, entitled to share in such estate and as to the shares to which they are respectively entitled. (2) The *Syariah* Court may, before certifying its opinion, require to hear the parties on any question of law, but shall not hear evidence or make findings on any question of fact."

[58] See *Moosa N.O. v Harnaker* 2017 (6) SA 425 (WCC), and *Moosa N.O. v Minister of Correctional Services* 2018 (5) SA 13 (CC). See also Abduroaf "An Analysis of Renunciation in Terms of s 2(C)(1) of the Wills Act 7 of 1953 in Light of the *Moosa NO and Others v Harnaker and Others* Judgment" 2019 *Electronic Journal of Islamic and Middle Eastern Law* for a discussion regarding the case.

7 CONCLUSION

This article has compared the application of the Islamic law of succession and administration of estates in Singapore with its application in South Africa. It has looked at the constitutional and international law obligations of these two countries with regard to prohibition of discrimination. This was important as the Islamic law of intestate succession states, for example, that a daughter inherits half the share of a son. The discussion has shown that Singaporean law places more importance on the right to freedom of religion than on the right to equality, whereas the reverse is true in South African law. It could be argued that the former value system was the reason for the successful enactment of Islamic law of succession legislation (which includes the Islamic law of intestate succession) in Singapore and that the latter is the reason that the Islamic law of succession has to date not been incorporated into South African legislation.

This article has shown that certain features found in the Singaporean model can be applied in South Africa in the absence of legislation regulating the Islamic law of succession. Suggestions have been made throughout this article in this regard but they are summarised here for purposes of completion.

A Muslim testator or testatrix should approach an Islamic law expert if he or she intends bequeathing items in his or estate in terms of Islamic law. The bequest can then be inserted in an Islamic will. The will should state that the claims against his or her estate must be dealt with in terms of Islamic law and according to the school of law that he or she states in the will. These would be liability claims, testate succession claims and intestate succession claims. The will should state that the liability claims against his or her estate (at the time of his or her death) must be ascertained by his or her executor or executrix in terms of Islamic law and in terms of the school of law stated in the will and should be deducted from the gross estate. The executor should approach an Islamic law expert in this regard in order to ascertain what these liabilities are. The testator or testatrix may then incorporate a bequest (if any) in the will according to the advice given by the Islamic law expert. The will should then state that the remainder of the estate must be distributed in terms of the Islamic law of intestate succession. The will should also state that the executor or executrix must approach an Islamic law expert to issue an Islamic distribution certificate in terms of the school of law that the testator or testatrix has stated in his or her will. The will should further state that all aspects regarding repudiation and disqualification of beneficiaries are to be dealt with in terms of Islamic law and not in terms of South African law, and that a certificate issued by an Islamic law expert shall be final and binding in this regard.

PUTTING THE RELATIONSHIP BETWEEN STATES AND THE ICC INTO PERSPECTIVE: THE VIABILITY OF NATIONAL COURTS IN DRIVING COMPLEMENTARITY IN AFRICA

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SUMMARY

This article discusses implementation challenges of the principle of complementarity; challenges in prosecuting sitting African Heads of state and nefarious warlords. The article highlights the disparity existing in physical security and remuneration between judges of national African courts and those of the ICC in similar jobs. While national judges are exposed to intimidation and influence from the most powerful in their jurisdictions, the ICC judges are provided with adequate protection and independence. Using the DRC and Kenya as case studies, this article asserts that where national courts intervene in prosecuting international crimes, heads of state would not be prosecuted. In most African states, the courts are spawned from the authoritarian regimes. This challenge renders the reliance on complementarity justice questionable.

1 INTRODUCTION

Pursuant to Article 17 of the Rome Statute on the admissibility criteria, the International Criminal Court (ICC) only assumes its jurisdiction in circumstances where a state has failed genuinely to investigate and

prosecute a given situation where crimes under its jurisdiction have been clearly committed.[1] These crimes include crimes against humanity, genocides and war crimes.[2]

Under the Rome Statute establishing the ICC, unlike most *ad hoc* security courts such as the International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) that have primacy over national courts, the ICC peremptively defers to the competence of domestic courts.[3] As a result, the jurisdiction of the ICC is only triggered when the national courts are unable or unwilling to prosecute alleged offences.[4] This has become known as the principle of complementarity under international criminal law.

The principle of complementarity has grown to be accepted as being well suited to dealing with international crimes. This is so because the involvement of a public-law dimension appeared to be at odds with an absence of an underlying system of shared social ethics, given that the international regime knows no global sovereign and that morals differ from country to country.[5] Consequently, giving national courts primacy to take action in a situation where an international crime has been committed is the way to go.

The Preamble to the Rome Statute is clear that the ICC's jurisdiction will be complementary to that of local jurisdictions as enshrined in Article 17 of the Statute.[6] National implementation obligations taken up by states that show interest in becoming members of the Rome Statute are quite extensive. According to the Rome Statute, effective prosecution will only result if steps are taken from the national level, including international co-operation.[7]

Pursuant to Article 12 of the Rome Statute, a state accepts jurisdiction by becoming a state party, or if the state is a non-party to the Rome Statute, it can declare its acceptance of jurisdiction. Given that the ICC lacks most of the institutions required for the progressive handling of a criminal matter such as a police force and others, it has to rely on the assistance and cooperation of national mechanisms and state agencies.[8]

Implementation of the principle of complementarity calls for the concomitant engagement of the principle of jurisdiction. Jurisdiction ascertains the degree to which criminal acts committed are under the power

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1 Jurdi *The International Criminal Court and National Courts: A Contentious Relationship* (2016) 132.

2 Which crimes fall within the jurisdiction of the ICC? https://www.icc-cpi.int/about?ln=en (accessed 2018-11-03).

3 Burke-White "Implementing a Policy of Positive Complementarity in the Rome System of Justice" 2008 19 *Criminal Law Forum* 59.

4 *Ibid*.

5 Brandon and Du Plessis *The Prosecution of International Crimes: A Practical Guide to Prosecuting ICC Crimes in Common Wealth States* (2005) xi.

6 Du Plessis "Complementarity and Africa: The Promises of International Criminal Justice" 2008 *African Security Review* 156.

7 *Ibid*.

8 Du Plessis 2008 *African Security Review* 157.

of a state.[9] The general principle under international law is that for a person to be accused of committing crimes before a domestic court, one of the four principles, which include territoriality, active nationality, passive nationality and universal jurisdiction, must be recognised.[10]

The aim of this article is to analyse the most overwhelming challenges faced by a majority of African national courts in implementing the principle of complementarity. In the process of the analysis, this article engages with a number of factors that have the potential to inhibit the realisation of this objective. These are the independence of national courts in Africa, the independence of judges in Africa, physical protection provided by government to judges in Africa, and the degree to which the pay package of judges in Africa is commensurate with the mammoth task with which they are entrusted. These factors are compared with the same factors in relation to ICC judges.

The next section of the article reflects on the prosecution of heads of state who are still in office in Africa, and of nefarious warlords. Thereafter, the article elaborates on the security and remuneration of judges of national African courts *vis-a-vis* that of ICC judges in discharging similar duties. The discussion here refers to a lack of self-protection and the dangers to which African judges are often exposed, given that nefarious warlords or powerful heads of state who have been indicted may threaten the lives of judges, which serves as a disincentive for judges to entertain such matters. The article also establishes that the intervention by municipal courts is reminiscent of double standards, given that only rebels are likely to be prosecuted. Most African countries' constitutions provide immunity for their sitting heads of state. A majority of African countries are authoritarian and the courts are spawn of the regimes.[11] Yet, independence of the judiciary is a recognised tenet of the rule of law.[12]

2 THE PRINCIPLE OF COMPLEMENTARITY AND THE PROSECUTION OF HEADS OF STATE

The principle of complementarity attributes the primary jurisdiction over international crimes to national jurisdiction. Nevertheless, when national jurisdiction fails to carry out that mandate, then the ICC takes over that role. Although the criminal-law systems of national courts provide justice for victims and due process for accused persons under international law, these states have often been unable or unwilling to fulfil that mandate.[13]

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[9] Brandon and Du Plessis *The Prosecution of International Crimes* 17.

[10] *Ibid*.

[11] Fombad "Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa" 2010 55 *The American Journal of Comparative Law* 13.

[12] Bedner "An Elementary Approach to the Rule of Law" 2010 *Hague Journal on the Rule of Law* 67–68.

[13] Macedo "The Princeton Principles on Universal Jurisdiction" in Macedo (eds) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (2004) 18.

Moreover, universal jurisdiction *in absentia* has been used by the Princeton Principles on Universal Jurisdiction[14] in its Principle 1 on the fundamentals of universal jurisdiction. This principle was also applied by the International Court of Justice in the *Democratic Republic of Congo v Belgium* (*Arrest warrant case*) of 2000.[15]

Ratification of the ICC Statute constitutes significant evidence of acknowledgment by states parties of their duty to reject impunity, to prosecute and to punish those who commit international crimes. The situation of two African states parties that have implemented the ICC Rome Statute at the national level (the Democratic Republic of Congo (DRC) and Kenya) is discussed hereunder.

2 1 The Democratic Republic of Congo (the DRC)

The Congolese justice system demonstrates the weaknesses and fundamental gaps and flaws that allow impunity to continue for past and current crimes committed in the DRC under international law.[16]

Despite efforts to bring about reforms to the justice sector and promote the fight against impunity by the ratification of the Rome Statute since March 2002, the outlook for justice at the national level remains bleak in the DRC. Few people have access to existing justice mechanisms, and confidence in the justice system is low. Victims and witnesses are reluctant to come forward, as there is no national system in place to protect them.[17]

Years have lapsed since the DRC ratified the Rome Statute in March 2002 but the DRC government has yet to meet its legal obligation to incorporate the statute into national law because the Senate must approve the Bill to that effect.[18] Such legislation is essential to ensuring complementarity between the Congolese national jurisdiction and the ICC, and also to strengthen the country's legal system so that it can end the ongoing cycle of impunity of all perpetrators for the most egregious international crimes they have committed in the country.[19]

Article 9 of the 2001 draft legislation, which prepared the DRC for the implementation of the ICC Rome Statute before ratification and the integration of its norms into the Congolese law, provides that it "applies to all in like manner, with no distinction made based on official capacity".[20] However, the 2001 draft legislation was replaced in October 2002 with the Draft Law implementing the ICC Statute (Draft 2 of October 2002).[21]

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[14] The Princeton Principles on Universal Jurisdiction (2001) 2.

[15] (11 April 2000) 2000 ICJ.

[16] Murungu "Immunity of State Officials and the Prosecution of International Crimes" in Murungu and Japhet (eds) *Prosecuting International Crimes in Africa (*2011) 56.

[17] Amnesty International "DRC: Neglected Congolese Victims Deserve Justice Now" (2019) https://www.amnestyusa.org/reports/drc-neglected-congolese-victims-deserve-justice-now/2/ (accessed 2019-03-30).

[18] Murungu in Murungu and Japhet (eds) *Prosecuting International Crimes in Africa* 58.

[19] Amnesty International "The Democratic Republic of Congo (DRC)" http://demandjusticenow.org/drc/ (accessed 2018-11-03).

[20] Murungu in Murungu and Japhet (eds) *Prosecuting International Crimes in Africa* 58.

[21] *Ibid*.

After ratification of the ICC Rome Statute, the Congolese parliament improved the Military Criminal Code (MCC) and granted the jurisdiction exclusive power over international crimes.[22] The military courts have proceeded to adjudicate over international criminal crimes committed in the DRC. For instance, the military court of garrison of Haut Katanga on 5 March 2009 convicted the Mayi Mayi commander Gédéon Kuyungu Matunga and 20 other combatants for serious crimes; it also invoked and applied the provisions of the Rome Statute in the case of *TMG de Mbandaka, Affaire Songo Mboyo, 12 April 2006, RP 084/05*[23] and many others.[24] In this case, the salary of soldiers had been stolen by a captain who was their commander and this resulted in mutiny in Songo Mboyo.[25] This was followed by reprisals by former rebels who awaited integration in the army according to a "global agreement."[26] The violence led to the rape and death of several women. The rape survivors laid charges against the TMG of Mbandaka and the military prosecutor charged the soldiers with the crime against humanity of rape.

Nevertheless, in the military justice system, officers defended soldiers under their command from justice and the political and military hierarchy protected senior military figures. This is of particular concern in a country where the army is one of the main perpetrators of crimes under international law.[27]

The DRC has signed and ratified many international instruments addressing international crimes – such as the Geneva Convention of 1946, the ICC Rome Statute, the African Charter on Human and Peoples' Rights (ACHPR) and the International Covenant on Civil and Political Rights (ICCPR), among others. Article 215 of the Constitution of the DRC stipulates that "lawfully concluded treaties and agreements have, when published, an authority superior to that of the law, subject to each treaty and agreement to its application by the other party".[28] Therefore, all perpetrators of international crimes including state officials must be prosecuted and punished for their crimes. Moreover, Article 10 of the 2002 Draft Bill provides that the law must be applied equally without discrimination or distinction based on the official position.[29] In other words, any state official, including the head of state, would in no case be exempt from criminal prosecution and responsibility. This law has been implemented by the Penal Code, but it fails to address the issue of distinction based on official position. Nevertheless, the DRC has ratified the Rome Statute and this treaty enforces that provision.

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22 Olugbuo "Positive Complementarity and the Fight Against Impunity in Africa" in Murungu and Biergon (eds) *Prosecution of International Crimes in Africa* (2011) 259.

23 Can also be cited as *Military Prosecutor v Eliwo Ngoy & Ors* RP 084/2006 12 April 2006.

24 Olugbuo in Murungu and Biergon (eds) *Prosecution of International Crimes in Africa* 260.

25 Imeodemhe *The Complementarity Regime of the International Criminal Court: National Implementation in Africa* (2017) 97.

26 The global agreement was so called because the Congolese war has been termed by commentators as "Africa's world war". Many African countries were involved in the war, including, among others, Burundi, Rwanda, Uganda and Zimbabwe.

27 Amnesty International http://demandjusticenow.org/drc/.

28 Art 215 of the Constitution of the Democratic Republic of Congo 2006.

29 Murungu in Murungu and Japhet (eds) *Prosecuting International Crimes in Africa* 59.

The provision also provides that "immunities or those special procedural rules that may attach to the official capacity of a person, pursuant to the law or under international law shall not bar the jurisdiction from exercising their competent jurisdiction over that person".[30] It is accordingly submitted that impunity cannot be tolerated, regardless of who orchestrates grave breaches. However, the authors believe that given the perception that Africans attach to the role of a president, it is recommended that this responsibility should be discharged with wisdom and prudence.

2 2 Kenya

The post-election crisis of late 2007 and early 2008 is considered to be the consequence of Kenya's historical politics.[31] Kenyan politics has been characterised by five negative factors: ethnicity, dictatorship, criminal gangs, political alliances and impunity.[32]

Subsequent to the announcement of the contested presidential election results on 30 December 2007, which gave a second term to Mwai Kibaki, Kenya was plunged into its worst political and humanitarian crisis from December 2007 to February 2008; violence caused the death of a thousand of people and the displacement of 300,000, both aspects having a serious ethnic character.[33]

Pursuing accountability for serious crimes committed in Kenya after the presidential election, the outcome of the Kenya National Dialogue and Reconciliation Accord of 28 February 2008 was to set up a Commission of Inquiry on Post-Election Violence (CIPEV), also referred as the Waki Commission after chairman Judge Philip Waki. The Waki Commission's mandate was to investigate the facts and surrounding circumstances related to the serious crimes committed after the presidential election, as well as the conduct of state security agencies in handling their responsibilities, and to make appropriate recommendations on these matters.[34]

In October 2008, the major recommendation of the Waki Commission was the creation of a Special Tribunal for Kenya. Both Kenyan and international judges had to seek accountability of individuals who bore the responsibility of international crimes. In December 2008, Kenya enacted the International Crimes Act 2008 to implement the Rome Statute in its legislation.[35]

Failing in their responsibility to prosecute perpetrators of the serious crimes, on 31 March 2010, Kenya handed over the case to the ICC, which

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[30] *Ibid*.

[31] Materu *The Post-Election Violence in Kenya: Domestic and International Legal Responses* (2015) 15.

[32] *Ibid*.

[33] Nicholas *The International Criminal Court and the End of Impunity in Kenya* (2014) 47.

[34] International Centre for Transitional Justice "The Kenyan Commission of Inquiry of the Post-Election Violence" (2008) https://www.ictj.org/sites/default/files/ICTJ-Kenya-Dialogue-Inquiry-2008-English.pdf (accessed 2018-11-03) 1.

[35] International Centre for Transitional Justice "Prosecuting International and Other Serious Crimes in Kenya" (April 2013) https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-Prosecutions-2013.pdf (accessed 2018-11-03) 1.

authorised the prosecutor to act *proprio motu* to start an investigation into Kenyan post-election violence.[36]

The result of this investigation was that, in January 2012, charges were confirmed against Uhuru Kenyatta and William Ruto (elected in 2013 as president and deputy president of Kenya respectively); these included several counts of crimes against humanity such as killing (murder), forcible transfer of population, persecution, sexual offences and other inhumane acts.[37]

Despite their high-ranking office, the question of immunity *ratione personae* did not constitute a barrier to their prosecution according to the International Military Tribunal of Nuremberg and the ICC under Article 27 of the Rome Statute, the International Criminal Law Commission and some scholars.[38] In fact, Kenyatta and Ruto did not face criminal proceedings in their positions but rather in their personal capacity.[39]

In response to the result of the investigation, the Kenyan government decided to bring the case back to the country, based on Article 17 of the Rome Statute, in order to let the national courts, the East African Court and the African Court of Justice and the African Court of Human and Peoples' Rights prosecute the perpetrators.[40] Later in 2012, the Director of Public Prosecution (DPP) established a multi-agency with the mandate to prosecute the cases of post-election violence.[41]

All five counts of crimes against humanity are also punishable under Chapter XIX (killing), Chapter XV (sexual offences) and Chapters XXII and XXIV (protecting life and health) of the Kenyan Penal Code, which is more punitive than the ICC Rome Statute.[42]

Unluckily for the victims of post-election violence, on 5 December 2014, the prosecutor (Fatou Bensouda) withdrew the charges of crimes against humanity against President Kenyatta, citing absence of sufficient evidence to proceed, while the case of Ruto and other perpetrator are still pending before the ICC's Pre-Trial Chamber.[43] Moreover, the prosecutor accused the Kenyan government of refusing to handle important evidence in the case, and of intimidation of witnesses.[44]

Although Kenya has a criminal justice system that includes the International Criminal Act 2008 and constitutional protection for the most fundamental human rights, the post-election crimes remain a major problem owing to the lack of investigation or the lack of interest in prosecuting the

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36 Pedritti *Immunity of Heads of State and State Officials for International Crimes* (2014) 261.

37 *Ibid*.

38 Pedritti *Immunity of Heads of State* 262.

39 *Ibid*.

40 International Centre for Transitional Justice https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-Prosecutions-2013.pdf 2.

41 *Ibid*.

42 Materu *The Post-Election Violence in Kenya* 94.

43 Novak *The International Criminal Court: An Introduction* (2015) 80.

44 *Ibid*.

crimes by the Office of the Director of Public Prosecutions.[45] Consequently, the International Crimes Division of the Kenyan High Court, proposed by a committee of the Judicial Service Commission (JSC) on 30 October 2012 and intended to prosecute post-election violence cases as well as other international and transnational crimes, may end up with no cases to prosecute.[46]

2 3 Obstacles to the principle of complementarity

Given these facts, it is important to highlight that the ICC functions differently from national criminal courts in a number of important respects. Despite the existence of all necessary provisions in the two African countries under survey, they have failed the litmus test to establish proper and genuine implementation of such provisions. The primary responsibility to investigate and to prosecute crimes lies with the national authorities.[47] The fundamental principle governing the functioning of the ICC is the principle of complementarity, in terms of which prosecutions are deferred to the national state.[48] The ICC also has limited jurisdiction based on the territorial principle and the active national principle, apart from the principle of complementarity between the ICC and national courts.[49] From the analysis of the DRC and Kenya, it is clear that notwithstanding the domestication of the ICC statute, this has not resulted in the prosecution of international crimes.

