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To submit articles, contact:
PULP
Faculty of Law
University of Pretoria
South Africa
0002
Tel: +27 12 420 4948
Fax: +27 12 362 5125
pulp@up.ac.za
www.pulp.up.ac.za

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EDITORS' NOTE

It is with great joy that I, along with the editorial committee, present to you, reader, the 2016 Pretoria Student Law Review. I believe it is only fitting that the tenth edition is one that portrays, very clearly, a new chapter in the life of this student publication.

This year has not only been a challenging one for students, staff and parents but also for the citizens of South Africa as a whole. It is thus with even greater pleasure that we offer our humble contribution to legal academia. As the editorial board we are extremely proud of successfully completing this most important tenth edition in such tumultuous times.

Many challenges have both been overcome and discovered in this year's exciting journey of creating this publication. Every year experiences different authors with varied contributions and themes but this tenth edition is one which illustrates a certain gusto and determination on the part of those who worked towards its completion. With that said, I would like to thank the authors for their submissions and tireless effort to meet (often exceedingly pressed) deadlines. My thanks also goes to the artist for this edition, Marijke Benade and Lizette Hermann for her support during this particularly unique time; Prof Anton Kok & Prof Andre Boraine, for their support in various ways and on short notice. But of course, thank you to the editorial team of 2016. Abel Maluleka, Abrie van der Merwe, Carin Cross, Daniel Badenhorst, Larisse Prinsen and Roxanne Gilbert; without your willingness to assist, there would be nothing between these pages. Thank you to Sarah Burford, in particular, who is not only part of the editorial team but who greatly assisted me with concluding edits and proofreading.

This year's edition includes a diverse range of articles. Some are close to home while others grapple with issues abroad. From feminism & queer theory, to child rights, sports law, free higher education, and of course, the language debate, our authors have ensured that every reader will find something to both challenge and broaden their minds.

I do hope that you enjoy this precious bundle of what the students at the Faculty of Law, University of Pretoria, have to offer.

Cara Furniss
Managing editor
2016

FROM THE DEAN'S DESK

It gives me great pleasure to congratulate the Editorial Board of the 2016 PSLR on this edition of our in-house student law journal.

The journal provides our students with an excellent opportunity to develop and hone their research and writing skills and to contribute to the academic discourses on legal and societal issues of the day.

This particular edition was born during the national crisis in our higher education system and some contributions speak directly to the issues relating to this pressing matter. At the same time a broad range of other matters like: labour law issues pertaining to religious leaders; global issues like the rights of refugees; race and society; gender; child pornography; threats to the rule of law and the escalation of commercial rights for sports mega events, have also been considered. The contributions were all subjected to a rigorous peer-review process and provide a broad range of topical discussions.

I want to encourage our students to continue to contribute to this journal and also to make themselves available to serve on its editorial board. The experience gained by participating, either as an author or as serving on the editorial board, will stand you in good stead in any future career in law.

Prof André Boraine
Faculty of Law
University of Pretoria

NOTE ON CONTRIBUTIONS

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

Please visit our website at www.pslr.co.za for more information.

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4th Floor
Law Building
University of Pretoria
Pretoria
0002

THE APPLICATION OF LABOUR LAW TO RELIGIOUS LEADERS IN SOUTH AFRICA

*by Devon-Lee Andriés**

1 Introduction

This article falls against the backdrop of a highly debated and controversial area of the law. In 2009 a homosexual minister was dismissed from her position at a Methodist church upon announcement of her impending marriage to her female partner.[1] This opened up the pertinent question of whether such a person constitutes an employee for purposes of labour law, which is what this article seeks to address.

2 Facts of the case and the unanswered question

De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being[2] involved a homosexual Methodist minister who had been living with her partner on church premises.[3] Upon announcement of her intention to marry her partner, the church dismissed her.[4] The church based this dismissal on the grounds that this was a breach of the church's policy and practices which only recognise heterosexual marriages.[5]

The court ended up dealing with an issue quite far from the direction in which it was anticipated the case would head. The Constitutional Court had to deal mostly with whether Mrs De Lange could appeal the Supreme Court of Appeal's judgment on the basis that the arbitration agreement, between her and the church, was not validly entered into or enforced.[6] It was anticipated that the court would need to assess whether Mrs De Lange was an employee of the church and therefore entitled to rely on the laws governing unfair dismissal. Although the judgment focused on a different issue, it is

* Final year LLB student, University of Pretoria.