Although the ICC only functions effectively if a state ratifies the Rome Statute, the provisions of the ICC already constitute a braking impact on the state's justice system.[50] Nonetheless, the jurisdiction of the ICC is activated only when there is unwillingness by a state to prosecute crimes under Article 5 of the ICC Rome Statute (crimes against humanity, war crimes and genocide), or inability in the case of a collapse of the judicial system or a lack of effective means at national level.[51] Thus, the ICC can admit a case where there is a lack of implementation in the national legal system. Applicable international standards, including the Statute under Article 21 of the Rome Statute, are a consequence of "incapability" of national jurisdiction to provide justice in the given case.[52]

The ICC can act where its jurisdiction has been accepted by the state in which the crimes were committed. The ICC can also act in the process of

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[45] Kenya for Peace with Truth and Justice "An Option for Justice? The International Crimes Division of the High Court of Kenya" (2014) http://kptj.africog.org/wp-content/uploads/2014/08/A_Real_Option_for_Justice_The_International_Crimes_Division.pdf (accessed 2018-11-03) 9.

[46] International Centre for Transitional Justice https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-Prosecutions-2013.pdf 2.

[47] Gentile "Understanding the International Criminal Court" in Plessis (eds) *African Guide to International Criminal Justice* (2008) 113.

[48] Lattanzi "The International Criminal Court and National Jurisdictions" in Politi and Nesi (eds) *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (2001) 80.

[49] Gentile in Plessis (eds) *African Guide to International Criminal Justice* 100.

[50] Lattanzi in Politi and Nesi (eds) *The Rome Statute of the International Criminal Court: A Challenge to Impunity* 180.

[51] *Ibid*.

[52] Lattanzi in Politi and Nesi (eds) *The Rome Statute of the International Criminal Court: A Challenge to Impunity* 181.

implementation *lato sensu* (in general) where a state is not party to the Rome Statute, as a means of avoiding the commission of such crimes in the state's territory by its state officials or by its nationals in third states.[53] Moreover, the ICC may also intervene in terms of its powers under Article 13(b) of the Rome Statute if:

> "a situation in which one or more of such crimes appears to have been committed is referred to the prosecutor by the [United Nations] Security Council acting under Chapter VII of the UN Charter even for crimes committed by nationals of or on the territory of non-state parties."[54]

For instance, the situation in Darfur, Sudan since 1 July 2002 was referred to the prosecutor of the ICC by the Security Council on its Resolution 1593 (2005).[55]

Despite the useful framework put in place for the purpose of implementing complementarity, an important question still remains: which judge in a national jurisdiction has the temerity to prosecute a sitting head of state? What makes the situation more complex is that in most of these jurisdictions, judges depend on the executive for their promotion and financial remuneration, and most often, the executive also has powers to discipline the judges. These factors pose a challenge to the realisation of complementarity in Africa.

3 THE FAILURE OF THE STATE TO PROTECT JUDGES

This section seeks to demonstrate the failure of states to secure or protect the lives of judges in Africa when compared to ICC judges who discharge similar duties.

The point of departure is that the principle of complementarity leaves the primary duty to prosecute heads of state (where necessary, as explained above) in the hands of local judges. In the event of failure or inability to carry out this function, the ICC steps in.

It is commonly observed that although the local judge has a daunting task to accomplish compared to that of the ICC judge, he or she lacks adequate security in terms of remuneration and life or human security.

The local judge lives in the same jurisdiction as the warlord or head of state who he or she must indict. Nefarious warlords may threaten judges' lives or those of their families because local judges are not given adequate protection by government. Again, an indicted head of state who is being prosecuted tends to command enough financial resources and influence to mobilise an illegal militia or loyal patronage networks if such head of state should wish to make life unbearable for the judge – an inert incentive for the judge to drop a case or recuse himself or herself permanently.

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[53] *Ibid*.

[54] Gentile in Plessis (eds) *African Guide to International Criminal Justice* 101.

[55] Security Council "Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court" (31 March 2005) http://www.un.org/press/en/2005/sc8351.doc.htm (accessed 2018-11-03).

To avoid encroachment on human rights, judges have a duty, according to theorists, to reach a judgment that ensures the sense of a just application of facts and substantive law.[56] However, in Africa, this is far from being true because most judicial organs are not independent but rather serve as a mouthpiece of authoritarian governments.[57] As a result, national courts' justice may only be reminiscent of the victor's justice and court – that is, justice as dictated by the strongest or more influential of the two parties

3 1 Financial security

Judicial independence is promoted by granting life tenure to judges, which ideally empowers them to decide cases and to make rulings according to the rule of law and judicial discretion, even if powerful interests oppose those decisions. Nevertheless, the financial security of judges in Africa seems to be a worrying issue as low payment only serves as a disincentive for judges to uphold the required standards.

3 1 1 Democratic Republic of Congo

Politicians in the DRC have constantly manipulated judges to the extent that judges are now accused of having become corrupt in order to supplement low salaries; that they are facing major independence challenges makes it more obvious that the judiciary may be vulnerable to corruption.[58] Some 1 700 judges of the DRC suspended a strike on 6 January 2004. The purpose of the strike was to demand better pay and working conditions, as well as greater independence of action. That the judiciary is not independent was among the reasons that their request for a salary increment could not be met.[59] This view suggests that an independent judiciary would enable judges to run their affairs without executive interference and as a result that the issue of their salary allocation should be fixed independently – probably to be voted on by Parliament, and not allocated by the executive. Whenever the salary of judges is allocated by the executive, a judge must defer to the authority of the executive for the latter to undertake any reform favourable to him or her.

Sambay Mutenda Lukusa, the president of the Gombe Court of Appeals and president of the judges' union, noted that "the financial question was part of our larger concern of ensuring an independent judiciary". At that time, the salaries of judges were between $15 (US) and $40 per month and they were asking for an increase in their salaries up to at least $950 per month and for payment of salary arrears.[60] However, there is still a problem of

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[56] Bedner 2010 *Hague Journal on the Rule of Law* 67–68.

[57] Lesirela *Providing for the Independence of the Judiciary in Africa: A Quest for the Protection of Human Rights* (LLM mini-dissertation) 2003 1.

[58] Anti-Corruption Resources Centre "Overview of Corruption in the Democratic Republic of Congo" (October 2010) http://www.u4.no/publications/overview-of-corruption-and-anti-corruption-in-the-drc/ (accessed 2018-11-03).

[59] Humanitarian News and Analysis "DRC: Judges Suspend Their Two Month Strike" http://www.irinnews.org/report/47909/drc-judges-suspend-their-two-month-strike (accessed 2018-11-03).

[60] *Ibid*.

financial autonomy and security that pushes judges to engage in corrupt practices. The judiciary receives less than one per cent of the budget of the country; they cannot live comfortably without being tempted by corruption to supplement the basic subsistence of their families – that is, health care, shelter, transport and education for their children and food for their families.[61]

Indeed, the Constitution provides that the judicial power has a budget to be included in the DRC's general budget.[62] The salary of judicial officials such as the First President of the Supreme Court, the Attorney General of the Supreme Court, the President of the Constitutional Council, the President of the Court of Auditors and the Commissioner of Law before the Constitutional Court has increased to 5 million francs ($3 192.61).[63]

However, the realities faced by judges, magistrates and the entire judicial support staff in the DRC are stark. Justice Dhekana has stated: "we don't even have a budget to run our office. To get money, we have to hassle the people in our cases." Every year, the judges write a report to the national government, explaining their needs. "Nothing ever happens".[64] Moreover, the judge also pointed out that they are not working in a professional and conducive space. For instance, there is no electricity in Bunia's judges' office, except for a small solar panel; no chairs existed until UN peacekeepers donated some furniture, and the clerk uses a typewriter for all his work.[65]

Unfortunately, the salary that Justice Dhekana receives as a judge at Bunia's court is $600, which cannot support his family.[66] Consequently, the judges extort money from the parties in the cases before them.[67]

3 1 2 Kenya

The government of Kenya provides funds to all staff members of the judicial power in terms of the Constitution of Kenya, which states in its Article 160(3)

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61 Rugege "Judicial Independence in Rwanda" 2006 424 *Global Business and Development* 533

62 Art 149(7) DRC Constitution states "The judicial power has a budget drafted by the Superior Council of the Magistrature and transmitted to the Government to be included in the general budget of the State".

63 APS "Le salaire des hauts magistrats porté à 5 millions par l'allocation d'une indemnité différentielle (ministre)" The salary of senior magistrates increased to 5 million by the allocation of a differential allowance (minister) 21 December 2011 http://www.seneweb.com/news/Afrique/le-salaire-des-hauts-magistrats-porte-a-5-millions-par-l-rsquo-allocation-d-rsquo-une-indemnite-differentielle-ministre_n_56162.html (accessed 2018-10-19).

64 York "Democratic Republic of Congo Teeters on Edge of 'Catastrophe'" (04 June 2017) https://beta.theglobeandmail.com/news/world/democratic-republic-of-congo-teeters-on-edge-ofcatastrophe/article35200017/?ref=http://www.theglobeandmail.com& (accessed 2017-10-11).

65 *Ibid*.

66 *Ibid*.

67 *Ibid*.

that "the remuneration and benefits payable to or in respect of judges shall be a charge on the Consolidated Fund".[68]

However, there are cases of corruption of the judiciary that tarnish its reliability. This was demonstrated in the case of a judge of the Supreme Court of Kenya, Philip Tunoi, who was accused by journalist Wilson Kiplagat of accepting a bribe amounting to $2 million (£1.4 million) from Dr. Evans Kidero to facilitate his victory to become the governor of Nairobi during the 2014 election.[69] This view was affirmed by his defeated opponent Ferdinand Waititu, who also claimed "he had fresh evidence indicating that Tunoi received Sh200 million to declare Kidero as the governor."[70] It is probable that more judges of the highest court in the land may have benefitted from the alleged bribe. Further evidence suggested that the bribe amount was not $2 million but about $3 million for four judges, but two of the judges were paid separately.[71]

The new Chief Justice, David Maraga, has also stated that ten per cent of staff in the judiciary are involved in this corruption, thereby tainting the image of the judiciary. This ethos has pushed the Chief Justice to wage a campaign against corruption in the judiciary.[72] Presently, the judiciary in Kenya is seen not only as a corrupt institution but its rulings are also seen as judicial populism. After the presidential election of 8 August 2017, the Supreme Court, composed of four judges, including Chief Justice David Maraga, agreed on the nullification of Uhuru's win. Despite the fact that two other judges Njoki Ndung'u and Jackton Ojwang made a decision on 1 September 2017 annulling the result of President Uhuru Kenyatta, he was retained as the President of Kenya.[73]

As a result of this diversity in views by the judges, politicians have in turn attracted different opinions depending on their political orientations. For politicians who occasionally manipulate the votes of the people, the nullification of Kenyatta's win has been seen as the emergence of judicial populism – that is, judges are seen as meddling with the popular choice. A critical analysis of the situation calls for an examination of the three powers: executive, legislative and judicial. The representatives in the legislative executive powers are voted for by the people in terms of Article 94(1) and (2) and Article 129(1) and (2) respectively of the Constitution.[74] In contrast, the

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68 Art 160(3) of the Constitution of Kenya 2010.

69 Osiro "Corruption in Kenya Supreme Court Judges Accused of Accepting Millions in Bribes" https://www.huffingtonpost.com/washington-osiro/corruption-in-kenya-supreme-court_b_9154580.html (accessed 2018-10-17).

70 *Ibid*.

71 *Ibid*.

72 Gitonga "There is Corruption in the Judiciary, says Chief Justice David Maraga" (21 October 2016) https://www.standardmedia.co.ke/article/2000220603/there-is-corruption-in-the-judiciary -says-chief-justice-david-maraga (accessed 2018-10-17).

73 Chengeta "Politics, Populism and the Law: Who Really Speaks for Kenyans?" (1 October 2017) https://www.standardmedia.co.ke/article/2001256132/politics-populism-and-the-law-who-really-speaks-for-kenyans (accessed 2017-10-17).

74 Art 94 states: "(1) The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament. (2) Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty." Art 129 states: "(1) Executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution. (2) Executive authority shall be exercised in

judicial power – in particular, the judges of the Supreme Court – are chosen by the president of the country and the Judicial Service Commission in terms of Article 166(1)(*a*) and (*b*).[75] The election of a president of the country implies the choice of the people. However, judges, who have not been voted for by the people, may have taken the nullification decision in the interest of the people or they may have taken the decision following the procedure of election investigation.[76] For opposition leader Raila Odinga and his supporters, this decision is considered as a decision taken in favour of the people, but for President Uhuru Kenyatta and his supporters, it is also considered to be a decision against the people.[77]

Indeed, financial insecurity as mentioned above supports the malfunctioning of the judiciary. Although each Constitution provides for a budget allocated to the members of the judiciary, this seems to have been ignored resulting in complaints by members of the judiciary relating to low salaries. The low salaries suggest either that government is unwilling to pay the judiciary or there is a lack of money in the state coffers. Since it is in the interest of the executive to subjugate and manipulate the judiciary to act according to its dictates, the former reason is likely to be correct. These factors serve as obstacles to a national judge in dispensing justice relating to international crimes in the same manner as the ICC.

3 2 Independence of the judiciary

The principle of an independent judiciary originates in the theory of separation of powers, whereby the executive, the legislature and the judiciary form three separate branches of government. Independence means that the judiciary must be able to decide on a case without being influenced by the executive, the legislature or any powerful person.

However, experience in Africa shows that judges are often subjected to pressures of different kinds, thereby compromising their ability to exercise their responsibilities.

3 2 1 Democratic Republic of Congo

In the DRC, the Constitution provides that the judicial power is independent of the executive and the legislative power.[78] Neither the executive nor the legislative power has the right to give orders to judges in the exercise of their

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a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit."

[75] Art 166 states: "(1) The President shall appoint– (*a*) the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and (*b*) all other judges, in accordance with the recommendation of the Judicial Service Commission."

[76] Chengeta https://www.standardmedia.co.ke/article/2001256132/politics-populism-and-the-law-who-really-speaks-for-kenyans.

[77] *Ibid*.

[78] Art 149(1) of the Constitution of the Democratic Republic of Congo 2006 states: "The judicial power is independent of the Legislative Power and of the Executive Power".

judicial powers[79] However, the DRC's judicial system exemplifies a lack of independence relating to the administration of justice. Notwithstanding the principle of separation of powers enshrined in Article 149 of the Constitution, the executive continues to interfere with the judiciary.

In the DRC, military courts under the Military Criminal Code, which covers international crimes under the ICC Rome Statute, may only entertain serious crimes. However, several reasons make for a mediocre performance of the professional responsibilities of military justice,[80] such as financial insecurity as explained above, interference by the executive in the administration of justice in order to protect leaders of armed factions from being prosecuted in military courts, and political pressures on prosecutors and courts to abandon proceedings that have already begun against former allies among the leaders of rebel or resistance movements.[81]

On 12 May 2006, the former Mayi-Mayi chief of North-Katanga Gédéon Kyungu Mutanga received protection from his former allies in the government in Kinshasa. This took the form of pressure to influence the investigation and, instead of being held in a cell, he was held in pre-trial detention at the officers' mess of the armed forces of the DRC (FARDC).[82]

The murder of Maître Charles Katambay, a member of the NGO *Groupe des Sans Voix* (group of those who have no voice) of the DRC Bar Association and of an association for the defence of judges that occurred on 25 May 2003 by a soldier from RDC-Goma (the *Rassemblement Congolais Pour la Démocratie*, a guerrilla rebel faction) in front of his house in Uvira. His work related to human rights activities is suspected to be the reason for his assassination.[83] The murder of Maître Charles Katambay is a clear mishap and indication of the existing challenge of the physical protection of judges and legal personnel in general in national courts in Africa.

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[79] Art 151(1) and (2) of the DRC Constitution states: "The Executive power may neither give orders to a judge in the exercise of his jurisdiction, nor decide on disputes, nor obstruct the course of justice, nor oppose the execution of a decision of justice. The legislative power may not decide on jurisdictional disputes, or modify a decision of justice, nor oppose its execution".

[80] The Open Society Initiative of Southern Africa and AfriMAP "Democratic Republic of Congo Military Justice and Human Rights: An Urgent Need to Complete Reforms" (2009) http://www.geneva-academy.ch/RULAC/pdf_state/AfriMAP-and-The-Open-Society-Initiative-for-Southern-Africa-Discussion-Paper-The-Democratic-Republic-of-Congo-Military-justice-and-human-rights-An-urgent-need-to-complete-reforms-2009.pdf (accessed 2018-11-03) 7.

[81] The Open Society Initiative of Southern Africa and AfriMAP http://www.geneva-academy.ch/RULAC/pdf_state/AfriMAP-and-The-Open-Society-Initiative-for-Southern-Africa-Discussion-Paper-The-Democratic-Republic-of-Congo-Military-justice-and-human-rights-An-urgent-need-to-complete-reforms-2009.pdf 12.

[82] The Open Society Initiative of Southern Africa and AfriMAP http://www.geneva-academy.ch/RULAC/pdf_state/AfriMAP-and-The-Open-Society-Initiative-for-Southern-Africa-Discussion-Paper-The-Democratic-Republic-of-Congo-Military-justice-and-human-rights-An-urgent-need-to-complete-reforms-2009.pdf 7.

[83] Refworld "Attack on Justice: Democratic Republic of Congo" (2 April 2003) www.refworld.org/pdfid/48abdd680.pdf (accessed 2018-11-03).

3 2 2 *Kenya*

Article 161(1) of the Kenyan Constitution provides for the independence of the judiciary.[84] However, the judiciary in Kenya also faces intimidation from the executive and legislative powers. After nullification of the August 2017 election results, judges have been threatened.[85] The Chief Justice David Maraga has denounced the intimidation of members of the judiciary by politicians. Judges and members of the judiciary often receive threats, especially from Uhuru Kenyatta's political party who are ready "to cut the judiciary down to size".[86] The Chief Justice has also disapproved of the conduct of the Inspector-General of the police, who has failed to provide security for the life and property of members of the judiciary who are under threat.[87]

Following the threats constantly received by judges, Femi Falana, human-rights lawyer, wrote to Diego Garcia Sayan, UN Special Rapporteur on the Independence of Judges and Lawyers, calling for an investigation into the attacks on the judges of Kenya:

> "I am writing to respectfully request that you use your good offices and position to urgently investigate recent reports of attack on judges in Kenya, and to make it very clear to the Kenyan authorities that your mandate will not accept intimidation, harassment or any form of attacks against judges and other actors of the justice system ... individual judges, particularly of the supreme court, as well as other judicial officers and staff have been attacked, threatened and negatively profiled on social media ... I am seriously concerned that these attacks are coming at a time when the judiciary is starting to hear the 339 petitions already filed in various courts. The attacks on judges and court officials would seem to be politically motivated".[88]

This struggle is meant to empower the judiciary to decide all the cases before it impartially in accordance with the law, without any restrictions, improper influences, and direct or indirect pressures from government or any powerful person for any reason. It is clear that most national courts and judges in Africa may be tempted to avoid certain cases relating to international crimes for fear of retaliation from the powerful whom they have indicted. The people indicted live in the same environment with the judges and also command numerous defence networks on the ground that could be directed against these courts. Conversely, for ICC judges, there are two reasons that those whom they prosecute may command little or no threat against them. First, judges are based in The Hague, disconnected from the

[84] Art 161(1) states: "In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority."

[85] BBC "Maraga Hits Back at 'Threats' over Kenya Election Re-Run" (19 September 2017) http://www.bbc.com/news/world-africa-41322927 (accessed 2017-10-19).

[86] Muthoni "Maraga Accuses the Executive and Parliament of Attempting to Control the Judiciary" (20 September 2017) https://www.standardmedia.co.ke/article/2001255034 /maraga-accuses-the-executive-and-parliament-of-attempting-to-control-the-judiciary (accessed 2017-10-19).

[87] *Ibid*.

[88] The Cable "Falana Asks UN to Investigate Attacks on Judges in Kenya" (26 September 2017) https://www.thecable.ng/falana-asks-un-investigate-attacks-kenyan-judges (accessed 2018-10-19).

environment of those prosecuted, thereby weakening the latter's influence. Secondly, the defence networks of the prosecuted are based in ground zero in Africa. This conclusively suggests that the ICC judge who indicts a sitting president or warlord is more inclined to act without fear or favour than the judge of a national court in Africa who is faced with numerous obstacles.

4 CONCLUSION AND RECOMMENDATIONS

4 1 Conclusion

Given the existence of numerous challenges for local African courts in complying with the principle of complementarity,, as demonstrated above, it is evident that much still needs to be done if this principle is to gain prominence in international criminal law. It should be noted that numerous dangers exist when states are allowed to refer cases to the ICC as delineated under the competence of referrals to the ICC. This is because in most African states, relinquishing power by an incumbent has not come easily.

The authors have discussed the various challenges that are faced by national courts in their attempt to implement the principle of complementarity. These shortcomings have stood in the way of local courts' addressing international crimes and dispensing justice to those who desperately need and deserve it. Owing to factors, among others, such as poor payment of local judges and lack of physical protection for them, it becomes difficult for these judges to rule in sensitive matters such as the prosecution of international crimes committed by the most powerful individuals in the state with the same degree of independence exercised by their counterpart-judges of the ICC.

National jurisdictions can only be said to be unable to prosecute international crimes within a domestic arena when the State has not yet domesticated the ICC Rome Statute. However, this article establishes that there are several national jurisdictions that have domesticated the ICC Statute, but which have nevertheless failed to prosecute these crimes. For instance, Kenya and the DRC, and also countries like South Africa, Chad and Malawi, among others, have failed to prosecute Al Bashir of Sudan for war crimes, even though they are parties to the Rome Statute. It follows that African national jurisdictions are unwilling to prosecute international crimes. Some of the challenges advanced above could explain why they are unwilling. In other words, it is suggested that these shortcomings exist as a result of the context within which justice is required to be meted out. The African environment is still predominantly governed and controlled by dictators and warlords who take no account of respect for human rights and justice.

Many citizens have become fed up with the authoritarianism of such African governments and have embraced rebellion as a last resort to overthrowing such illegitimate governments who have tightened their grip on power against the will of the people. Some of these countries are parties to the Rome Statute and some are not. A few examples of authoritarian governments in Africa are the DRC, Cameroon, Uganda and to a certain

degree, Nigeria. In the course of such struggles, gross human-rights violations are bound to be committed by both factions. In these situations, the State is always quick to refer actions by rebels to the ICC as a means of eliminating opposition to their authority under the thin guise of attempting to curb human-rights violations, given that government itself cannot be absolved of gross human-rights violations resulting from confrontations. The nature of the referrals of Thomas Lubanga from the DRC and Joseph Kony from Uganda can attest to this paradigm.[89]

For a state to accept jurisdiction over egregious crimes committed during an armed struggle by opposing warring factions simply means that the government is judge in its own cause; in most African states, as examined above, courts are spawn of the regime and separation of powers is mostly symbolic or nominal. As a consequence, national courts would rarely rule against a sitting head of state even if it were proven that he or she had committed gross human-rights violations.

Therefore, the principle of complementarity faces two major challenges or setbacks in its implementation domestically. If local courts intervene, the executive might manipulate the verdict to its advantage. Yet, the matter will only be referred to the ICC when it is politically expedient for the executive to do so, rather than when there is a genuine interest in meting out justice or rooting out impunity.

4 2 Recommendations

National interest should be considered in the course of responding to an international crisis. The principle of national jurisdiction to prosecute offenders in international human-rights law should be applied to everyone to avoid insubordination. If this view is ignored, a time will come when national courts start agitating against complementarity. For instance, it is said that Al Bashir has been targeted by the ICC over the commission of international crimes,[90] whereas George Bush and Tony Blair are still at large after committing the same international crimes in Iraq.[91] The standard for indictment or prosecution should be uniform across the board.

It is recommended that the international community should adopt measures that expressly define the position of former heads of state, particularly in Africa. While the Rome Statute seems to remedy the existence of immunity of heads of state by providing that every person regardless of their position is subject to the jurisdiction of the court in instances where human rights have been violated, this cannot guarantee an effective capacity to prosecute, given that the ICC constitutes merely a complementary capacity to national jurisdictions, and not an exclusive jurisdiction in international matters.

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[89] Wanki "Exploring the Interrelationship between the Responsibility to Protect and the Principle of Complementarity in Africa: Conceptual Ambiguities and Contestable Assumptions" 2018 4 *Journal of South African Law* 822.

[90] *The Prosecutor v. Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09.

[91] Caplan "Bush and Blair Carry on Unpunished for the Crimes of the Iraq War" (2018) The Globe and Mail https://www.theglobeandmail.com/news/politics/bush-and-blair-carry-on-unpunished-for-the-crimes-of-the-iraq-war/article31118851/ (accessed 2019-04-10).

It is also recommended that the African Union, together with the ICC, should be able to adopt resolutions or declarations to enforce the independence of the judiciary in Africa. The salaries of judges should be voted on directly by Parliament and should include huge financial incentives to discourage judges from becoming corrupt so that they may discharge their duty without fear or favour. The ICC, the African Union and national governments must finalise a pact on the creation of a security unit exclusively for the maximum protection of judges involved with international crimes. Such a measure would encourage and embolden judges to discharge their mandate fearlessly. At the same time, this measure would discourage implicated heads of state and warlords from threatening judges because they would be aware of such maximum protection and their determination to root out criminal responsibility in terms of international law.

This process would also inspire confidence and it certainly culminates in establishing the independence of the judicial power over executive power in African jurisdictions. Proper independence of the judiciary can lead to implementation of the rule of law and respect for international human rights in Africa.

All African states should be persuaded to implement the Rome Statute principles in order to ensure that grave and atrocious international crimes do not go unpunished and in order to end impunity at the national level with the help of complementarity.

DEVELOPING A STRATEGY FOR EFFICIENT ENVIRONMENTAL AUTHORISATION OF ACTIVITIES AFFECTING WETLANDS IN SOUTH AFRICA: TOWARDS A WISE-USE APPROACH[1]

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SUMMARY

South Africa is a party to the Convention on Wetlands of International Importance especially as Waterfowl Habitat of 1971 (also referred to as the Ramsar Convention). Article 3(1) of the Ramsar Convention makes provision for the wise use of wetlands, which is defined as the "maintenance of the ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development". The Conference of the Parties has agreed on inherent weaknesses that could lead to the hampering of wise use. These weaknesses include, but are not limited to, authorities working in isolation; and the lack of communication between public and private sectors or technical personnel (environmental impact assessment specialists).Within the enabling provisions of South Africa's EIA regulations, reference is made to "water source", "water resource", "wetland" and "ecosystem". All these terms are read to include a wetland. However, whereas the terms "water source", "water resource" and "wetland" are defined in the National Water Act 36 of 1998 (NWA), an "ecosystem" is defined in the National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA), and "water source" is defined in the Conservation of Agricultural Resources Act 43 of 1983 (CARA). Furthermore, the administration of the NWA is with the Department of Water and Sanitation, while NEMBA is with the Department of Environment, Forestry and Fisheries, and CARA is with the Department of Agriculture, Land Reform and Rural Development. This multiplicity, combined with the application of the various specific environmental management acts (SEMAs), complicates the manner in which an EIA application is considered. This is so in that the national environmental framework casts the net wide in identifying the competent authority, but also in its effect on wise use decision making on activities pertaining to wetlands. In light of the aforementioned, this article aims to address the shortfalls and make recommendations that promote wise use.

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[1] Adapted from Lemine *South Africa's Response in Fulfilling Her Obligations to Meet the Legal Measures of Wetland Conservation and Wise Use* (Unpublished thesis, CPUT) 2018.

1 BACKGROUND

The Convention on Wetlands of International Importance especially as Waterfowl Habitat of 1971 (also referred to as the Ramsar Convention) was the first international agreement promulgated to address the conservation of wetlands. The Ramsar Convention aims to make provision for a framework of international cooperation for the wise use and conservation of wetlands and its related resources. Parties to the Ramsar Convention desired to "stem the progressive encroachment on and the loss of wetlands now and in the future" and to "combin[e] far-sighted national policies with coordinated international action".[2] The Ramsar Convention was entered into by South Africa on 21 December 1975 without any reservations deposited to the Secretary-General.[3] Thus, South Africa is bound to the provisions of the Ramsar Convention.

Central to promoting wetlands protection and conservation is the enabling provision, article 3(1) of the Ramsar Convention, which makes provision for the wise use of wetlands – interpreted to mean the sustainable use of the resource.[4] Sustainable use, within this context, is subject to each party's interpretation of sustainable development. Promoting wise use in the light of environmental impact assessment legislation, the Ramsar administration advised that "[g]iven the ecological sensitivity of wetlands, Parties should ensure wherever possible that under that relevant legislation: Environmental considerations concerning wetlands are integrated into planning decisions in a clear and transparent manner."[5]

Within the enabling provisions of South Africa's Environmental Impact Assessment (EIA) regulations, reference is made to a "water source", "water resource", "wetland" and "ecosystem".[6] All these terms are read to include a wetland. It is equally important to indicate that the word "environment" is read to include a wetland,[7] and this author has previously recommended a legislative amendment for the inclusion of the words "wetland environment"

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2 Preamble of the Ramsar Convention.

3 Ramsar Convention Secretariat "South Africa" (undated) https://www.ramsar.org/wetland/south-africa (accessed 2020-03-01).

4 Birnie and Boyle *International Law and the Environment* (2009) 674; De Klemm and Shine *Wetlands, Water and the Law: Using Law to Advance Wetland Conservation and Wise Use* (1999) 47; and Sands *Principles of International Environmental Law* (2003) 604.

5 Ramsar Convention Secretariat "Laws and Institutions: Reviewing Laws and Institutions to Promote the Conservation and Wise Use of Wetlands" (2010) https://www.ramsar.org/sites/default/files/documents/pdf/lib/hbk4-03.pdf (accessed 2020-03-01) 39.

6 GN R327 in *GG* 40772 of 2017-04-07; GN R325 in *GG* 40772 of 2017-04-07; GN R324 in *GG* 40772 of 2017-04-07.

7 In terms of s 1 of the National Environmental Management Act 107 of 1998 (NEMA), the word "environment" means "the surroundings within which humans exist and that are made up of–

(i) the land, water and atmosphere of the earth;

(ii) microorganisms, plant and animal life;

(iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and

(iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and wellbeing".

specifically.[8] Thus, on the face of it, the EIA regulations regulate this domain by way of reference to the aforementioned terms. The terms “water source”, “water resource” and “wetland” are defined in the National Water Act (NWA);[9] an “ecosystem” is defined in the National Environmental Management: Biodiversity Act (NEMBA);[10] and “water source” is defined in the Conservation of Agricultural Resources Act (CARA).[11] Wetlands falling within protected areas (National Environmental Management: Protected Areas Act 57 of 2003) and those forming part of heritage sites (World Heritage Convention Act 49 of 1999) are excluded from this article due to the nature of the protection afforded here. The administration of the NWA is by the Department of Water and Sanitation (DWS); that of NEMBA by the Department of Environment, Forestry and Fisheries (DEFF); and CARA is administered by the Department of Agriculture, Land Reform and Rural Development (DALRRD). Within each department is a competent authority, charged with the power of granting or refusing environmental authorisations. This multiplicity, combined with the application of the various SEMAs (NWA, NEMBA and CARA), make it troublesome to identify the competent authority for granting or refusing environmental authorisations for wetlands, but more so for the way in which decision-making is made. Therefore, before development or any activity in and around a wetland may commence, the competent authority is required, within the specified time, either to grant or refuse the activities, along with reasons.

The World Wildlife Fund (WWF) submitted a list of activities and events that constitute causes for the disappearance of wetlands. These include, but are not limited to: the conversion of wetlands for commercial development, drainage schemes, extraction of minerals and peat, overfishing, tourism, siltation, pesticide discharges from intensive agriculture, toxic pollutants from industrial waste, and the construction of dams and dikes.[12] These activities may only occur subject to a competent authority granting environmental authorisation to an applicant.[13]

However, which department is the decision-making body on granting or refusing environmental authorisation for EIA applications affecting wetlands is unclear, as is the manner in which they are considered.

2 VALUE OF WETLANDS FOR PROMOTING FUNDAMENTAL HUMAN RIGHTS

Wetlands provide an array of important functions to both the natural environment and humans. Falkenmark and Rockström have stated that wetlands function as the “kidneys of a landscape”; they improve water

8 Lemine *South Africa’s Response in Fulfilling Her Obligations* 4.

9 S 1 of 36 of 1998.

10 S 1 of 10 of 2004.

11 S 1 of 43 of 1983.

12 World Wildlife Fund “Half of the World’s Wetlands Have Disappeared Since 1900. Development and Conversion Continue to Pose Major Threats to Wetlands, Despite their Value and Importance” 2 February 2018 https://wwf.panda.org/?322330/Half-of-the-worlds-wetlands-have-disappeared-since-1900 (accessed 2019-11-12) 1.

13 S 24 of NEMA.

quality through the absorption and sedimentation of certain pollutants and nutrients.[14] They function as a natural filter by trapping nutrients, sediments, and bacteria. By doing so, they improve water quality.[15] The nutrients thus trapped by a wetland allow the growth of various plants, which in turn attract various creatures by providing shelter and food.[16] Contrary to the belief that wetlands are water-producing resources, they are in fact water-consuming, as they facilitate groundwater recharge during flood season.[17] This function is crucial in areas surrounded by spaces used for domestic, agricultural and other purposes.[18] In the context of climate-change complications, wetlands also provide a vital service by acting as a carbon sink, contributing greatly towards reducing carbon emissions.[19]

Wetlands fulfil human needs by providing a source of grazing and reeds for the construction of huts.[20] If there is a failure to recognise these valuable functions of wetlands, constitutionally recognised socio-economic rights entrenched in sections 26 (housing) and 27 (water and food security) of the Constitution of the Republic of South Africa, 1996 (the Constitution) will arguably be diminished. Both these sections oblige the State to "take reasonable legislative and other measures within its available resources, to achieve the progressive realisation" of these rights.[21] The interpretation of "available resource" cannot be limited to financial measures. It is submitted that wetlands qualify; their value should be viewed through their availability as an "available resource" that must be protected for the benefits they provide for humans and the natural environment. Stated plainly, wetlands are a resource that could, if not protected, be damaged irreversibly. If the State fails to protect and conserve the resource while it is available, this will put further pressure on the State to engineer for the natural services provided by wetlands. The environmental-law clause found in section 24 of the Constitution guarantees that everyone has a right to an environment that is not harmful to their health and well-being;[22] and to have it protected through reasonable legislative measures.[23] These legislative measures must be well supported by policies and programmes implemented by the executive.[24] Put differently, strategies to inform wetland legislative and policy measures are required.

The primary role player in wetland protection and conservation, from a legislative perspective, is the State – and more narrowly, for purposes of this research, the competent authority.

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14 Falkenmark and Rockstrȍm *Balancing Water for Human and Nature* (2005) 15

15 Wepener, Malherbe and Smit "Water Resources in South Africa" in Strydom and King (eds) *Environmental Management in South Africa* (2018) 363.

16 Falkenmark and Rockstrȍm *Balancing Water for Human and Nature* 14.

17 Falkenmark and Rockstrȍm *Balancing Water for Human and Nature* 16.

18 Turpie "Environmental Management Resources Economics" in Strydom and King (eds) *Environmental Management in South Africa* (2009) 45.

19 *Ibid.*

20 Day "Rivers and Wetlands" in Strydom and King (eds) *Environmental Management in South Africa* (2009) 842–843.

21 Ss 26(2) and 27(2) of the Constitution of the Republic of South Africa, 1996.

22 S 24(*a*).

23 S 24(*b*).

24 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) 42.

3 COMPETENT AUTHORITY

In terms of the national environmental framework Act, NEMA, a competent authority,

> "in respect of a listed activity or specified activity, means the organ of state charged by this Act with evaluating the environmental impact of that activity and, where appropriate, with granting or refusing an environmental authorisation in respect of that activity."[25]

Central to the definition is an "organ of state" which, according to the Constitution, is "any department of state or administration; or functionary or institution".[26] At this point of the investigation, the scope for identifying the competent authority has not been sufficiently narrowed as the competent authority could be referring to any of the environmental-matter ministries by way of the "organ of state", thus casting the net wide. In the case of *Van Huyssteen NO v Minister of Environmental Affairs and Tourism*,[27] albeit that the main issue was about access to information as it relates to rezoning, the court had to decide for the first time on development in terms of the environmental impact in the context of the enabling provisions of the Ramsar Convention and Environmental Conservation Act 73 of 1989. The court confirmed the obligation of the State, in this case, to protect the Langebaan Lagoon, "which is part of a sensitive ecosystem of international importance."[28] The court therefore temporarily declined the application for development of the steel mill pending, amongst other things, the board's investigation of the environmental impact on the said wetland[29] The court further considered whether the harm is irreparable and whether there will be any alternative remedy.[30] However, "irreparable harm" was not applied to or in reference to the wetland.[31] In this instance, the then-Department of Environmental Affairs and Tourism was arguably identified as the competent authority. Worth mentioning here is that this case was decided when environmental legislation, including NEMA, was either in its infancy or non-existent.

Section 24C of NEMA is titled "Procedure for Identifying Competent Authority". NEMA unequivocally states that the Minister (defined as "the Minister responsible for environmental matters"), or the MEC with the concurrence of the Minister, must identify the competent authority who will be responsible for granting environmental authorisations in respect of the said activities.[32] Section 24C(2) in peremptory terms and as a general rule indicates that the Minister is the competent authority for the duty set out in section 24C(1), especially with matters relating to international environmental commitments or relations, or where the footprint traverses international boundaries or falls within the boundaries of more than one

25 S 1 of the National Environmental Management Act 107 of 1998.

26 S 239 of the Constitution.

27 1995 (9) BCLR 1191 (C) 1191 C and D.

28 *Van Huyssteen NO v Minister of Environmental Affairs and Tourism supra* 1198E.

29 *Van Huyssteen NO v Minister of Environmental Affairs and Tourism supra* 1206E

30 *Van Huyssteen NO v Minister of Environmental Affairs and Tourism supra* 1217D.

31 *Van Huyssteen NO v Minister of Environmental Affairs and Tourism supra* 1217E.