1 G Nicolaides 'Gay Reverend takes Appeal to ConCourt' http://ewn.co.za/2015/08/28/Gay-reverend-takes-appeal-to-ConCourt (accessed 16 October 2015).

2 2016 (2) SA 1 (CC).

3 *De Lange* (n 2 above) para 4.

4 *De Lange* (n 2 above) para 5.

5 As above.

6 *De Lange* (n 2 above) para 2.

strongly believed that the facts of this case are an excellent example of the type of instance in which a religious leader may require the protection of South African labour law.

If Mrs De Lange were to qualify as an employee, she would be entitled to rely on the Employment Equity Act (hereafter the EEA) which denotes that dismissal based on sexual orientation is automatically unfair and invalid.[7] However, on the other hand, if Mrs De Lange was not held to be an employee but rather a person providing services for the church on the basis of her spiritual calling, she would not be able to rely on such legislation. It seems in this instance, there would not be much protection for religious leaders. However, the question is whether this corresponds with the Constitutional provision that *everyone* is entitled to fair labour practices?[8]

Olivier states that the decisive criterion in determining whether a minister of religion is an employee or not, is whether there was an intention to enter into a binding contractual arrangement and particularly, one with the nature of an employment relationship.[9]

3 The legislative framework: Who is an employee?

The Constitution, which is the supreme law of South Africa, entrenches the right to fair labour practices.[10] Various pieces of legislation have been created to give effect to this constitutional right. These include the Labour Relations Act[11] (hereafter the LRA), the EEA[12] and the Basic Conditions of Employment Act[13] (hereafter the BCEA), to name a few.

Section 213 of the LRA defines an employee as:

> (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
>
> (b) any other person who in any manner assists in carrying on or conducting the business of an employer.

7 Sec 6 of the Employment Equity Act 55 of 1998.
8 Sec 23 of the Constitution of the Republic of South Africa, 1996 (the Constitution).
9 M Olivier '"Reflections on the essence of employment status" minister of religions, judges and magistrates' (2008) 1 *Tydskrif vir die Suid-Afrikaanse Reg* 4.
10 Sec 23 of the Constitution.
11 The Labour Relations Act 66 of 1995.
12 The Employment Equity Act 55 of 1998.
13 The Basic Conditions of Employment Act 75 of 1997.

The BCEA[14] contains a definition identical to that of the LRA. While, the EEA[15] contains a similar definition for the word employee which only differs in the fact that the exclusion of an independent contractor does not appear in subparagraph (a) but in the introductory paragraph.

Notwithstanding the definition of 'employee', provided for in the abovementioned legislation, the courts have struggled in deciding who constitutes an employee. The legislature has attempted to resolve this issue by including a deeming clause in Section 200A of the LRA, but uncertainty still looms in this regard.[16]

In assessing the above definition of 'employee', firstly, it is clear that a distinction is made between an employee and an independent contractor. This very distinction is the topic of much deliberation in case law. In *Smit v Workmen's Compensation Commissioner*[17] the court summarised a list of factors which indicate the difference between these two types of workers.[18] These factors include the following: the type of work at hand — a personal service or a specified result; if the service is performed personally or through another; if the service is readily available or only performed for a specified period; if the worker is obliged to carry out the instructions of the employer or alternatively, if the worker is subservient to the provisions of a contract.[19]

The term 'works for' in subsection (a) includes a person who has concluded an employment contract but has not yet started working.[20] This allows for a broader protection of vulnerable persons, which is the main aim of labour legislation.[21] This interpretation of the definition of employee emphasises the importance of an employment contract. It is implied that, should an employment contract exist, from the date of conclusion, the parties are employer and employee respectively.[22]

Subsection (b) of the definition expands the very narrow description of an employee provided in subsection (a).[23] This assists in situations where a person may be engaged in an employment relationship with their employer whilst not having concluded a formal employment contract.[24]

14 Sec 1 of the Basic Conditions of Employment Act.
15 Sec 1 of the Employment Equity Act.
16 J Grogan *Workplace law* (2014) 17.
17 *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A).
18 A van Niekerk *Law@Work* (2015) 58.
19 *Smit* (n 17 above) as discussed in van Niekerk (n 18 above) 58.
20 D Du Toit *et al Labour Relations Law* (2015) 89.
21 Du Toit (n 20 above) 89.
22 As above.
23 Grogan (n 16 above) 17.
24 Du Toit (n 20 above) 89.