32 S 24C(1) of NEMA.

province.[33] The exception to the rule is created by section 24C(2)(*d*), where it is indicated that the competent authority may be: (i) a national department; (ii) a provincial department responsible for environmental affairs or organ of state; or a (iii) statutory body. Furthermore, section 42(1) of NEMA empowers the Minister to delegate his or her power or duty in terms of NEMA or any specific environmental management Act. This further complicates the investigation as the competent authority of DEFF, for example, could be the national office or provincial office of the said department.

In *City of Cape Town v Really Useful Investments 219 (Pty) Ltd*,[34] the court quoted the principle enunciated in the *Maccsand*[35] case, which appears to address part of the central issue of this research by stating:

> "Where [environmental] authorization for a specified activity is required under any number of laws or by-laws, the developer must obtain authorization under each piece of legislation, albeit the repository of power is the same entity under the various legal instruments concerned."[36]

The abovementioned position is arguably modelled on section 24(4)(*a*)(i) of NEMA, which requires the "coordination and cooperation between organs of state in the consideration of assessments where an activity falls under the jurisdiction of more than one organ of state". This article highlights that the environmental assessment practitioner must in reality submit an application to each department concerned. The consequence is that each department, within its set timeframe, provides its individual environmental authorisation. This approach negates the achievement of integrated decision making. Being cognisant of the nature and complexity of the administration of wetlands, it is unclear where the competency of one competent authority commences and another ends. This is counterproductive for implementing clarity and transparency in the provision of environmental authorisation for activities pertaining to wetlands.

4 ENVIRONMENTAL AUTHORISATION

Section 24(1) of NEMA makes provision for the acquisition of environmental authorisation where:

> "potential consequences for or impacts on the environment of listed activities or specified activities must be considered, investigated, assessed and reported on to the competent authority or the Minister … except in respect of those activities that may commence without having to obtain an environmental authorisation."

The tool for which environmental authorisation is required is referred to as an EIA. An EIA is described as "a systematic process of identifying, assessing and reporting environmental impacts associated with an activity is

33 S 24C(2)(*c*)of NEMA.
34 (21106/2014) [2018] ZAWCHC 6; [2018] 2 All SA 65 (WCC).
35 *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC).
36 *Macssand supra* par 64.

provided and includes a basic assessment and scoping and environmental impact assessment".[37]

In relation to the specified activities, section 24H of NEMA empowers a registered environmental assessment practitioner (EAP) to be appointed by the applicant (developer) to manage the application process.[38] NEMA defines an EAP as "[t]he individual responsible for the planning, management, coordination or review of environmental impact assessments" The EAP subsequently submits the application to the correct competent authority.[39] Although this competent authority, at this point, according to the *Maccsand* case quoted in *City of Cape Town v Really Useful Investment* case and section 24(4)(*a*)(i), is every department concerned. The consequence is that this approach promotes silo-working networks, which goes against the grain of wise use, as discussed elsewhere in greater detail.

To give effect to section 24 of NEMA, three EIA regulations were passed to identify or list specific activities for which environmental authorisation is required; and to identify their competent authorities. Briefly, activities in Listing Notice 1 are smaller scale activities, the impacts of which are reasonably known and can be easily managed.[40] For activities in Listing Notice 2, scoping and EIA is required; here activities are considered to be higher risk activities that are likely to have significant impacts on the environment that cannot be easily predicted.[41] Listing Notice 3 relates to activities requiring basic assessment and which are undertaken in specific geographical areas.[42] As to which listing must be consulted, an "ecosystem" is only marked in EIA Listing Notice 3.[43] However, a "wetland" and a "watercourse" are marked in EIA Listing Notices 1 and 2.[44] There are no guidelines categorising these "distinct" systems. This creates legal uncertainty, and where the law is not certain, arguably, implementation becomes problematic.

The EIA listings identify a "wetland", "watercourse" (both defined in the NWA) and "ecosystem" (defined in NEMBA), but not a "water source" (defined in CARA), although the latter is read in CARA to include a wetland. Again, the administration of these water bodies, albeit essentially the same thing, are managed by different environmental-matter departments and different environmental management Acts. This complicates and endangers the protection and conservation of wetlands. The hypothesis is that where legislation is not aligned, an opportunity emerges for disintegration in wetland (environmental) management, which impedes the wise use of wetlands.

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37 GN R326 in *GG* 40772 of 2017-04-07.

38 Oosthuizen *et al* "National Environmental Management Act 107 of 1998 (NEMA)" in Strydom and King (eds) *Environmental Management in South Africa* (2018) 168.

39 *Ibid*.

40 GN R327 in *GG* 40772 of 2017-04-07.

41 GN R325 in *GG* 40772 of 2017-04-07.

42 GN R324 in *GG* 40772 of 2017-04-07.

43 *Ibid*.

44 GN R327 in *GG* 40772 of 2017-04-07; GN R325 in *GG* 40772 of 2017-04-07.

5 WISE USE OF WETLANDS AND SUSTAINABLE DEVELOPMENT

The wise use of wetlands is defined as the "maintenance of the ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development".[45] The "ecosystem approach" is however defined as a "strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way".[46] NEMBA defines an ecosystem to mean "a dynamic complex of animal, plant and micro-organism communities and their non-living environment interacting as a functional unit".[47] A wetland falls within the concept of an ecosystem.

An ecosystem approach could be considered through a particular lens, integrating conservation and sustainable use through management[48] – for example, an administrator within an environmental-matter department must grant environmental authorisation.

The administrator is obliged to promote "wise use" within the context of sustainable development. The concept of sustainable development can be traced back to the Stockholm Conference of 1972. Section 1 of NEMA provides that sustainable development means "the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations". Sands, without providing a definition for sustainable development, identifies elements that comprise the legal concept:

- "The need to take into consideration the needs of present and future generations;
- The acceptance, on environmental protection grounds, of limits placed upon the use and exploitation of natural resources;
- The need to integrate all aspects of the environment and development; and
- The need to interpret and apply rules of international law in an integrated and systematic manner."[49]

It has been submitted that the wise use of specific wetlands is an integral part of sustainable development.[50] Considering the above, it is evident that wise use within the sustainable development framework requires the promotion of integrated environmental management aspects for the benefit of present and future generations, and that a "silo approach" to addressing environmental issues cannot exist within this realm.

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45 Birnie and Boyle *International Law & the Environment* 674.

46 Paterson "Biological Diversity" in Strydom and King (eds) *Environmental Management in South Africa* (2018) 524.

47 S 1 of NEMBA.

48 Paterson in Strydom and King (eds) *Environmental Management in South Africa* 524.

49 Sands *Principles of International Environmental Law* (2003) 253.

50 De Klemm and Shine *Wetlands, Water and the Law: Using Law to Advance Wetland Conservation and Wise Use* (1999) 49.

6 INTEGRATED ENVIRONMENTAL MANAGEMENT

Chapter 5 of NEMA is titled "Integrated Environmental Management" (IEM) and houses the entire section 24 and related provisions of environmental authorisations and EIA. Furthermore, NEMA's stated purpose is

> "to provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote cooperative governance and procedures for co-ordinating environmental functions exercised by the organ of state; to provide for certain aspects of the administration and enforcement of other environmental management laws; and to provide for matters connected therewith."

The embodiment of cooperative environmental governance is articulated by Du Plessis who avers that "South Africa's policy and legislation have served to strengthen cooperative governance, especially with regard to environmental matters."[51]

This research shines a light on section 24L, which makes provision for the "Alignment of environmental authorisation". Section 24(L)(1) provides:

> "[a] competent authority empowered…to issue an environmental authorisation and any other authority empowered under a specific environmental management Act may agree to issue an integrated environmental authorisation".

This provision promotes integration between departments for the issuing of environmental authorisations, which appears to address the administrative issue with which this article is concerned. The shortfall in section 24(L)(1) is its failure to create an obligation to issue an integrated environmental authorisation (IEA); this is evident by the inclusion of the word "may". Furthermore, NEMA fails to define IEA or provide guidelines to assist departments in engaging with IEAs. Should the departments choose to issue an IEA, section 24(L)(2)(*a*) prescribes that cognisance must be given to enabling provisions of NEMA, other law or SEMA. To implement the purpose of NEMA would arguably make an IEA compulsory. This would fulfil the Ramsar administration's recommendation to integrate decisions in a clear and transparent manner, which also has the effect of promoting cooperative environmental governance, as envisaged in NEMA's preamble. "Other law" could be read to include the Constitution.

Chapter 3 of the Constitution makes provision for the broad principles of cooperative government in terms of section 41(1)(*h*), which provides:

> "All spheres of government and all organs of state within each sphere must–
> (h) co-operate with one another in mutual trust and good faith by–
> (i) fostering friendly relations;
> (ii) assisting and supporting one another;
> (iii) informing one another of, and consulting one another on, matters of common interest;
> (iv) co-ordinating their actions and legislation with one another;
> (v) adhering to agreed procedures."

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[51] Du Plessis "Legal Mechanisms for Cooperative Governance in South Africa: Successes and Failures" 2008 23 *SAPR/PL* 87 87.

Du Plessis submits that despite this constitutional and legislative imperative, turf wars, unwillingness of officials, and fragmentation sometimes frustrate this ideal of cooperative environmental governance.[52] Cooperative environmental governance refers to the various spheres of government (national, provincial and local) mandated to perform functions relating to the environment.[53]

Section 2 of NEMA provides for a set of sustainable development principles. Section 2(4)(*r*) describes a wetland as a "sensitive, vulnerable, highly dynamic and stressed ecosystem". It continues by providing that specific attention is required in the management and planning procedures of these systems. To provide clearly defined and/or identified attention to wetlands as required could arguably be interpreted to mean that a "coherent and consolidated" approach is required, and certainly not a framework that creates legal uncertainty or vagueness. The Ramsar administration requires the implementation of EIA into planning-law mechanisms.[54] Planning-law mechanisms are extensive within our current framework; however, the focus here is on EIAs, as provided for in NEMA. The inclusion of EIAs as a planning tool within the scope of wetland protection is vital. It is submitted that EIAs control development through environmental planning, the aim of which is sustainable development.[55]

In the current framework, without legal intervention, one provincial environmental-matter department might refuse a development application while another provincial environmental-matter office might grant it, thus arguably leading to friction between government departments. Furthermore, the non-prescriptive nature of an IEA, in terms of section 24(L)(1), is a missed opportunity for promoting the objectives of cooperative environmental governance.

7 ANALYSIS

Permissible activities impacting wetlands are managed by a competent authority by way of environmental authorisation, as the activities may not commence without such authorisation. The power of permitting and managing the activities and, in the bigger scheme of things, protecting wetlands, sits with the competent authority.

The use of the words "ecosystem", "water source", "water resource" and "wetland" within legislation and the EIA regulations themselves creates uncertainty, as they are all read to protect one resource, for example. Irrespective of its expression, the series of benefits provided by this resource are vital to the natural environment and humankind.

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52 Du Plessis 2008 *SAPR/PL* 87.

53 Nel and Alberts "Environmental Management and Environmental Law in South Africa: An Introduction" in Strydom and King (eds) *Environmental Management in South Africa* (2018) 44.

54 Ramsar Convention Secretariat https://www.ramsar.org/sites/default/files/documents/pdf/lib/hbk4-03.pdf 36–37.

55 So "Environmental Law of Korea in Nicholas, Robinson, Burleson and Lin-Heng Lye (eds) *Comparative Environmental Law and Regulation* (2019) §§34:16.

This resource is not regulated by one piece of legislation; or managed by one environmental-matter department; but, in each case, by three. Practically, this multiplicity could result in lack of accountability, conflict, loss of resource, poor coordination and governance issues, to mention a few. These problems hinder adherence to the constitutional principle of cooperative government, and lead to the abrogation of the concept of IEM under which environmental authorisation falls. Similarly, IEM does not suggest that only one department should be the competent authority. On the contrary, it is arguably indicative, by way of linking the constitutional provision of cooperative government and IEM, that environmental authorisation should be pursued as a joint venture. This idea is supported by section 24(2)(*a*)(i), and the more so by section 2(4)(*l*) of NEMA, which provides that "there must be intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment". This section is coined a sustainable development principle. The hypothesis is therefore that coordination of legislation, policies or regulations would bolster the management of wetlands by the different departments.

Note again that "environment" is read to include wetlands.[56] Thus, the concept of cooperative government, cooperative environmental governance, the purpose of NEMA and the legislative framework does not suggest that there should be only one competent authority. Rather, innovative mechanisms should be explored in promoting IEM for wetland authorisations, from the commencement stage (application) to the final decision (outcome).

South African planning law must be lauded for incorporating wetland considerations within the body of planning law (EIA), which is a concern raised by the Ramsar administration. However, inclusion does not necessarily constitute compliance if the said provisions are inconsistent with the purpose for which they were created. It is clear that for EIAs pertaining to wetlands, there are some inconsistencies and uncoordinated efforts that lead to decisions being problematic. The adequacy of this tool (EIAs) in its current form abrogates spirit of Ramsar which instructs contracting parties to coordinate planning mechanisms that bolster the sustainable use of wetlands.[57] Key in the submission is the word "coordinate.

8 RECOMMENDATION

The wise-use approach calls for a strategy of integration of matter within the context of sustainable development. In application, such an approach encompasses integration of the management of land, water and living resources on the one hand, balanced with social, environmental and economic consideration through planning, implementation and decision-making on the other hand. This calls for a multifaceted strategy for addressing the process of considering applications for activities for authorisation. The ecosystem approach is represented in this that the DALRRD's administers the issue of land, the DWS administers water, and

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56 Lemine *South Africa's Response in Fulfilling Her Obligations* 4.

57 Art 5.

DEFF, living resources. However, failure to integrate processes and decision-making could have devasting effects on the future of the environment and South Africa.

8 1 Strategies

8 1 1 Environmental management

The ecosystem approach is representative of the various aspects that constitute a wetland as they relate to the various environmental departments' mandates in line with those individual aspects (land, water and living resources). Supporting the 2030 Agenda for Sustainable Development (UNSDG), to which South Africa subscribes and reports, the Ramsar administration calls for "increased integration and synergies across multilateral agendas".[58] Note that the legislation pertaining to wetlands as administered by various environmental departments is not the primary concern. This article raises the concern that implementation is stifled by legal uncertainty and vagueness created by our current legal framework, with specific reference to the lack of integration or wise use. Yet, environmental authorisation for wetlands is only one aspect raised. Administrative bodies must be pulled together by plausible strategies to overcome many other uncertainties that perpetuate the failure to promote wise use. Where the law is uncertain, space for abuse is created.

8 1 2 The Constitution

The Constitution's promotion of environmental conservation and protection does not in any way prevent or abrogate policy development. Instead, the promotion of environmental (wetland) conservation and protection places a positive obligation on the State to enact legislative measures that will bolster sustainable development.

8 1 3 NEMA and the EIA regulations

To implement IEM and wise use properly, section 24(L)(1) must be amended to read that IEA is mandatory with activities triggering different departments. Such an amendment would arguably promote departmental integration for other environmental media. Furthermore, the lack of a clear definition of IEA and guidelines for implementing an IEA should be addressed. Environmental authorisation for activities pertaining to wetlands should be modelled on agreed guidelines by the competent authorities.

In the spirit of the UNSDGs, section 41 of the Constitution and IEM, and keeping in mind the benefits provided by wetlands, it is recommended that the EIA regulations be amended. The amendment should identify DEFF, the DWS and the DALRRD as the competent authority. As prescribed in section

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58 Ramsar Convention Secretariat "Scaling Up Wetlands Conservation, Wise Use and Restoration to Achieve the Sustainable Development Goals" (July 2018) https://medwet.org/wp-content/uploads/2018/07/wetlands sdgs e.pdf (accessed 2020-02-29) 2.

24(2)(*a*)(i), the EAP would submit the application to each department. From this point onward, a policy directive could guide the way these departments consult and decide together as a single competent authority and submit an IEA. This would promote section 41(1)(*h*)(i)-(v) of the Constitution. Where an EAP (specialist) fails to include a department, then that application must be resubmitted, and any process that commenced must start *de novo*. For purposes of brevity, examples of conflict resolution mechanisms are not discussed here. It should be noted that NEMA and EIA regulations are time bound for decision-making, and this must be taken into consideration when drafting the policy directive. The recommendation as it relates to time period could be extended to ensure proper engagement, decision-making and conflict resolution in the interests of preventing the extinction of the valuable wetlands resource. Departments do not have to meet physically but could engage with each other and make decisions on other media platforms (such as Microsoft Teams or Zoom). Such platforms create an exciting opportunity for departmental integration on different levels. Matters relating to monitoring and evaluation – for example, after granting the authorisation – can be addressed here too, in order to eliminate duplication.

Interestingly, in January 2020, the Minister of Environment, Forestry and Fisheries published Schedules in a notice that set out "minimum criteria for reporting of identified environmental themes when applying for environmental authorisation".[59] This notice applies specifically to impacts on terrestrial animal species, along with levels of sensitivity (very high/high/medium/low). In terms of the National Biodiversity Assessment Report 2018 (NBAR), out of the 135 inland wetlands, 83 fall within the "critically endangered" category.[60] Nothing prevents the Minister from considering and publishing a similar notice for wetlands, based on the research contained in the NBAR by the South African National Biodiversity Institute.

In order to bolster integration further, research suggests that stakeholders of wetland management and wise use are not limited to environmental-matter departments but include local and scholarly communities.[61]

9 CLOSING REMARKS

This research has looked into the area merely through a single lens. Other legal obligations having a direct bearing on or incidental to the law and wetlands may be stifled by the way sectoral environmental legislation regulates and aims to govern wetlands. This research may serve as a tool to address issues pertaining to wetland EIA authorisation where sectors cut

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59 GN R655 in *GG* 42946 of 2020-01-10. Procedures to be followed for the assessment and minimum criteria for reporting of identified environmental themes in terms of section 24(5)(*a*) and (*h*) of the National Environmental Management Act, 1998, when applying for environmental authorisation.

60 South African Biodiversity Institute "National Biodiversity Assessment 2018: The Status of South Africa's Ecosystems and Biodiversity" (2019) 104.

61 Sugiura "'Wise Use' in Watarase-yusuichi: Creating New Value through the Integration of Stakeholders" 2019 7 *International Journal of Social Science Studies* 93 93.

across each other and sectoral legislation and management intersect. Perhaps the future will see only one department of environmental matters.

Currently, there is no national policy or SEMA for wetlands as there is for the coast, biodiversity, protected areas and water, to mention a few. Within such a policy, there should be a specific section dedicated to the environmental authorisation submission process as it relates to activities around wetlands.

NOTES / AANTEKENINGE

THE PROPOSED AMENDMENT TO THE DEFINITION OF "VELDFIRE" AS ARTICULATED BY THE NATIONAL VELD AND FOREST FIRE AMENDMENT BILL [B22–2016]

1 Introduction

It goes without saying that fire is an important factor in the development of humankind. When humans first discovered fire, it instantly became their best friend. Fire enabled early humans to light up the dark, indulge in cooked meals and provide warmth for their bodies and homes. However, even before they figured out how to manually reproduce fire, it existed in nature. Fire, and specifically "veldfire", exists naturally and does not need the agency of man.

Today, severe drought (Forsyth, Le Maitre, Van den Dool, Walls, Pharoah and Fortune "The Knysna Fires 2017: Learning From the Disaster" (April 2019) https://www.polity.org.za/article/the-knysna-fires-of-2017-learning-from-this-disaster-2019-06-07 (accessed 2019-11-06) 2), specific weather conditions (for example, high temperatures, high wind speed and low rainfall combine to induce favourable veldfire conditions) and an array of other factors (such as topography, land size, fuel type, population density (human influence) and climate change) all increase the possibility of a veldfire occurring (Schulze and Schütte "Fire Danger Rating Under Natural Conditions in South Africa and Climate Change" in Schulze *Handbook for Farmers, Officials and Other Stakeholders on Adaptation to Climate Change in the Agriculture Sector Within South Africa* (2016) 20). Owing to these contributing factors, fire has become both friend and, in some instances, deadly foe. For example, fire is used as a friendly management tool to prevent or lower the risk of veldfire (Teie *Fire Managers Handbook on Veld and Forest Fires* 2ed (2009) 471), while an example of fire as foe are what are now commonly known as the "Knysna Fires" of 2017, which remain a vivid reminder of what uncontrolled fires can do. This type of fire not only damaged social, economic and environmental assets, it also quickly escalated into an emergency incident. An "incident" is defined in s 30(*a*) of the National Environmental Management Act 107 of 1998 to mean "an unexpected sudden occurrence, including a major emission, fire or explosion leading to serious danger to the public or potentially serious pollution of or detriment to the environment, whether immediate or delayed." (See Santam "Knysna Fires of 2017: Santam Releases Independent Disaster Report" (6

June 2019)). The Knysna Fires are a classic example of why managing veldfires in an integrated way is important within a South African context and are one of the main reasons for the promulgation of the National Veld and Forest Fire Act (101 of 1998) (NV&FFA) (s 3).

Regrettably, however, the NV&FFA defines neither "veld" nor "veldfire". Instead, it defines "fire" to "include a veldfire" and goes on inadequately to explain that "veldfire" means "veld, forest and mountain fire" (s 2(1)(xix)). With no definition in the NV&FFA to explain what a veldfire is, one of the problems it may create is the following:

> "Assume a scenario where a fire spreads from a railway reserve, through a field of pasture (this qualifies as veld), then through a dry maize field, passing onto a "werf" (the ground surrounding a farmhouse), burning down the farmhouse and then spreading into an area of uncultivated land. This will be a fire that is not a veldfire (in the railway reserve), then a veldfire (in the pasture), then a fire that is not a veldfire (in the maize field and the "werf"), then a veldfire again (in the uncultivated land). Surely the Act is concerned with the fire from its start to its demise, not portions of it, depending on what it happens to be burning as it spreads. Even more ridiculously, because the fire spreading through the "werf" is not a veldfire, it could be concluded that the farmhouse was not burnt down by a veldfire." (Kidd "When is a Veldfire Not a Veldfire?" 2007 28(3) *Obiter* 607 612)

Taking the above reasoning into consideration, arguably one of the main challenges of the NV&FFA is the strict interpretation and inadequacy of the term "veldfire". In refreshing contrast, however, the National Veld and Forest Fire Amendment Bill (the Bill) aims to provide more meaning to the term "veldfire" by proposing the following definition:

> "Any vegetation fire that occurs outside a city, town, its adjoining industrial or residential area."

The purpose of this note is therefore a critical analysis of the proposed amendment to the definition of veldfire by:

- providing legislative background to the term "veldfire";
- investigating the way the courts of the past have interpreted the term "veld" and consequently "veldfire";
- explaining why the proposal to amend the term "veldfire" is important;
- briefly looking at how other countries define their equivalent of South Africa's "veldfire"; and, lastly,
- by providing remarks and suggestions.

2 Legislative background of "veldfire"

During the time of the seventeenth-century European settlers, a division grew between managers of forests and those of pastoral and grazing land on the management of veldfires (Teie *Fire Managers Handbook* 472). This was mainly because most laws passed at that time focused on preventing veldfires occurring in forests and not necessarily on agricultural land (Teie *Fire Managers Handbook* 472).

The Forest and Herbage Preservation Act (18 of 1859) (the Preservation Act) was the first piece of legislation drafted with the intention to combat veldfires specifically. It was also the first in South Africa (SA) to introduce and promote the idea of conservation (Anderson and Grove (eds) *Conservation in Africa* (1989) 26). Importantly, however, the Preservation Act did not define "veld" or "veldfire". This Act was replaced by the Forest Act of 1888 and the Forest Act of 1984, which also provided for the prevention and combating of veldfires, but without defining "veld" or "veldfire". Various other pieces of legislation aimed at preventing and controlling veldfires have also been passed. These include: "the Soil Conservation Act of 1946 (later replaced by the Conservation of Agriculture Resources Act 43 of 1983), the Natal Act of 1895, the Mountain Catchment Areas Act 63 of 1970, the Nature Conservation Ordinance 19 of 1974, the Occupational Health and Safety Act 85 of 1993, the Fire Brigade Services Act 99 of 1987, the Atmospheric Pollution Prevention Act 45 of 1965 (since replaced by the National Environmental Management: Air Quality Act 39 of 2004) and the National Environmental Management Act 107 of 1998). However, only the Conservation of Agriculture Resources Act (43 of 1983) (CARA) defines "veld", which is discussed in more detail below.

More recently, two further Acts were passed almost simultaneously – the NV&FFA and the National Forest Act (84 of 1998) (NFA). One of the objectives of the NFA is to "promote the sustainable management and development of forests for the benefit of all" (s 1(*a*)). By contrast, the overall purpose of the NV&FFA is to prevent and combat veld, forest and mountain fires throughout the Republic (s 1(*a*)).

The NFA embraced most of the historical developments and ideas relating to preventing and combating veldfires, and most of the mechanisms put in place by the Forest Act for the preventing and combating of veldfires were incorporated into the NV&FFA. Important practices such as obliging landowners to have firebreaks were imported from the old Forest Act (122 of 1984) into the new NV&FFA. However, as already noted, there was no definition of "veldfire" in the Forest Act.

This brings us to the NV&FFA, where the definition of "veldfire" makes a debut – albeit insufficiently. As previously mentioned, the Act simply states that "fire" includes a "veldfire" (s 2(1)(vi)) and that a "veldfire" means "veld, forest and mountain fire" (s 2(1)(xix)). Strictly speaking therefore, the NV&FFA deals only with these three specific types of fire, none of which is defined in the NV&FFA. Of the three, only "forest" is specifically defined in another Act – namely, the National Forests Act (84 of 1998) (s 2(1)(x) provides that "forest" includes – (a) a natural forest, a woodland and a plantation; (b) the forest produce in it; and (c) the ecosystems which it makes up). Conceivably, the legislature at that time may have reasoned that no explanation is needed to explain the types of fire as these would be plainly understood.

Due to the lack of a definition, the South African courts were forced to provide clarity on the interpretation of the term "veld". This was done in the case of *West Rand Estates v New Zealand Insurance Co Ltd* (1925 AD 245), where Solomon JA held that, generally, the concept of (grass) veld is not only identified by its uncultivated and unbuilt state but also by the

characteristic that it does not occur within a residential or industrial yard (*West Rand Estates v New Zealand Insurance Co Ltd supra* 253). Kotze JA continued by providing the perfect summary of the above reasoning:

> "By veld is generally understood the uncultivated and unoccupied portion of land, as distinct from the portion which is cultivated, occupied and built upon. It is that part of open and unoccupied land over which cattle and sheep and other stock are turned for grazing purposes." (*West Rand Estates v New Zealand Insurance Co Ltd supra* 264)

Watermeyer J, in the case of *Van Wyk v Hermanus Municipality* (1963 (4) SA 285 (C)), confirmed the above interpretation and held further that, should a fire break out on a golf course, it cannot be considered a veldfire (264). This of course makes sense as a golf course is cultivated, occupied and built upon, as per the court's interpretation. Both cases were quoted in the more recent case of *Gouda Boerdery BK v Transnet* (2005 (5) SA 490 (SCA)), in which Scott JA agreed with the *dicta* of both above cases (*Van Wyk v Hermanus Municipality supra and West Rand Estates v New Zealand Insurance Co Ltd supra*). (For an instructive evaluation of these cases, see Kidd 2007 *Obiter* 609.)

At this stage, it is worth noting that the CARA Regulations (GN R1048 in *GG* 9238 of 1984-05-25, commencement date 1984-06-01) (the Regulations) as alluded to earlier, are the only source of a specific definition of "veld", which is defined as:

> "land which is not being or has not been cultivated and on which indigenous vegetation, or other vegetation which in the opinion of the executive officer is or can be utilised as grazing for animals, occurs." (CARA Regulations, reg 1)

As referred to earlier, the above definition is couched in the same terms used by the courts in interpreting and defining "veld" and thus "veldfire". To this end, the Guide to Interpretation and Implementation of the NV&FFA (Version 3, 6 January 2005) published by the then-custodians of the NV&FFA, the Department of Agriculture, Forestry and Fisheries, states the following:

> "The fires are specified as "veld, forest and mountain fires" to distinguish the scope of the Act as excluding fires in built-up areas, and we refer to them as veldfires". (The Guide to Interpretation and Implementation of the National Veld and Forest Fire Act (V 3, 6 January 2005) 10)

We can see how the courts' interpretation corresponds with this guiding document as it relates to the interpretation of the NV&FFA. Thus, technically speaking, the courts were correct in the way they interpreted veldfire at that stage. It is, however, surprising that even though the courts had in 1925 already shed light on what was considered to be "veld", at the time of writing this note, the NV&FFA has still not been amended to reflect this interpretation. This brings us squarely to the purpose of this note – to critique the proposed amendment to the definition of veldfire.

3 The critique

As previously stated, the Bill proposes the following definition of "veldfire":

> "Any vegetation fire that occurs outside a city, town, its adjoining industrial or residential area."

As a point of departure, it is important to note that, strictly speaking, the definition of "veldfire" is not being extended. As repeatedly pointed out above, there currently is no definition in the NV&FFA, but the intention is, for the first time, to attempt to define "veldfire" more accurately and appropriately. With this in mind, this note intends to unpack the proposed definition by focussing on two of its elements.

The first is the phrase "any vegetation". "Any vegetation" would be broad enough to include grass and flower beds that are commonly found in yards of private home owners and even golf courses. This means that should you live outside a city, town, or its adjoining industrial or residential area, and your garden plants burn, this can be classified as a "veldfire", which, as discussed through the case law and the Guide to Interpretation and Implementation of the NV&FFA, was not the intention of the NV&FFA.

Further, and practically speaking, the idea of "outside" a city, town or its adjoining industrial or residential area is possibly the biggest shortfall of the proposed amendment. The term "outside" in this context is vague as it may be interpreted to mean, among others, outside the district municipal boundaries, or outside a physical boundary, such as a boundary comprising a fence, wall or any other man-made structure, or even outside a natural boundary such as a body of water or mountains. The term "boundary" should be specifically defined to articulate the geographical locations of where veldfires can occur.

As a reminder, the NV&FFA caters solely for fires that occur in veld, forest or on a mountain. In accordance with case law, these areas would not be cultivated, occupied or built on. To now include all types of fire that occur outside a city, town, or its adjoining industrial or residential area would, at the very least, call for a change to the name of the NV&FFA. This is true as, historically, "veld" was plainly understood in terms of the above case law. Today, however, this understanding would have to be rethought – given factors such as the already-mentioned urbanisation challenge, where uncultivated and unbuilt-on land becomes scarce as human population increases and expands. The probablity is that the legislature originally intended a narrower scope for the definition of "veldfire", which the cases have endorsed. Strictly speaking, the proposed amendment clashes with the purpose (s 1(1)) of the NV&FFA. As pointed out, the definition, as it currently reads, is impractical – in the sense that, and as Kidd describes it, a veldfire will be able to morph between being a veldfire and then not a veldfire, depending on where and what it burns during the same event (Kidd 2007 *Obiter* 612).

As far as the division and ownership of land is concerned in South Africa (SA), there can never be an "outside" a city, town, or its adjoining industrial or residential area. This is true because whenever we find an end to any

municipal boundary line (for example), another is immediately identified. There is no "no-man's-land" in SA, as all land is presumably owned by someone (whether privately or by government within its various spheres) and, as such, all land is demarcated. (The Constitution of the Republic of South Africa, Act 108 of 1996, states in s 151(1) that the whole territory of the Republic must be covered by municipalities.) This demarcation essentially means that, where one boundary line ends, another immediately commences.

On the other hand, one can appreciate that government has taken steps to address the issue of crafting a definition for "veldfire", albeit with shortcomings. It is perhaps fitting at this juncture to look at how other jurisdictions have termed and defined the equivalent of "veldfire".

The Food and Agricultural Organisation of the United Nations (UN) (Fire Management: Voluntary Guidelines Fire Management Working Paper FM17E (2006) 2) uses the term "wildfire" and defines it as "any unplanned and uncontrolled wildland fire that, regardless of ignition source, may require suppression response or other action …" (Fire Management: Voluntary Guidelines Fire Management Working Paper FM17E 59). In the same breath, "wildfire" and "wildland fire" is also adopted throughout the United States of America (USA) (https://www.nfpa.org/Public-Education/Fire-causes-and-risks/Wildfire/Firewise-USA (accessed 2019-11-10)). In other parts of the USA, the term "brushfire" is used and refers only to a fire involving low-growing plants, such as scrub and brush (https://www.latimes.com/california/story/2019-10-21/brush-fire-in-pacific-palisades-threatens-homes (accessed 2019-10-22)).

In Australia, the Rural Fires Act 1997 No 95 uses the term "bushfire" and defines it to include "grass fire" (Rural Fires Act s 4, read with the Act's Dictionary found at the end of the Act).

Canada also refers to the term "wildfire" but defines it differently as: "An unplanned or unwanted natural or human caused fire, as contrasted with a prescribed fire" ("CIFFC Canadian Wildland Fire Management Glossary" Canadian Interagency Forest Fire Centre (2017) 31).

Among these various terms or phrases used, along with their respective meanings, it is the UN's definition of "wildfire" that is the more forward thinking in its alluding to specific elements within the definition. The first of these elements is the phrase "uncontrolled wildland fire". This is particularly important as not all "veldfires" are regarded as uncontrolled. The second is "may require suppression". This is important as not all "veldfires" may need to be extinguished. The author is therefore in agreement with Kidd when he argues that not only should the definition of "veldfire" be reconsidered but should, at the very least, include these two elements (Kidd 2007 *Obiter* 613).

4 Closing remarks and proposed definition

Amending legislation with the aim of making it more relevant and practically implementable should always be at the forefront of national, provincial and municipal planning. Even though the definition can be seen as flawed, it is a

step in the right direction. The discussion on the different definitions illustrate that it is important and helpful to have a definition regardless of whether the term used be "veldfire", "wildfire" or something else. In the case of the USA and Canada, both jurisdictions use the term "wildfire", but each with different connotations. Journalists throughout the developing and developed world commonly refer to "wildfire" when describing a fire consuming vegetation and or structures on a large scale (examples of these include the already-mentioned reporting on the Knysna fires, the fires occurring in the rainforest (affecting Brazil, Peru, Bolivia, Paraguay), and in California in the USA, Lebanon, Alaska, Siberia, Greece, Spain, France and Russia).

As the proposed amendment to the definition currently reads, it remains unhelpful and impractical. Should the proposed amendment become law, the first hurdle to overcome would be to determine where, in terms of geographical location, a veldfire can occur in SA, if at all. By borrowing some concepts from the definitions discussed, perhaps the definition of "veldfire" could be more accurately reworked as:

> "Any vegetation fire that may require suppression or other action and which occurs outside a residential or industrial plot where there is a potential threat to human life, environmental harm or damage to property."

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CASES / VONNISSE

PARATE EXECUTIE CLAUSE IN MORTGAGE BOND VERSUS POST-DEFAULT AUTHORITY TO SELL

Business Partners Limited v Mahamba (4568/2016) [2019] ZAECGHC 17 (26 February 2019)

1 Introduction

The purpose of this note is to consider a case that came before a full bench of the Eastern Cape Division of the High Court in Grahamstown – namely, *Business Partners Limited v Mahamba* ((4568/2016) [2019] ZAECGHC 17 (26 February 2019)). The case touched on the age-old debate surrounding the validity of *parate executie* (summary execution or private sale) clauses in agreements that hypothecate property as security for the payment of a debt. Even though such clauses are popular in pledge agreements pertaining to movable property (including the hypothecation of incorporeal movables via a cession *in securitatem debiti*), this case involved a mortgage bond pertaining to immovable property. Moreover, as explained below, the impugned clause *in casu* technically was not a *parate executie* clause but an agreement entered into after the debtor defaulted on a loan.

A *parate executie* clause generally seeks to entitle the secured creditor to dispose of the hypothecated property through a private sale – that is, without going through the normal court processes – when the debtor defaults on payment obligations under the loan agreement. The validity of *parate executie* clauses has been debated since at least Roman-Dutch times (see Krause "The History of *Parate Executie*" 1924 41 *SALJ* 20), while the debate has also featured in modern South African case law and literature. More recently a constitutional dimension has been added to (and has revived) the controversy by virtue of the right of access to courts guaranteed in section 34 of the Constitution of the Republic of South Africa, 1996 (the Constitution). There is also a significant difference depending on whether a pledge of movable or a mortgage of immovable property is involved. It is moreover necessary to distinguish between *parate executie* clauses included in the bond itself and agreements subsequent to a debtor's default in terms of which a debtor authorised a creditor to sell the property without having to go through the court processes.

In view of the judgment in *Business Partners v Mahamba* (*supra*), it is arguably necessary to revisit the matter and to clarify some aspects

surrounding *parate executie* clauses, such as the circumstances under which they are valid and invalid as well as how they differ from similar contractual arrangements between debtors and creditors. It is also necessary to affirm the difference in this regard between pledges of movable and mortgages of immovable property. The article also comments on the implications, in the residential mortgage foreclosure context, of the difference between *parate executie* clauses in mortgage agreements, on the one hand, and post-default agreements allowing a creditor to sell the property privately, on the other.

2 *Business Partners v Mahamba*

2 1 Facts

The case concerned a credit relationship between a close corporation (Alizw'amaHlubi Multi Skilling Centre CC) and a financier (Business Partners Limited). The sole member of the CC (Mahamba) concluded certain loan agreements on behalf of the CC with Business Partners. The latter as financier required of Mahamba to bind herself as surety for the debt and to register a surety bond over her immovable property as security for repayment of the loan granted to the CC as principal debtor (*Business Partners v Mahamba supra* par 1–4).

When the CC defaulted on its payment obligations to Business Partners, the latter sought payment from Mahamba as surety, as well as an order declaring her property executable as provided for in the surety bond (*Business Partners v Mahamba supra* par 7). After summons was issued and served on Mahamba, she and Business Partners engaged in settlement talks, which resulted in a so-called "agreement to pay debt" (*Business Partners v Mahamba supra* par 9). The salient portions of the settlement agreement for present purposes were clauses 3.2 and 3.3.

In clause 3.2, the surety authorised the creditor "to dispose of the property by private treaty or in such other manner as it deems fit". Clause 3.3 went on to determine that the creditor would only embark on such a private sale if the principal debtor and/or the surety breached the terms of the settlement agreement. In such a case, the creditor would "be entitled to proceed with the marketing and sale of the property without further notice to the principal debtor and/or surety" (*Business Partners v Mahamba supra* par 12).

In addition to this settlement agreement, Mahamba signed a power of attorney in terms of which she authorised the creditor "to sell by private treaty or in any manner at such price and on such terms and conditions as it may in its sole discretion determine and to sign the deed of sale and at all such other documents as may be required to give effect to registration of transfer of (the property)" (*Business Partners v Mahamba supra* par 15).

Subsequently both the CC as principal debtor and Mahamba as surety failed to comply with the settlement agreement in that no payment was effected as required. On the basis of the abovementioned power of attorney, the creditor responded by mandating an auctioneering firm to sell the property, after which the property was indeed sold (*Business Partners v*

Mahamba supra par 16). After the sale, Mahamba approached the court *a quo* for an order declaring the sale unlawful and for an interdict restraining the transfer of ownership to the purchaser (*Business Partners v Mahamba supra* par 17). She contended that the sale was not preceded by due process of law because no fresh summons was issued and no order was obtained declaring the property executable (*Business Partners v Mahamba supra* par 18).