More important than the definitions themselves, is the interpretation of the LRA. Section 3 of the LRA sets out guidelines on how to interpret the provisions of this Act.[25]

> Any person applying this Act must interpret its provisions-
>
> (a) to give effect to its primary objects;
>
> (b) in compliance with the Constitution; and
>
> (c) in compliance with the public international law obligations of the Republic.

Bearing this interpretation in mind, it is now necessary to asses one of the more important provisions used in employee identification.

Section 200A of the LRA reads as follows:[26]

> (1) Until the contrary is proved, a person, who works for or renders services to any other person, is presumed, regardless of the form of the contract, to be an employee, if one or more of the following factors are present:
>
> (a)The manner in which the person is subject to the control or direction of another person;
>
> (b)The person's hours of work are subject to the control or direction of another person;
>
> (c)In the case of a person who works for an organisation, the person forms part of that organisation;
>
> (d)The person has worked for that other person for an average of at least 40 hours per month over the last three months;
>
> (e)The person is economically dependent on the other person for whom he or she works or renders services;
>
> (f) The person only works for or renders services to one person.
>
> (2) Subsection (1) does not apply to any person who earns in excess of the amount determined by the minister in terms of Section 6(3) of the Basic Conditions of Employment Act.
>
> (3) If a proposed or existing work arrangement involves persons who earn amounts equal to or below the amounts determined by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act, any of the contracting parties may approach the Commission for an advisory award on whether the persons involved in the arrangement are employees.
>
> (4) NEDLAC must prepare and issue a Code of Good Practice that sets out guidelines for determining whether persons, including those who earn in excess of the amount determined in subsection (2) are employees.

25 Sec 3 of the Labour Relations Act.
26 Sec 200A of the Labour Relations Act.

This section was enacted in response to problems which arose from the identification of an employee.[27] A person is deemed to be an employee if any one of the abovementioned criteria is satisfied, regardless of indications to the contrary.[28] Section 200A has created a rebuttable presumption which places a burden on the employer to prove that the worker is not an employee should any of the factors above be triggered.[29] Section 200A(2) explains that this rebuttable presumption does not apply to persons who are earning more than an amount specified by the Minister of Labour — which is currently fixed at R205 433, 30 per annum.[30] Section 200A(4) provides that persons earning more than the aforementioned amount, can look to a Code of Good Practice to determine their employment status.

This presumption gives rise to an easier way to categorise workers as employees or non-employees. This distinction is important for the application of employee protection, as mentioned above. However, this is not the only factor determining the status of working persons. Over and above black and white definitions, practice has turned to assessing the nature of the relationship between employers and their workers.

At common law, there is large emphasis placed on the existence of an employment contract being the indicator of a person qualifying as an employee. In more recent years, the focus has shifted from the importance of a contract to establishing whether an employment relationship exists. In the case of *State Information Technology Agency (SITA) (Pty) Ltd v CCMA*[31] the court supported the aforementioned shift and emphasised that the existence of a valid employment contract does not carry as much weight as an enquiry into the existence of an employment relationship.[32] The court went further than that and actually laid down criteria to determine the existence of such a relationship.[33] This criteria includes assessing an employer's right to supervision and control, whether an employee forms an essential part of the organisation, and the extent of the economic dependence of the employee upon the employer.[34] To further entrench this change of focus, all reference to 'contract of employment' in the definition in the Labour Relations Amendment Act[35] has been removed.[36] This alteration allows for a wide scope of

27 Du Toit (n 20 above) 93.
28 Grogan (n 16 above) 17.
29 Du Toit (n 20 above) 93.
30 Van Niekerk (n 18 above) 63.
31 2008 (7) BLLR 611 (LAC).
32 Van Niekerk (n 18 above) 63.
33 *State Information Technology Agency (SITA) (Pty) Ltd* (n 31 above) para 12.
34 Van Niekerk (n 18 above) 63.
35 Labour Relations Amendment Act 6 of 2014.
36 Du Toit (n 20 above) 89.

application of protection for any person engaged in an employment relationship.[37]

In the case of *Discovery Health Ltd v CCMA*[38] it was held that 'a contract of employment is not the sole ticket for admission into the golden circle reserved for employees'.[39] It is therefore clear that a valid and enforceable contract of employment is not a pre-requisite for workers to obtain rights in terms of the LRA.[40] This broad scope must not, however, allow for an employment relationship to be inferred without the parties having intended such a relationship to come into existence.[41]

It should be borne in mind that in addition to the applicable legislation discussed above, the intention of the parties is of vital importance. It was so eloquently stated by Olivier: 'It is clear that the written contract and the intentions/perceptions of the parties are extremely important, although not conclusive: the true nature of the relationship and the conduct of the parties can still point to an opposite conclusion.'[42]

If we are to look specifically at the presumption of employment set out above, on a very basic level, the following thoughts come to mind regarding the manner of control to which a person is subject.[43] It can be argued that a religious leader is subject to the control of God and not necessarily to that of the church. It is opined that this places a religious leader within the spiritual realm of work as opposed to the commercial sphere. This would result in a religious leader not qualifying as an employee, but rather a servant, not of the church, but of God.