The creditor objected to this argument because, as the judge put it, Mahamba "had freely and voluntarily registered a bond over the property in favour of [Business Partners] and signed a power of attorney authorising [Business Partners], in its discretion, to sell the property by private treaty in the event of the principal debtor and [Mahamba] failing to discharge their indebtedness towards [Business Partners]" (*Business Partners v Mahamba supra* par 19).

It should be noted that one must approach this argument (or at least the way the court put it) with care. It creates the impression that the creditor relied on a clause in the mortgage bond itself, which is not the case. Instead, the power of attorney was signed separately, after the debtor had defaulted on the terms of the mortgage loan. This distinction is important because, as explained below, a *parate executie* clause is invalid if included in a mortgage agreement pertaining to land, while it is valid for a debtor to agree, after defaulting on a loan, to allow a creditor to sell the property.

2 2 Judgment of the court a quo

The crux of the judgment of the court *a quo* was summarised by the full bench (*Business Partners v Mahamba supra* par 20). The court *a quo* agreed with Mahamba's contention and thus declared the sale unlawful on the basis that it was not preceded by due process of law. The court *a quo* regarded this as an unacceptable form of self-help because it supposedly permitted the creditor to take the law into its own hands by circumventing the courts. For this conclusion, the court *a quo* relied on the Constitutional Court case of *Chief Lesapo v North West Agricultural Bank* (2000 (1) SA 409 (CC)).

2 3 Judgment of the full bench

On appeal, the full bench regarded the judgment of the court *a quo* as "clearly incorrect" (*Business Partners v Mahamba supra* par 21). With reference to the facts, the court explained that Mahamba had an opportunity to seek the court's protection when the original summons was issued seeking to have her property declared executable (*Business Partners v Mahamba supra* par 24) but that she chose an out-of-court settlement in terms of which she voluntarily authorised the creditor to sell the property if she could not fulfil the settlement agreement. The court effectively upheld the validity of the agreement on the basis that it is supported by the principle *pacta sunt servanda* (*Business Partners v Mahamba supra* par 25).

The court went on to confirm "for the sake of completeness" that "it is trite that a *parate executie*, which authorises execution without an order of court,

is valid, provided it does not prejudice, or is unlikely to prejudice, the rights of the debtor unduly" and that "a *parate executie* is not *per se* unconstitutional or offensive to public policy" (*Business Partners v Mahamba supra* par 27, citing *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 14D–F; *Eastwood v Shepstone* 1902 TS 294 302; *SA Bank of Athens Ltd v Van Zyl* 2005 (5) SA 93 (SCA)).

The court also distinguished between the case under discussion and the judgment in *Chief Lesapo v North West Agricultural Bank* (*supra*). The latter case concerned a statutory provision that authorised the Northwest Agricultural Bank to seize and sell certain property without court authorisation. It was declared unconstitutional for unjustifiably violating the debtor's right of access to court (s 34 of the Constitution). The case under discussion was different because the debtor voluntarily waived her right of access to court and voluntarily authorised the creditor to sell the property privately. In this regard, the court confirmed that it was lawful for the debtor, after default, to agree to allow the creditor to sell the property (*Business Partners v Mahamba supra* par 28, citing *Bock v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) par 7; *Juglal NO v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 (5) SA 248 (SCA) par 25; *Iscor Housing Utility Co v Chief Registrar of Deeds* 1971 (1) SA 613 (T) 616).

3 Validity of *parate executie* clauses as compared to similar arrangements

The judgment of the full bench is relatively straightforward, and the outcome cannot be faulted in general. However, a number of aspects should be clarified. This will be done with reference to some background information regarding the validity of summary execution clauses as well as other comparable contractual stipulations in the context of mortgage and pledge agreements (in general, see also Brits *Real Security Law* (2016) 64–65 and 162–180; *LAWSA XVII Mortgage and Pledge* par 366 and 427; Muller, Brits, Pienaar and Boggenpoel *Silberberg and Schoeman's The Law of Property* 6ed (2019) 443-444 and 460-461; Kritzinger *Principles of the Law of Mortgage, Pledge & Lien* (1999) 22–23; Van der Merwe *Sakereg* 3ed (1989) 627–628 and 658–660).

The default position in any instance of debt enforcement is that the creditor must make use of the formal court processes to enforce its rights, by obtaining a judgment order as well as permission to have the relevant assets attached and sold in execution. It is trite that a creditor may not take the law into its own hands by seizing and selling property without following the proper procedures. However, attempts have been made over the years to devise contractual clauses in terms of which the debtor supposedly authorises the creditor to bypass the court processes. Some of these have been recognised, while others have been rejected.

The first example is a so-called *pactum commissorium* (or forfeiture clause) that purports to allow the creditor to "keep" (or become owner of) the pledged or mortgaged property if the debtor defaults on the loan – and this despite the size of the outstanding debt or the value of the asset. Such clauses have been outlawed since Roman times owing to the high risk of

abuse (*C* 8.34(35).3) – namely, that desperate credit seekers might easily agree to such a draconian provision in order to obtain financing (see also Voet 20.1.25). Modern South African case law confirms the invalidity of such clauses in mortgage and pledge agreements (see *Mapenduka v Ashington* 1919 AD 343 351–352; *Graf v Buechel* 2003 (4) SA 378 (SCA) par 9–11; *Bock v Duburoro supra* par 8; *Citibank NA v Thandroyen Fruit Wholesalers CC* 2007 (6) SA 110 (SCA) par 13).

A clause that appears similar to a *pactum commissorium* is one that provides for a so-called *quasi*-conditional sale. In terms of this arrangement, which has also been recognised since Roman times (*D* 20.1.16), if the debtor defaults, the creditor is permitted to invoke the clause in order to purchase the property from the debtor at a fair value determined after default. In effect, the creditor acquires the property while the fair value of the asset is set off against the outstanding debt and any surplus is returned to the debtor. Such clauses are less susceptible to abuse, and thus are recognised as valid in both mortgage and pledge agreements in South Africa. (See *Mapenduka v Ashington supra* 352–353 for a good explanation of the difference between *quasi*-conditional sales and *pacta commissoria*. For further authority that a clause permitting a *quasi*-conditional sale is valid in South Africa, see *Sun Life Assurance Co of Canada v Kuranda* 1924 AD 20 24–25; *Graf v Buechel supra* par 27–31; *Bock v Duburoro supra* par 9.)

The third example of attempts to bypass court processes is the most controversial – namely, the clause permitting *parate executie*, an immediate or private sale by the creditor without court authorisation. The *locus classicus* on *parate executie* in South Africa is *Osry v Hirsch, Loubser & Co Ltd* (1922 CPD 531). The court investigated the different opinions expressed by the Roman-Dutch authors as well as conflicting earlier court judgments. It concluded that a *parate executie* clause is valid in an agreement where movables are delivered in pledge to a creditor but that the debtor can seek the court's protection if the creditor acts in a way that prejudices his rights (*Osry v Hirsch supra* 547). This approach was confirmed and followed without much controversy during the decades that followed (see *Paruk v Glendale Estate Co* (1924) 45 NPD 1 4; *Mercantile Bank of India Ltd v Davis* 1947 (2) SA 723 (C) 736–737; *Aitken v Miller* 1951 (1) SA 153 (SR) 154–155; *SAPDC (Trading) Ltd v Immelman* 1989 (3) SA 506 (W) 508–509 and 511; *Sakala v Wamambo* 1991 (4) SA 144 (ZH) 147; *Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd* 1992 (2) SA 459 (C) 463).

However, at the turn of the new millennium, the constitutional validity of these clauses was placed in doubt in *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd* (2001 (1) SA 251 (E) 256). Prior to this case, the Constitutional Court had delivered two judgments in which it declared unconstitutional certain statutory provisions that permitted the seizure and sale of a debtor's property without court authorisation (see *Chief Lesapo v North West Agricultural Bank supra* and *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa; Sheard v Land and Agricultural Bank of South African* 2000 (3) SA 626 (CC)). The reason for the constitutional invalidity was that the statutory provisions in question unjustifiably denied the debtors their right of access to court. The judge in *Findevco v Faceformat*

(*supra*) relied on these judgments to reason that, basically, a contractual clause cannot permit a sale without court authorisation either. For reasons that need not be expanded upon here, the reasoning in *Findevco v Faceformat* (*supra*) was criticised convincingly by Scott "Summary Execution Clauses in Pledge and Perfecting Clauses in Notarial Bonds: *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd* 2001 (1) SA 251 (E)" 2002 65 *THRHR* 656.

The Supreme Court of Appeal in *Bock v Duburoro* (*supra* par 7 and 13) subsequently clarified the situation by reaffirming the authority of *Osry v Hirsch* (*supra*) and thus confirmed the validity of *parate executie* clauses in pledge contracts pertaining to movable property (see also *Juglal v Shoprite supra* par 11; *SA Bank of Athens v Van Zyl supra* par 10–16; and see further Steyn "Perfection Causes, Summary Execution (*Parate Executie*) Clauses, Forfeiture Clauses (*Pacta Commissoria*) and Conditional Sales in Pledge Agreements and Notarial Bonds: The Position Clarified" 2004 25 *Obiter* 443).

It can be noted that there remains some debate in academic circles surrounding the constitutional implications of *parate executie* clauses (see Cook and Quixley "*Parate Executie* Clauses: Is the Debate Dead?" 2004 121 *SALJ* 719; Scott "A Private-Law Dinosaur's Evaluation of Summary Execution Clauses in Light of the Constitution" 2007 70 *THRHR* 289) and it also appears that such clauses are not lawful when included in most credit agreements that fall under the scope of the National Credit Act 34 of 2005 (see Brits "Pledge of Movables Under the National Credit Act: Secured Loans, Pawn Transactions and Summary Execution Clauses" 2013 25 *SA Merc LJ* 555).

For the sake of completeness, reference should briefly be made to so-called perfection clauses typically included in general notarial bonds – also because the court in *Findevco v Faceformat* (*supra* 256) appears to have conflated such clauses with *parate executie* clauses (see *Bock v Duburoro supra* par 15; Scott 2002 *THRHR* 656 and 659–660). A perfection clause in a general notarial bond authorises the creditor (bondholder) to demand delivery of the bonded movables when certain conditions are met (typically when the debtor defaults). Should the debtor refuse to deliver the assets to the creditor voluntarily, the creditor can enforce this duty by applying to court for an order perfecting the bond, which essentially amounts to an order for specific performance of the duty to deliver the property. When a court grants the application (in the form of an attachment order) and the movables are subsequently attached by the sheriff, the creditor's security is "perfected", thus placing the creditor in the position of a pledgee (a secured creditor) for all intents and purposes (see generally *Firstrand Bank Ltd v Land and Agricultural Development Bank of South Africa* 2015 (1) SA 38 (SCA) par 4; *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd* 2003 (2) SA 253 (SCA) par 3–6; *Development Bank of Southern Africa Ltd v Van Rensburg* 2002 (5) SA 425 (SCA) par 20).

Importantly for present purposes, a perfection clause in a general bond cannot logically be equated with a *parate executie* clause and it cannot be viewed as permitting the creditor to take the law into its own hands (self-help). The patent reason for this is that the creditor would require a court order to obtain possession of the property and thus there is no room for self-

help (see Scott 2002 *THRHR* 659–660; and on the perfection of general notarial bonds in general, see further Brits *Real Security* 212–227; Roos "The Perfecting of Securities Held Under a General Notarial Bond" 1995 112 *SALJ* 169).

Returning to *parate executie* clauses, it must be said that although the above discussion regarding the validity of *parate executie* clauses represents the general position, it is mostly focused on contracts whereby movables are pledged. Therefore, the next question is whether the position is the same for mortgage bonds pertaining to immovable property, also because the case under discussion involved a mortgage of land, not a pledge of movables (see also generally Schulze "*Parate Executie*, *Pacta Commissoria*, Banks and Mortgage Bonds" 2004 26 *De Jure* 256).

The leading case on *parate executie* clauses in mortgage bonds over immovable property is *Iscor Housing v Chief Registrar* (*supra*). Prior to this judgment, there was a degree of uncertainty whether the position set out in *Osry v Hirsch* (*supra*) with reference to the validity of *parate executie* clauses in pledges of movable property also applied to mortgage bonds over immovable property (see *Paruk v Glendale supra*; *Executors Testamentary of The Estate of DJ Van Wyk v CJ Joubert* (1897) 4 Off Rep 360; *Insolvent Estate of WC Evans and AA Evans v South African Breweries Ltd* (1901) 22 NLR 115; *John v Trimble* 1902 TH 146; and also Anonymous "Clause in Mortgage Bond Allowing Mortgagee to Sell in Case of Non-Payment of Debt" 1910 27 *SALJ* 527).

The court in *Iscor Housing v Chief Registrar* (*supra*) found that the general rule did not apply to immovable property and thus that *parate executie* clauses are unenforceable when included in mortgage bonds pertaining to land. The main reasoning was that neither case law nor the preponderance of common-law authorities extended the validity of such clauses to agreements involving land. Nevertheless, the court stressed that, despite a prohibition against agreeing to a private sale when the bond is passed, it is possible to agree to a private sale if the debtor subsequently defaults on the loan (*Iscor Housing v Chief Registrar supra* 616). Effectively, therefore, the latter circumstance is not caught in the general prohibition against *parate executie* clauses in mortgage agreements (for a discussion of *Iscor Housing v Chief Registrar supra*, see Isakow "*Parate Executie*" 1971 88 *SALJ* 310).

After being followed in other high court judgments (see *Mardin Agency (Pty) Ltd v Rand Townships Registrar* 1978 (3) SA 947 (W) 952–954; *Tenner v Leeufontein Mines (Pty) Ltd* 1982 (4) SA 586 (T) 588-589), the decision in *Iscor Housing v Chief Registrar* (*supra*) was also confirmed by the Supreme Court of Appeal in *Bock v Duburoro* (*supra* par 7) (see also *Citibank NA v Thandroyen supra* par 13). In *Bock v Duburoro* (*supra*), the Supreme Court of Appeal regarded the invalidity of *parate executie* clauses in mortgage agreements as trite while also confirming that it is permissible for the debtor, after default, to authorise the creditor to sell the property privately (citing *Iscor Housing v Chief Registrar supra* with approval; see also *Israel v Solomon* 1910 TPD 1183 1186–1187; *In re Cradock Building Society* (1896) 13 SC 99).

In view of the above, it is necessary to qualify the statement in *Business Partners v Mahamba* (*supra* par 27) confirming the general validity of *parate*

executie clauses without drawing a distinction between movable and immovable property. The authority is clear that *parate executie* clauses are valid only in pledge agreements involving movable property and not in mortgage bonds over immovable property. However, in both instances it is possible to conclude a post-default agreement authorising the creditor to sell the property privately.

A question that might require some reflection is why a distinction is made between movable and immovable property when it comes to the validity of *parate executie* clauses. The court in *Iscor Housing v Chief Registrar* (*supra*) did not provide a detailed principled analysis, except to point out that the implications of a wrongful or mistaken private sale (for instance, if the property was sold in terms of the *parate executie* clause without the debtor's knowledge while the latter actually had a valid defence against the creditor's claim) are significantly more serious and more complex to overturn in the case of immovable property than with movable goods (*Iscor Housing v Chief Registrar supra* 617). Although true, one could regard this reasoning as an over-generalisation that does not take account of high-value movables or of the reality that a mistaken private sale of movables could have similar (or even worse) consequences than a mistaken private sale of immovable property.

A stronger reason might be that, in the context of a pledge agreement, the creditor already has lawful possession of the property and thus a *parate executie* would only involve the private sale of the property, and not any private means to dispossess the debtor. On the other hand, with mortgage bonds, the creditor is typically not in possession of the property and thus a private sale would, at best, involve selling the property "out from under" the debtor while he still occupies it or, at worst, involve a private eviction of some kind. Therefore, a pledgee creditor does not have to use self-help to obtain possession of the movable before selling it, while such dispossession would indeed be necessary in the case of immovable property. Put differently, the theory is that *parate executie* clauses in pledge agreements do not permit unacceptable self-help, while such clauses in mortgage agreements, by implication, do (see also Scott 2002 *THRHR* 661 with reference to *Iscor Housing v Chief Registrar supra* 541).

It is important to note that, even though the court in *Business Partners v Mahamba* (*supra*) discussed the validity of *parate executie* clauses, the facts of the case did not truly involve a *parate executie* clause. Indeed, no such clause appeared in the mortgage bond in question. Instead, after the debtor had defaulted on the original agreement, the parties agreed in a separate agreement that the creditor could sell the property privately if the debtor breached obligations in the separate agreement. If there had been a *parate executie* clause in the mortgage bond itself, that would have been invalid because, as established above, such clauses are not permitted in mortgage agreements pertaining to land. However, it is clear that the parties may agree to a private sale after the debtor has defaulted on the loan, which is what happened in this case.

4 *Parate executie* versus post-default authority to sell in the residential foreclosure context

Post-default agreements allowing the private sale of mortgaged property are not novel in South Africa, but they have recently taken on a new dimension in the context of residential property. Without going into detail, it is well known that the procedure for foreclosing mortgage bonds and having residential property sold in execution has become more strenuous in order to protect homeowners from the unjustified limitation of their right to have access to adequate housing and the right not to be arbitrarily evicted from their home (s 26(1) and (3) of the Constitution respectively). The leading cases on this issue are *Jaftha v Schoeman; Van Rooyen v Stoltz* (2005 (2) SA 140 (CC)) and *Gundwana v Steko Development* (2011 (3) SA 608 (CC)), with many others having dealt with this topic as well. Moreover, High Court Rule 46(1)(*a*)(ii) was amended in 2010 to require a court, before authorising such a sale, to consider all the relevant circumstances of the case, while a more expansive amendment of the rules came into force in 2018 with the introduction of the new High Court Rule 46A and the new Magistrates' Courts Rule 43A (see GN R1272 in *GG* 41257 of 2017-11-17; for more detail on residential foreclosure topic generally, see Brits *Real Security* 68–100 and the other sources cited there).

The immovable property in *Business Partners v Mahamba* (*supra*) was residential in nature and was indeed Mahamba's primary residence (home). The court also mentioned that when summons was served on Mahamba in order to commence enforcement of the surety bond, she was informed of her rights under section 26 of the Constitution (the housing clause) and invited to present information to the court regarding the possible infringement of her rights in this regard (thus complying with the practice directive issued by the Supreme Court of Appeal in *Standard Bank of South Africa Ltd v Saunderson* 2006 (2) SA 264 (SCA) par 25–27; see *Business Partners v Mahamba supra* par 8). There is no indication that Mahamba made use of this opportunity and thus this factor had no impact on the matter.

One key development in mortgage foreclosure law in recent years is that a sale in execution of a home should, in accordance with the proportionality test, generally only be permitted if there is no other reasonable way to satisfy the creditor's rights – that is, if the forced sale of the home is the last resort (see *Jaftha v Schoeman supra* par 40 and 59; *Gundwana v Steko supra* par 53; High Court Rule 46A(2)(*a*)(ii)). One alternative to sale in execution could be that the house is put up for sale on the private market – for instance, in terms of an agreement between the debtor and creditor whereby the debtor authorises the creditor to sell the property on his behalf.

This option (which most banks provide as an alternative to foreclosure these days) is beneficial for other reasons as well. First, no judgment is taken against the debtor, which has positive implications for his or her creditworthiness and avoids negative information being recorded at a credit bureau. Secondly, the property is likely to be sold at a more favourable price than would be the case with a sale in execution at a public auction. This increases the chances that there might be a surplus for the benefit of the debtor. Thirdly, legal costs are kept much lower than would be the case if the

creditor had to go through normal enforcement processes, which also increases the chances (and size) of a surplus after the sale. Finally, losing one's home through a controlled private sale is undoubtedly more dignified than going through a potentially traumatic public enforcement, execution and eviction process (see s 10 of the Constitution: "Everyone has inherent dignity and the right to have their dignity respected and protected").

The judgment does not say so expressly, but these might be some of the reasons that Mahamba granted the bank authority to sell her home instead of going ahead with the normal enforcement process. Indeed, the service of summons on Mahamba probably inspired her acceptance of the settlement agreement that authorised the bank to sell the property on her behalf on the private market, being preferable to formally defending the matter in court. In any event, having regard to the benefits listed above (and there might be others), it is commendable that the court in *Business Partners v Mahamba* (*supra*) reaffirmed the validity of entering into such post-default agreements. A caveat might be that it is important to ensure that a summons (and thus the threat of legal action) does not unduly induce a debtor to agree to prejudicial terms in a settlement agreement. It should also be remembered that, when the creditor sells the property on the debtor's behalf, it does so as her representative (agent) and accordingly the creditor is subject to all the duties and limitations of an agent in terms of the common law of agency (*Sakala v Wamambo supra* 148).

At the same time, while the law continues to sanction post-default agreements authorising the bank to sell the property without court oversight, it probably remains necessary to outlaw the inclusion of a *parate executie* clause in the mortgage bond itself (that is, when the loan is granted and the mortgage passed). Agreeing to a private sale after default means that the debtor does so with full knowledge of his or her position and presumably under circumstances where the debtor does not believe that he or she requires the protection provided by the judicial process, or that it is otherwise worthwhile to defend the matter in court.

This is not the case when the debtor agrees to a private sale, years in advance, via a *parate executie* clause in the mortgage bond. If *parate executie* clauses were permissible in mortgage bonds, this would create an opportunity for creditors to bypass the protection that judicial oversight is meant to provide, particularly in the context of residential mortgage foreclosure. The debtor in such a case would have agreed to *parate executie* when the loan was granted – well before default, and thus before the need for judicial oversight arose. The clause would have the result that, when the debtor defaults, he or she would have to submit to the private sale and thus forfeit the protection afforded by the normal process. This would be problematic if the debtor would have liked to place information pertaining to his or her housing rights before a court if granted an opportunity to defend the creditor's application for a judgment and execution order. A *parate executie* clause (included in the bond itself, not agreed to post default) means that the debtor would forfeit this opportunity to defend the creditor's foreclosure application, and instead would have to approach the court for protection against prejudice as contemplated in *Osry v Hirsch* (*supra*). It can be noted that the debtor *in casu* did not provide information regarding any

prejudice that she suffered or would suffer if the creditor were to continue with the private sale. She merely challenged the inherent validity of the agreement and power of attorney in question, alleging that these amounted to a prohibited *parate executie* clause, which clearly was not the case.

The point is that the application of the constitutional-right-to-housing clause in the mortgage foreclosure context provides support for the continued prohibition against *parate executie* clauses in mortgage bonds. In *Gundwana v Steko* (*supra* par 44 and 47–48), the Constitutional Court explained that the voluntary registration of a mortgage bond does not mean that the debtor waives his or her protection, or that it ousts the court's responsibilities, under the housing clause. The same reasoning supports the notion that no clause in a bond (including one for *parate executie*) can be used to bypass the requirement of judicial oversight when a home is sought to be sold to settle a mortgage debt. At the same time, inasmuch as the housing clause buttresses the prohibition against *parate executie* clauses in mortgage agreements, it also supports the rule that permits the post-default granting of a power to sell the property. The reason for this is that, under circumstances where the debtor does not have a strong defence against the creditor's foreclosure application (and thus the sale in execution appears inevitable), the debtor can choose to authorise a private sale by the creditor, which may be less prejudicial to his or her rights – both financially and with reference to his or her dignity.

5 Conclusion

Contractual clauses designed to enable a creditor to bypass court processes have been and probably will remain controversial. A fine balance must be struck between the benefits and risks associated with legal constructs that allow the sidestepping of judicial procedures that are otherwise required. Freedom of contract must also be weighed against the policy that no one should be permitted to take the law into his or her own hands (self-help). Regarding mortgage bonds registered over immovable property, the current position remains that both *pacta commissoria* and *parate executie* clauses are invalid when included in the mortgage bond. However, a *quasi*-conditional sale agreement is permissible, even if included in the bond, provided that the creditor takes over the property at fair value determined after default. Furthermore, a post-default agreement in terms of which the creditor is authorised to sell the property without court oversight is valid and, as pointed out above, could be beneficial also for the debtor. Yet, if history is anything to go by, this conclusion is probably not the last word on the matter.

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BIOWATCH SHIELD, COSTS LIABILITY FOR ABUSE OF PROCESS AND CROSSFIRE LITIGATION

***Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC)**

1 Introduction

While costs are traditionally dealt with at the tail end of proceedings and invariably in the concluding segment of a court's judgment, they nevertheless continue to be consequential. This is especially so in respect of how access to constitutional justice is pursued and levered. The outlines of the progressive costs awards jurisprudence in constitutional and public interest litigation are encapsulated in *Biowatch Trust v Registrar Genetic Resources* (2009 (6) SA 232 (CC) (*Biowatch*); see also *Ferreira v Levin NO* 1996 (2) SA (CC), *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC)). *Biowatch* established the general proposition that in litigation between the State and private parties seeking to assert a fundamental right, the State should ordinarily pay costs if it loses. The *Biowatch* shield seeks to mitigate the "chilling effects" cost orders could have on parties seeking to assert their constitutional rights – even where unsuccessful. The threat of hefty costs orders may chill constitutional assertiveness. It may deter parties from challenging questionable practices of the State (*Motsepe v CIR* 1997 (2) SA 898 (CC) par 30; *Affordable Medicines Trust v Minister of Health supra* par 138). This is particularly so in a society characterised by disparities in resources and inequality of opportunities. The vindication of fundamental rights is inseparably linked to the transformative process the Constitution envisages. It is now established that the general rule in constitutional litigation is that an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs. On the other hand, the *Biowatch* principle also permits exceptions and does not go so far as to immunise all constitutional litigation from the risk of an adverse costs order. A worthy cause or worthy motive cannot immunise a litigant from an adverse costs order for abuse of process or engaging in frivolous or vexatious proceedings.

The case note addresses the application of the *Biowatch* principle in respect of cost orders where a public interest litigant has conducted the proceedings in an abusive, vexatious or frivolous manner, as well as in crossfire litigation. The first-tier question that arises is: can a court impose adverse costs awards on a constitutional litigant where a suit is

unmeritorious or there is impropriety in the manner in which the litigation has been undertaken? There is also the delicate issue of costs awards in crossfire disputes. In pith and substance, crossfire disputes involve litigation between a private party and the State, provoked by the latter's failure to perform its regulatory role but adversely affecting the interests of other private parties. In effect, the knotty question is: can adverse costs orders be made against interveners or parties who become involved in proceedings?

2 The problem of abuse of process, frivolous or vexatious litigation

The questions arising from abuse of process (*Beinash v Wixley* 1997 (3) SA 721 (SCA) 34F–G) and frivolous or vexatious litigation (*Bisset v Boland Bank Ltd* 1991 (4) SA 603 (D) 608D; *Lawyers for Human Rights (LHR) v Minister in the Presidency* 2017 (1) SA 645 (CC) par 19; see also s 2(1)(*b*) of the Vexatious Proceedings Act 3 of 1956) are as inherently murky as malicious prosecution (Okpaluba "Proof of Malice in the Law of Malicious Prosecution: A Contextual Analysis of Commonwealth Decisions" 2012 37(2) *JJS* 65; Okpaluba "Reasonable and Probable Cause in the Law of Malicious Prosecution: A Review of South African and Commonwealth Decisions" 2013 16(1) *PER/PELJ* 241; Okpaluba "'Prosecution' in an Action for Malicious Prosecution: A Discussion of Recent Commonwealth Case Law" 2013 13 *TSAR* 236; Okpaluba "Quantification of Damages for Malicious Prosecution: A Comparative Analysis of Recent South African and Commonwealth Case Law (1) (2018) 31(2) *SACJ* 235, (2) (2018) 31(3) *SACJ* 410 and (3) (2019) 32(1) *SACJ* 28). The manner in which a suit is conducted is relevant to the question whether a litigant will be shielded from an adverse costs award and its relevance to constitutional litigation is borne out by the fact that the general approach to costs in proceedings between parties and the State is not unqualified (see *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) par 36). Sympathy for the public interest litigant, by itself, will not relieve the party from the normal obligation to pay costs if the application is frivolous or vexatious or is in any other way manifestly unmeritorious. That could encompass the unusual censure of granting a punitive costs order against a constitutional litigant. Adverse costs awards have been granted against a party whose proceedings are stayed or dismissed on the grounds of being vexatious or frivolous. (In *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC) par 82, the Constitutional Court ordered the State to pay the full costs in respect of the SCA proceedings where the State refused to argue the terms of appeal before that court. Chaskalson CJ expressed disapproval of the stance adopted. He commented as follows: "[C]ourts are entitled to expect assistance and not obstruction from litigants in the discharge of their difficult duties. What happened in the present case not only failed to meet the requirement, but also evinced a deplorable lack of respect for the Supreme Court of Appeal.") Similarly, punitive costs orders have been made against litigants who during the course of the proceedings acted constitutionally inappropriately. (In *Gauteng Gambling Board v MEC*

for Economic Development 2013 (5) SA 24 (SCA), the SCA expressed its disapproval for the cavalier conduct of the MEC by mulcting her with special costs – namely, on the attorney-and-client scale. The MEC had employed her statutory powers for an ulterior purpose – namely, to compel compliance with her instruction to accommodate another party. The MEC's conduct following the launching of the application for interdictory relief – in particular her dismissal of the Board and the subsequent appointment of an administrator while the appeal was pending – merit censure).

While courts are ordinarily loath to grant a punitive costs order in constitutional litigation (*Moutshe Demarcation Forum v President of the RSA* 2011 (11) BCLR 1158 (CC) par 84), in exceptional circumstances, they will not hesitate to do so against a public interest litigant where proceedings have been conducted in an abusive, vexatious or frivolous manner. Such "exceptional circumstances" justifying an adverse costs order were found to exist in *Afri-Forum v Malema* (2011 (12) BCLR 1289 (EqC)). The respondent, a prominent political figure, failed to comply with the directions of the court, and persisted in singing a song knowing the impact it would have on the target group (*Afri-Forum v Malema supra* par 116). The hate speech litigation had its origin in the repeated conduct of Malema whose words in translation drew the target group's attention to the song. The Equality Court found that the respondent's moral culpability when measured in this fashion warranted an appropriate costs order against him (*Afri-Forum v Malema supra* par 117). Inasmuch as the ANC was misguided in trying to protect the singing of the song, the court found that it was entitled to express the views of its constituencies (*Afri-Forum v Malema supra* par 114). Because the ANC was not culpable in participating in the proceedings, it was not mulcted with costs.

Another example of an adverse costs order is found in *Kalil NO v Mangaung Municipality* (2014 (5) SA 123 (SCA)). In this case, the appellants unsuccessfully resisted the imposition of higher rates on business properties by the municipality. Relying on *SA Property Owners Association v Johannesburg Metropolitan Municipality* (2013 (1) SA 420 (SCA)), the appellants argued that the required community participation did not take place, a point that the respondent conceded on appeal. Although the appellant did not prevail on the community participation issue, punitive costs were granted against the municipality because of the obstructionist conduct of its officials.

In *Helen Suzman Foundation (HSF) v President of the RSA; Glenister v President of the RSA* (2015 (2) SA 1 (CC)), the Constitutional Court was faced with a situation in which each party had landed some good punches during rounds of High Court and appellate litigation, but neither party had scored a knockout. In the High Court, Glenister's application was dismissed. In line with the Minister's application, the High Court also struck out the additional evidence on which his case was predicated. Nonetheless, HSF achieved partial success in that some of the impugned sections were found to be constitutionally invalid, whereas several others were not. HSF was awarded costs. Despite aligning himself with a prevailing party, a punitive

costs order was made against Glenister in respect of the successful striking-out application.

One of the issues that fell to be decided by the Constitutional Court in *HSF v President of the RSA* was the consequential punitive costs order made against Glenister and the failure to award him costs for the successful HSF application. With respect to the conduct of the litigation before the High Court, the court found that Glenister had made scandalous allegations against the government, the ruling party and the SAPS, which were brought for collateral purposes. The High Court could not be faulted for "striking out material amounting to reckless and odious political posturing or generalisation which should find no accommodation or space in a proper court" (*HSF v President of the RSA supra* par 29). In the eyes of the court, "this stereotyping and political narrative is an abuse of court process. A determination of the constitutional validity of the DPCI legislation does not require a resort to this loose talk" (*HSF v President of the RSA supra* par 29).

In rejecting the appeal against punitive costs, the Chief Justice observed:

> "Mr Glenister has always been represented by experienced Senior Counsel. And it ought to have been known that no good purpose would be served by the admission of the 'troubling, alarming and discomforting' mass of additional evidence he sought to have the Court admit. This is a manifestly inappropriate and frivolous course to pursue also because, on his own version, it seeks to project the public perception about corruption that was stale news already when *Glenister II (Glenister v President of the RSA* 2011 (3) SA 347 (CC). *Glenister v President of the RSA* 2009 (1) SA 287 (CC) *(Glenister I)* concerned the dissolution of the DSO) was decided. To seek to burden this Court with so many pages of hearsay, opinion, speculative, scandalous and vexatious evidence is conduct that must be discouraged.
>
> In pursuit of an otherwise legitimate constitutional cause of ensuring that there is an adequately independent corruption-fighting agency in this country, Mr Glenister chose to be careless and to overburden the record with an ocean of irrelevancies. The worthiness of his cause should not be allowed to immunise him against an otherwise well-deserved adverse costs order. This Court has not made an order for costs against anyone litigating against the state for a long time and for good reason. If there would ever be a fitting case for a costs order, this is it. In the exercise of this Court's discretion on costs for the application to strike out the huge volumes of unnecessary evidential material, Mr Glenister must bear ordinary costs in the High Court and in this Court." (*HSF v President of the RSA supra* par 37–38)

The tricky question arising from *LHR v Minister in the Presidency* (*supra*) is whether *Biowatch* can shield a constitutional litigant from a punitive costs order where an urgent application was neither frivolous nor vexatious but the way in which the proceedings had been managed was manifestly inappropriate – largely on the grounds of the litigant's extreme belatedness, and the fact that it targeted an operation that was done and dusted. Also surfacing was the consideration that the constitutional litigant seeking to overturn the adverse costs award had advanced no acceptable basis on which the Constitutional Court could conclude that the High Court exercised its discretion unjudicially. The importance of the third finding, however, overshadows the earlier ones – specifically, the fact that the costs order at issue was unlikely to have a "chilling effect" on future litigation.

The main features of the matrix of facts on the basis of which the High Court exercised its discretion judicially, and upon which there was no basis for the Constitutional Court to interfere, concerned Operation Fiela (Reclaim). (The genesis of the large-scale armed forces operations was the recurrence of attacks on non-South African nationals in 2015. Search and arrest operations were carried out in private homes in the early hours of the morning without warrants. Scores of people were arrested. See also *LHR v Minister in the Presidency supra* par 1.) Six weeks after the Operation had been completed, LHR approached the High Court seeking urgent relief. It was a pre-emptive challenge in the sense that it was directed not only at the constitutional validity of the main operation but at future raids as well. Even though the High Court found that the litigation was not frivolous or vexatious, it had misgivings about the conduct of LHR. It did not express hesitation or reluctance in striking off the application on the basis that bringing it as an urgent matter was gravely inappropriate. It awarded costs on a punitive scale. An appeal against the costs award to the Supreme Court of Appeal was unsuccessful. The appellate court dismissed the leave application with costs.

At the heart of LHR's appeal against the adverse costs award lay two submissions. First, it was submitted that, in determining costs, the court of first instance considered neither *Biowatch* nor *Phillips v SARB* (2013 (6) SA 40 (SCA)). The main plank in the applicant's argument was that the High Court elided *Biowatch* despite the constitutional dimensions of the application. Phrased differently, there was an adverse costs order against a litigant seeking to vindicate constitutional rights. By drawing a close analogy with *Phillips v SARB*, the applicant contended that the High Court exercised its discretion unjudicially or in a manner that warranted interference. *Phillips v SARB* is the authority for the proposition that mere impatience on a private litigant's part, and acting inappropriately in a technical or procedural sense, does not amount to vexatious or manifestly inappropriate conduct. Secondly, the applicant placed great weight on the fact that its constitutional challenge was genuine and non-frivolous. This all pointed distinctly to acceptance that "the application before the High Court may not have been fundamentally misdirected and so unreasonable that merely bringing it counted against LHR" (*LHR v Minister in the Presidency supra* par 22). It could not be ignored that the principal relief that LHR sought raised constitutional questions of overriding significance. Simply put, it was seeking to protect the dignity and privacy of those affected.

On the point of inappropriate conduct of the proceedings, the unanimous bench of the Constitutional Court was in total agreement with the observations of the court *a quo* that "although the issues LHR raised before the High Court may in other circumstances have protected them if they lost the litigation, bringing them six weeks after the Operation – and giving the government respondents barely a day in which to respond – was not just imprudent. It was not proper" (*LHR v Minister in the Presidency supra* par 25). Since LHR did not act frivolously or inappropriately in seeking leave to set aside the High Court costs order, the court held that sparing it a costs order was justified.

Perhaps the most telling example of "manifestly inappropriate" litigation that was "so unreasonable or out of line that it constituted an abuse of process of court" is provided by *Limpopo Legal Solutions v Eskom Holdings Soc Ltd* (2017 (12) BCLR 1497 (CC) (*LLS II*)). The facts in *LLS II* were that Eskom received a telephone call or complaint that there was a loose electricity cable hanging dangerously. It promptly dispatched a technician and later a team of workers to the site. What is noteworthy is that the applicants went ahead with the urgent application despite Eskom's assurance to them – assurances supported by WhatsApp photographs – that the matter was receiving immediate attention. The question before the High Court was whether the applicants were justified at all in moving the application. Eskom insisted that the applicants had misled the court. It pointed out that the applicants were not candid about urgency. Aggravating their deceitfulness was that they deliberately withheld information from the court that Eskom had already fixed the cable. On any view, this was conduct of "utmost dishonesty" (*Limpopo Legal Solutions v Eskom Holdings* [2017] ZALMPPHC 1 par 23). What the applicants were seeking had in fact already been accomplished. The High Court held that their application was "irrational, ill-thought, capricious and/or superfluous" (*Limpopo Legal Solutions v Eskom Holdings supra* par 43). Another pointer to the extent of impropriety in the manner in which proceedings were conducted is that the applicants insisted on pursuing the litigation eight months down the line (*LLS II supra* par 15). The court at first instance could not be faulted for imposing costs on a punitive scale.

These were the facts that confronted the Constitutional Court on appeal against the High Court costs award. Relying on *Biowatch*, the applicants submitted that the High Court had overlooked that this was a constitutional litigation. It was further submitted that no order as to costs was appropriate because LLS was just an unsuccessful public interest litigant vindicating the fundamental right to a safe environment enshrined in section 24 of the Constitution. Eskom resisted the appeal on the grounds that the High Court order, including the costs award, was unassailable. The real gravamen of the submission by the respondent was that there was no constitutional issue at stake, and the costs order was anyhow warranted. Moreover, "the application was dead in the water by the time it was heard and the rule *nisi* discharged – dead, vexatious, and frivolous" (*LLS II supra* par 17). In sum, the court of first instance exercised its discretion judicially to protect its own processes.