Secondly, regarding economic dependence of a person,[44] it is fairly clear that a religious leader would rely financially on the church, however what is found to be very important in this argument is that monetary security is not the goal of a religious leader. This is in contrast to people in, for instance, an administrative job, where remuneration forms a large part of their purpose and motivation for fulfilling such a role. However, the perception is that religious leaders reap their reward through the doing of good deeds and fulfilling their God-given spiritual purpose. A monetary sentiment is merely a bonus. Although this financial reward is vital to the day-to-day wellbeing of a religious leader and their family, this does not seem to be the foundation upon which the office of a religious leader is fulfilled.

37 As above.
38 2008 (7) BLLR 633 (LC).
39 *Discovery Health Ltd* (n 38 above) para 49.
40 Du Toit (n 20 above) 89.
41 Du Toit (n 20 above) 90.
42 Olivier (n 9 above) 3.
43 Sec 200A(1)(a) of the Labour Relations Act.
44 Sec 200A(1)(e) of the Labour Relations Act.

These two points are indicative of the fact that an employment relationship is created through the presence of an intention to do so. Furthermore, the motive of both parties regarding the purpose of the agreement is also decisive.

Olivier's statement above and the law surrounding this issue implies that while specific tests, presumptions and legislation may appear to indicate one thing, the nature of the relationship and the intention of the parties may indicate the contrary. 'An employment relationship cannot be forced upon parties who did not intend one.'[45] The type of relationship formed is decisive in this matter over any other indication, including rigid parameters set out in legislation.

4 The Court's Stance

The Labour Appeal Court held in the case of *Universal Church of the Kingdom of God v Myeni*[46] that a minister was not an employee and that section 200A did not apply.[47] The court referred to the UK case of *President of the Methodist Conference v Preston*[48] where Lord Sumption stated 'the question whether an arrangement is a legally binding contract depends on the intentions of the parties.'[49] In the recent case of *Universal Church of the Kingdom of God v Myeni*[50] the court assessed section 200A in the context of a religious leader. The court held that 'section 200A advocates substance over form' and that a proper construction of this section requires a legally enforceable agreement or working arrangement between the parties.[51] This necessitates a contract of employment as a prerequisite for section 200A to apply, according to Ndlovu JA of the Labour Appeal Court.

In the case of *Schreuder v Nederduitse Gereformeerde Kerk, Wilgespruit & others*[52] (the *Schreuder case*) a priest was dismissed by a church and when the priest contended this dismissal was unfair, the court had to determine whether the priest was in fact an employee.[53] The court held that the priest was an employee due to the letter of appointment issued by the church.[54] It was held that this letter created contractual obligations and therefore an employment relationship had arisen.[55]

45 Olivier (n 9 above) 2.
46 2015 (36) ILJ 2832 (LAC).
47 *Universal Church of the Kingdom of God* (n 46 above) para 49.
48 (2013) UKSC 29.
49 n 48 above, para 26.
50 n 46 above.
51 *Universal Church of the Kingdom of God* (n 46 above) paras 37 & 40.
52 (20) ILJ 1936 (LC).
53 The facts as set out in B Grant 'Is a priest an employee for the purposes of our labour legislation' (2003) 24 *Obiter* 158.
54 As above
55 *Schreuder* (n 52 above) para 19.

The court took an opposite view in the case of *Church of the Province of Southern Africa Diocese of Cape Town v CCMA & others*[56] (the *Church Diocese* case) where a minister was dismissed on two charges of misconduct.[57] The minister approached the CCMA stating that this dismissal was unfair and that he should be afforded protection as an employee of the church.[58] The court held that the priest was not an employee for purposes of labour law.[59] The court was concerned with the type of relationship between a priest and the church. It was held in the *Church Diocese case* that the very basis of the relationship between the church and the priest is the priest's 'calling from God.'[60] The church merely provides a platform upon which the priest is able to give effect to this calling. The court held that while this space may happen to provide all the features of an employment relationship, this does not make such a relationship an employment one.[61] The court further emphasised the importance of assessing the intention of the parties: 'offer, acceptance and consideration must be accompanied by an intention to create a contractible relationship giving rise to enforceable obligations'.[62] Calitz so eloquently states:[63]

> In the light of the perceived special calling of a priest, he will not be regarded as an employee of the church unless it is clear that there was indeed an intention to create such a relationship.

In a journal article detailing the very same question being discussed, Grant reconciles the two vastly different views held in the *Schreuder* and *Church Diocese* cases. Grant believes the correct approach was adopted in the *Church Diocese* case where the court focused on the intention of the parties.[64] Grant explains that in asking whether a priest is an employee or not, one cannot ignore the basis of the relationship, which in this instance, is a calling from God.[65] This renders the relationship ecclesiastical in nature as opposed to contractual.[66] It has been said that although there may be an

56 *Church of the Province of Southern Africa Diocese of Cape Town v CCMA* 2002 (3) SA 385 (LC).
57 *Church of the Province of Southern Africa Diocese of Cape Town* (n 56 above) para 3.
58 *Church of the Province of Southern Africa Diocese of Cape Town* (n 56 above) para 4.
59 *Church of the Province of Southern Africa Diocese of Cape Town* (n 56 above) para 40.
60 *Church of the Province of Southern Africa Diocese of Cape Town* (n 56 above) para 37.
61 As above.
62 *Church of the Province of Southern Africa Diocese of Cape Town* (n 56 above) para 33.
63 K Calitz 'The Liability of Churches for the Historical Sexual Assault of Children by Priests' (2014) *Potchefstroom Electronic Law Journal* (17) 2461.
64 Grant (n 53 above) 160.
65 Grant (n 53 above) 161.
66 Grant (n 53 above) 162.

agreement to certain obligations between a church and a priest, this agreement flows more from a spiritual sphere than an enforceable civil contract.[67] In the case of *Smith v Die Ring van Amandelboom van die Verenigde Gereformeerde Kerk in Suider Afrika (VGKSA)*[68] the court found that the minister was subject to the authority and discipline of the church but that such authority and discipline arose from an ecclesiastical authority of the church and not an employment relationship between the parties.[69]

Other perspectives provide that ministers or members of the clergy can indeed be appointed as an employee.[70] In the case of *Wagenaar v Uniting Reformed Church in SA*[71] the court found that the parties had made a conscious effort to comply with labour legislation and that the parties intended for such legislation to be applicable.[72] Consequently, the court found that the church constitution was supplementary, and did not replace the labour legislation.[73]

In the case of *Borcherds v C W Pearce & F Sheward t/a Lubrite Distributors,*[74] where the facts did not deal with a religious minister, but still with the question of identifying an employee, the court held that the applicant was not an employee due to him being his own master and not bound by his employer's orders.[75] In applying this to the above unanswered question, one could argue that priests are more subjected to the orders of God than that of the church since their primary objective is to fulfil the will of God. This would mean that an element of control by the church over a religious leader would be diminished. Ultimately this issue comes down to the question of whether a religious leader is a 'servant of man or a servant of God.'[76]

Case law dictates that the intention of the parties is of the utmost importance. Did they intend to enter into an agreement, in the nature of an employment relationship which gives rise to legally binding obligations?[77] Giving power to the intention of the parties reiterates one of the cornerstones of the law of contract, namely, the freedom of contract. This principle plays a vital role in our law and should not be overlooked. In stating that the intention of the parties is important, cognisance is taken of the fact that ascertaining such an intention may be difficult due to the spiritual calling upon which a religious leader commences their job. Perhaps some form of

67 Olivier (n 9 above) 4.
68 Case no NHK11/2/5587 (unreported).
69 *Smith* (n 68 above) para 22-23.
70 Olivier (n 9 above) 6.
71 2005 (1) BALR 127 (CCMA).
72 *Wagenaar* (n 71 above) paras 133 F-H & 134 F-G.
73 *Wagenaar* (n 71 above) paras 133 H-I.
74 1991 (12) ILJ 383 (IC).
75 *Borcherds* (n 74 above) para 386A.
76 As stated by J Hawthorne in '"Priests" employment rights: Your service or His?' http://www.economist.com/node/21538148 (accessed 31 May 2016).
77 Olivier (n 9 above) 14.

regulation would assist in ascertaining and appropriately dealing with the intentions of the parties in this situation. This results in one having to assess this question on a case by case basis. It may not be adequate to have hard and fast rule as to whether religious leaders are employees or not.