With regard to awarding costs against constitutional litigants, the Constitutional Court noted that the High Court was justified in describing the first applicants' conduct as "irrational, ill-thought, capricious and/or superfluous". The context of the instant case was distinguishable from *Limpopo Legal Solutions v Vhembe District Municipality* (2017 (9) BCLR 1216 (CC) (*LLS I*)) and *Limpopo Legal Solutions v Vhembe District Municipality* (2018 (4) BCLR 430 (CC) (*LLS* III)). The basis for the Constitutional Court's merciful intervention in setting aside the adverse costs order in *LLS I* was confusion, not impropriety. It will be recalled in that case that there was justifiable confusion as to whether Vhembe District Municipality or Thulamela Municipality bore the responsibility of fixing the

burst sewage pipe. In contrast, the Constitutional Court in *LLS III* overturned an adverse costs award by the High Court because the court below lumped the first applicant with costs without referring to *Biowatch* at all. In neither *LLS I* nor *LLS III* was there a suggestion that LLS had jumped the gun or behaved egregiously as in the instant case (*LLS II*) in misleading the High Court. The obverse is clear in *LLS II*. Suffice it to say, that the conduct of the applicants here fell without grip through the *Biowatch* safety net. Self-evidently, "the litigation was initiated without good cause. It served no serious purpose or value. And it was entirely unreasonable" (*LLS II supra* par 33).

Turning to the question of the scale of the costs award, the court in *LLS II* relied on *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* (1946 AD 597) and *President of the RSA v Quagliani* (2009 (8) BCLR 785 (CC)) in concluding that there was no basis for intervening in the High Court's costs award. It is clear from the longstanding Appellate Court principle enunciated in *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* that a court may consider it just to award a punitive costs order against the losing party, not just as punishment, but also to protect the successful party against being left "out of pocket". In *President of the RSA v Quagliani*, Sachs J rebuked the applicant's lawyer for bringing a last-minute application to postpone the court's delivery of judgment. (The SCA in *Gamevest (Pty) Ltd v Regional Land Claims Commissioner: Northern Province & Mpumalanga* 2003 (1) SA 373 (SCA) upheld a special punitive costs order against an attorney who conducted himself in a reprehensible manner. The attorney concerned prosecuted a case he had conceded). As a result of the lapse of professional judgement, attorney-and-client costs were awarded against the lawyer. If we go back to the present case, the first applicant actively misled the High Court to secure an interim order. Although it was asserting constitutional rights, its excess of zeal meant that it could obviously not invoke *Biowatch* to escape liability for costs.

It cannot be disputed that the applicant misled and abused the High Court processes. Further, the upshot, in the court's own words is that

> "[i]t launched the urgent application seeking relief for a problem that, to the knowledge of its officers and its legal counsel, was there and then being fixed. The High Court's view that counsel was dishonest in taking the interim order the next day was, regrettably, warranted. And we must not forget that Eskom was severely prejudiced. It was dragged through unmeritorious litigation that it was at pains to avoid from the outset by doing its job – promptly and responsively. It is impossible to say that the High Court failed to exercise an impeccable discretion in concluding that the applicants' conduct must be met with the severest of rebukes in the form of a punitive costs award. Nor is there any reason why Eskom's exposure to out-of-pocket legal expenses should not be minimised by an order on the attorney and client scale." (*LLS II supra* par 38)

The arguments that previously assisted the applicant in persuading the Constitutional Court to overturn an adverse or punitive costs order following the dismissal of its urgent application could not be countenanced in this instance. Put concisely, there was no basis to reverse the punitive costs award imposed by the High Court.

But what about costs in the Constitutional Court? The court addressed this by pointing out that, unlike in the court below where the manner in which the applicants conducted the proceedings warranted a punitive costs award, their application in the Constitutional Court was not frivolous or vexatious, or manifestly inappropriate (*LLS II supra* par 43). All these are ways of expressing a conclusion that the Constitutional Court application fell within the generous ambit of *Biowatch*. Consequently, each party was ordered to party its own costs in the apex court.

3 Curtailing Stalingrad defence strategy

Law reports are studded with cases dealing with Mr Zuma's criminal prosecution and related civil proceedings (see for example, the disclosure of transcripts of the conversations recorded in the spy tapes in *DA v Acting NDPP* 2016 (2) SACR 1 (GP); *Zuma v DA* [2014] 4 All SA 35 (SCA) and his opposition to the DA's review application in *Zuma v DA* 2018 (1) SA 200 (SCA); *DA v Acting NDPP* 2016 (2) SACR 1 (GP); *President of the RSA v Office of the Public Protector* [2018] 1 All SA 576 (GP). The seemingly unending litigation is nothing but a manifestation of the high points of Stalingrad tactics that have led to the derailment of the administration of justice. The term "Stalingrad defence", Wallis JA explained in *Moyo v Minister of Justice & Constitutional Development* [2018] ZASCA 100 par 169, "[h]as become a term of art in the armoury of criminal defence lawyers. By allowing criminal trials to be postponed pending approaches to the civil courts, justice is delayed and the speedy trials for which the Constitution provides do not take place" (see also *DA v President of the RSA* [2018] ZAGPPHC 836 par 11). In the latter case, the full bench of the North Gauteng High Courts was asked to decide whether the then-sitting President of the RSA, Mr Zuma, should personally bear the costs incurred in his abortive urgent application launched a day before the release of the State Capture Report. The President had belatedly sought injunctive relief to prevent the finalisation and release of the Public Protector Report until such time as he had been afforded a reasonable opportunity to provide input into the investigation conducted by the Public Protector (PP). The President's application provoked a frenzy of activity by way of intervening applications by the EFF, UDM, COPE, DA and Ms Mentoor. Much later, the Minister of Co-operative Governance and Traditional Affairs also joined the fray.

At the stage that the President's application was to be heard, to the consternation of all, he made sudden *volte face*. He abandoned the application and tendered costs on the attorney-and-client scale as well as costs occasioned by the employment of two counsel, where applicable (*President of the RSA v Office of the PP supra* par 3). The case advanced by the intervening parties that the President should personally be mulcted with costs proceeded on the footing that he conducted litigation in a manner unbecoming of a reasonable litigant. The charge of unreasonable conduct flowed from the fact the President continued with litigation when it was apparent to all parties that the Office of the PP had filed an affidavit on 14 October 2016 confirming that the investigation had been finalised and the report signed (*President of the RSA v Office of the PP supra* par 33). There

was no gainsaying that the proceedings ought to have been discontinued in light of the President's statement "in his answer to the DA's application, that if the investigation was finalised and the report signed, then the report had to be released" (*President of the RSA v Office of the PP supra* par 33). In brief, the foundational premise of the President when he launched his application was effectively obliterated as soon as the investigation was finalised and the report signed (*President of the RSA v Office of the PP supra* par 34 and 37).

The court brushed aside the President's reliance on a typing error or the possibility thereof. The record clearly established that the President's assertion of a typing error was an attempt to bolster his quest for amended relief (*President of the RSA v Office of the PP supra* par 43). Even so, the path to the amended relief was destined to fail. It seemed paradoxical that the amended relief the President sought was to review administrative action without following the mandatory Rule 53 or the Promotion of Administrative Justice Act 3 of 2000. The reason, as the court pointed out, was that "he sought to review and set aside the report without it being released" (*President of the RSA v Office of the PP supra* par 43). The requirement that a decision subject to review must be final is a familiar legal filter that serves to eliminate certain moot questions from being adjudicated (*MEC for Education: KZN v Pillay* 2008 (1) SA 474 (CC) par 30–35). In other words, "there can clearly be no review and setting aside of administrative action without the impugned decision being final and in the absence of the record underpinning that decision" (*President of the RSA v Office of the PP supra* par 43). Invoking *Gauteng Gambling Board v MEC for Economic Development*, Mlambo JP made the point that it was impermissible to award a simple punitive costs order because that would make the taxpayer carry the burden. The context of the litigation that the President had initiated called for a sterner reprimand. Not only had he no acceptable basis in law and in fact to have persisted with the litigation, "the President's conduct amounted to an attempt to stymie the fulfilment of a constitutional obligation by the Office of the Public Protector" (*President of the RSA v Office of the PP supra* par 47).

Undoubtedly, it must have occurred to the President that there was no basis whatsoever for continuing further with litigation – hence in vain the decision to withdraw the application at the eleventh hour and tender costs. The critical findings are elaborated as follows:

> "The President's persistence with the litigation in the face of the finality of the investigation and report, as well as his own unequivocal statement regarding that finality, clearly amounts to objectionable conduct by a litigant and amounts to clear abuse of the judicial process. An abuse of the judicial process is evinced when a party conducts litigation in an unreasonable manner to the prejudice of those who are naturally forced to defend their interests. It is such conduct that has been viewed by courts as a justifiable basis to mulct the culpable litigant with a punitive costs order." (*President of the RSA v Office of the PP supra* par 46)

It is hard to disagree with the ultimate conclusion that the former President was unreasonable and a reckless litigator:

> "[t]he President persisted with litigation and forced the intervening parties to incur costs in circumstances when this should and could have been avoided as well as delaying the release of the report. In so doing he clearly acted in flagrant disregard for the constitutional duties of the Public Protector. What is also aggravating is the fact that the President's application was based on self-created urgency. Simply put, the President had become aware some six (6) months before his abortive application that the Public Protector was in possession of complaints implicating him in serious misconduct and he did nothing when he was invited for comment." (*President of the RSA v Office of the PP supra* par 49)

In the circumstances, the President's cavalier attitude to litigation compelled a determination that he must personally bear the costs that were occasioned from 14 October 2016. Beyond the question of costs reinforcing the norm of accountability (Okpaluba "The Constitutional Principle of Accountability: A Study of Contemporary South African Case Law" 2018 33 *SAPL* 1; Okpaluba "Delictual Liability of Public Authorities: Pitching the Constitutional Norm of Accountability Against the 'Floodgate' Arguments" 2006 20(2) *Speculum Juris* 248), *President of the RSA v Office of the PP* has broader implications for the administration of justice. The salient feature of litigation involving the former President has been inordinate delay, extending over a decade. The fact the President incurred personal liability for costs would, it is submitted with respect, provide a strong incentive to securing finality. The imposition of a punitive personal costs order curtails Stalingrad strategy. It is to be hoped that the prospects of excessive delays are thereby much reduced. But the history of the President's proceedings (*NDPP v Zuma* 2009 (2) SA 277 (SCA) par 2; *Zuma v DA* 2018 (1) SA 200 (SCA) par 1), and their cumulative delay, persuades one of the need to provide an incentive, indeed something of a goad, to progress. In this regard, *President of the RSA v Office of the PP* represents a cautionary tale to public officials litigating in their representative capacity.

4 Costs awards in crossfire litigation

One is here concerned with cases where the State is required to perform a regulatory role, in the public interest, between competing private parties. The balancing of competing claims on the purse and the allocation of resources is guided by the applicable statutory or regulatory framework. The ranges of issues envisaged include, among others, competition law matters (*Competition Commission of SA v Senwes Ltd* 2012 (7) BCLR (CC); *Minister of Economic Development v Competition Tribunal* [2012] ZACAC 2), environmental law (*Earthlife Africa (Cape Town) v DG, Department of Environmental Affairs & Tourism* 2005 (3) SA 156 (C)), restitution of land rights claims (*Concerned Land Claimants Organisation of Port Elizabeth v Port Elizabeth & Community Restoration Association* 2007 (2) SA 531 (CC)), and public procurement (*Minister of Finance v Gore NO* 2007 (1) SA 112 (SCA); *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC)). A crossfire dispute in this context turns on matters involving litigation between a private party and the State, with radiating impact on other private parties (*Biowatch supra* par 28). In effect, matters challenging the constitutionality of government action or omission, presented for

adjudication by an aggrieved private party, will naturally implicate a number of private parties with vested interests in the outcome of the dispute. Regardless of the number of private litigants embroiled in the controversy, the proceedings cannot be characterised as between private litigants. The significant factor here is that it was primarily the failure of state functionaries to fulfil their constitutional and statutory responsibilities that spawned the litigation and forced both opposing private parties come to court.

Costs awards in crossfire disputes appropriately capture the intractable problem of location of risk of costs where opposing private parties are embroiled in a contest as a result of the State's failure to fulfil its statutory and constitutional obligations. The crisp question is: who should shoulder the costs incurred by a successful party where the State's conduct provoked the litigation in the first place? Broadly speaking, the determination of costs awards in crossfire constitutional proceedings underlines the constitutional tri-norms of accountability, responsiveness and openness that are foundational to constitutional democracy. Also surfacing on the horizon is the pervasive issue of governmental liability (Okpaluba and Osode *Government Liability: South Africa and the Commonwealth* (2010)).

Sachs J came face to face with the problem of costs awards in crossfire disputes where an organ of state was sued for its failure to perform regulatory functions regulating competing claims between private parties. The High Court had declined to accord preferential treatment to Biowatch notwithstanding that the latter was a predominantly prevailing party in a manifestly meritorious suit. Biowatch had obtained an order allowing it access to crucial information whose release Monsanto had vigorously resisted (*Biowatch supra* par 33 and 37). Biowatch's application also raised constitutional issues of enormous import, transcending the immediate interests of the parties involved – namely, the State, Monsanto and itself (*Biowatch supra* par 57). The High Court decision with respect to cost was anomalous in the sense that, on the one hand, it held that the State should not be saddled with costs incurred by the prevailing party while, on the other hand, it mulcted Biowatch with costs incurred by Monsanto. By the time the High Court judge disposed of costs in the case at bar, the guidelines set out in *Affordable Medicines Trust v Minister of Health* were already well entrenched. It bears repeating that in litigation between government and a private litigant seeking to vindicate fundamental rights, the accepted approach is that if government loses, it should pay the cost of the prevailing party, and conversely, if the government prevails, each party should bear its own costs.

The Constitutional Court found that the form of Biowatch's request for information, although lacking in precision, did not warrant decisions made by the High Court with regard to costs. The reasoning of the High Court judge displayed a lack of appreciation of the constitutional dimensions of the suit. Biowatch had raised an important and arguable constitutional issue. It also achieved a measure of success as it not only dealt with a number of preliminary objections aimed at keeping it out of court altogether, but prevailed with regard to the majority of information it sought (*Biowatch supra* par 37). In this regard, the learned judge's "failure to expressly locate costs

awards in constitutional setting must raise serious doubt as to the weight, if any, given to the constitutional context" (*Biowatch supra* par 41). Sachs J expressed the point as follows:

> "The Constitutional issues were implicated in two ways. The applicant was pursuing information in terms of a right conferred by section 32 of the Constitution, and the information sought concerned environmental rights protected by section 24 of the Constitution. The government's duty was to act as impartial steward, and not to align itself with parties seeking access to it. It was important that objectivity not only be present, but be seen to be present in circumstances where the information related to the question of general public interest and controversy, and there was no lawful ground to withhold it. This required objectivity and distance in respect of any competing private interests that might be involved. The greater the public controversy, the more the need for transparency and for manifest fidelity to the principles of the Constitution, as ultimately given effect to by PAIA ... In these circumstances rule of law considerations would require the government to be astute to act in a way which would encourage parties who have strong and diametrically opposed opinions to submit themselves to the regulated and rational balancing of interests provided for by the Constitution and PAIA." (*Biowatch supra* par 45)

A costs review in favour of Monsanto entailed the *Biowatch* court having to address the threshold question of location of risk of costs in an extra-curial battle between opposing private litigants triggered by the State's failure "to grasp the nettle and draw an appropriate line between information to be disclosed and information to be withheld" (*Biowatch supra* par 33 and 37). In the present case, neither Biowatch nor Monsanto acted badly. Monsanto as the intervening party was within its right to join the proceedings in order to protect information furnished by it that fell within the purview of confidential information. In intervening, Monsanto was prompted by the failure of the regulatory body to expeditiously and neatly deal with applicant's requests for information. That the intervening party was vexed by Biowatch's application for access to its information is to be expected, but that does not suggest that the application was conducted in a frivolous, vexatious, or constitutionally inappropriate manner (*Monsanto SA (Pty) Ltd v Bowman Gilfillan* [2011] ZACAC 5). The overriding consideration was protection of its interests. Considering that this was a mixed result case, no costs order should have been made between the private parties involved. The High Court's order that Biowatch pay Monsanto's costs is untenable and fell to be set aside. In a mixed result case, where neither party has acted badly, the determinative factor in resolving costs is to locate the risk at the correct door. Put differently, it starts with the recognition that it was the failure of the state functionaries to fulfil their constitutional and statutory responsibilities that triggered the litigation and obliged both parties to come to court.

The solution to the costs conundrum in crossfire litigation in which private parties in adversarial positions were engaged, not to settle a legal dispute between themselves, but in relation to determining whether the State had appropriately shouldered its constitutional and statutory responsibilities can be articulated as follows: the State should be saddled with costs incurred by the prevailing litigant, and ordinarily there should be no adverse costs orders against any private parties who were forced to enter the fray (*Biowatch supra* par 56. See also *Hamiltonians for Progressive Development v City of Hamilton* [2014] ONSC 420 par 8–10).

The case of *Walele v City of Cape Town* (2008 (6) SA 129 (CC)) is instructive of the sort of dispute between private parties that is compounded by the authorities' failure to fulfil their regulatory responsibilities. The applicant sought to review a decision of the municipality to approve building plans. The effect of the applicant's successful review was that the decision was set aside and referred back, adversely affecting the rights of the citizens that sought the approval of the building plans. The City Council as the body responsible for dealing with the proposed plans and objections made to them was mulcted with costs.

Also informative is the case of *Fuel Retailers Association of SA v DG Environmental Management* (2007 (6) SA 4 (CC)), in which the contest was essentially between the applicant and the authorities and the respondents. The case concerned the review and setting aside of the decision of the DG under section 22 of the Environment Conservation Act 73 of 1989 to grant the necessary authorisation for the construction of a filling station. The High Court and the Supreme Court of Appeal had dismissed the application. In setting aside the decision of the SCA, the majority held that the authorities had misconstrued the nature of their obligations and as a consequence had failed to comply with a compulsory and material condition prescribed by the law for granting authorisation to establish a filling station. With respect to costs, the Constitutional Court held that costs should follow the event. Therefore, the trust and its trustees must not be saddled with costs. They intervened and opposed the matter in order to safeguard their interests. It is these respondents who should pay the costs of the applicant while the remaining respondents who opposed the matter should look after their own costs.

5 Conclusion

The preferential treatment of costs in constitutional litigation is not a licence for litigants to institute frivolous or vexatious proceedings against the State. Even where litigation is aimed at asserting constitutional rights, if a litigant is guilty of unbecoming behaviour in relation to how proceedings are conducted, it may be mulcted with costs. The interplay between abuse of process, frivolous or vexatious proceedings and Stalingrad defence tactics demonstrate that, where an unsuccessful party has lowered its ethical and professional standards in pursuit of a constitutional cause, such a litigant would not be entitled to rely on *Biowatch* to escape liability for costs – not even a punitive costs order. The imposition of a punitive personal costs order may serve to inhibit a resort to Stalingrad defence strategy. In costs awards in crossfire litigation, triggered by a failure of state functionaries to fulfil their constitutional and statutory responsibilities, it follows that the State should be saddled with costs incurred by the prevailing litigant, and ordinarily there should be no adverse costs orders against any private parties who were entangled in litigation.

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