5 An International Perspective

The international labour community plays an enormous role in the implementation of South Africa's labour laws. It is entrenched in our Constitution that when interpreting any legislation, courts should prefer an interpretation consistent with international law, as opposed to an inconsistent interpretation.[78] In assessing whether religious leaders qualify as employees, we should also assess the legal jurisprudence of our international counterparts, those who are also member states to the ILO, namely the United Kingdom (hereafter UK) and Australia.[79]

Labour law in the UK is regulated by various pieces of legislation. One of the more pertinent legislative instruments is the Employment Rights Act (hereafter the ERA).[80] This Act defines 'employment status' in the following way: [81]

> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
>
> (3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
>
> and any reference to a worker's contract shall be construed accordingly.

78 Sec 233 of the Constitution.
79 International Labour Organisation 'ILO Standards' http://www.ilo.org/public/english/standards/realm/country.htm (accessed 10 April 2016).
80 Ch 18 of the Employment Rights Act 1996.
81 Sec 230 of the Employment Rights Act 1996, ch 18.

> (4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.
>
> (5) In this Act "employment"—
>
> (a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and
>
> (b) in relation to a worker, means employment under his contract;
>
> and "employed" shall be construed accordingly.

In interpreting the above provision regarding employment status, it is clear that there are three types of employment under which an individual may fall, namely an employee; and independent contractor and a worker.[82] Davies states that this definition of employment status portrays a contract of employment as a common law concept[83] which leads to much litigation 'as individuals strive to get into a more protected category and employers seek to avoid the legal obligations that would follow from this'[84]

There are a variety of tests that have been developed over the years in UK law dealing with the determination of employment status. Firstly, the control test was applied in the case of *Yewens v Noakes*[85] where the court explained the 'master-servant' nature of the employment relationship. In this type of relationship an employer has the ability to not only control the work the employee performs, but also the manner in which it is performed.[86] This test has been criticised as being vague and although it is a common sense approach, these criteria often fail in the face of more complex labour constructions.[87]

Secondly, the organisation test was used in the case of *Cassidy v Ministry of Health*.[88] This test made the consideration of the part played by an individual in the employer's organisation more important than the degree of control to which such an individual was subjected.[89] The organisation test was viewed in a more favourable light than the control test.[90]

In the case of *Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*[91] the court laid down three tests

82 J Marson 'Anatomy of an employee' (2013) 19(3) *Web Journal of Current Legal Issues* para 4.
83 A Davies *Perspectives on labour law* (2009) 81.
84 Davies (n 83 above) 91.
85 (1880) 6 QBD 530.
86 As discussed in *Yewens v Noakes* (n 85 above).
87 O Kahn-Freund 'Servants and independent contractors' (1951) 14 *The Modern Law Review* 507.
88 (1951) 2 KB 343.
89 As discussed in *Cassidy* (n 88 above).
90 Marson (n 82 above) para 5.
91 (1968) 2 QB 497.

to determine employment status. This is the more modern test used in the UK.[92] These tests were posed as questions, namely:[93]

> (1) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master;
>
> (2) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master; and
>
> (3) The other provisions of the contract are consistent with it being a contract of service.

The abovementioned tests, developed and applied by courts create a checklist which is to be applied in proving a prima facie case of employment status.[94]

Despite the tests available to the courts in the UK, often it is still difficult to determine what the outcome would be of, for example, a question like: do religious leaders qualify as employees? There is a long line of English cases which consistently held that ministers serve the church in terms of ecclesiastical law.[95] There appear to be two vital cases which came before the UK courts dealing with this very question, namely: *Percy v Church of Scotland Boards of National Mission*[96] (the *Percy case*) and *New Testament Church of God v Stewart*[97] (the *Stewart case*).

In the *Percy case*, the court was faced with determining whether a minister's relationship with the church constitutes one of employment.[98] The court paid special attention to whether legal relations were intended in the appointment of Ms. Percy as a minister. There initially seems to be a presumption created against the intention to create legal obligations.[99] Lord Nicholls of Birkenhead expressed the opinion that employment arrangements between a minister and a church should be easily assumed to have no legal effect.[100] The House of Lords held, in this case, that the minister was a 'worker' as defined in section 230(3) of the ERA.[101]

The Court of Appeal took a different stance in the *Stewart case* and held that the minister was an employee in terms of section 230(1)

92 Marson (n 82 above) para 5.
93 *Ready-Mixed Concrete (South East) Ltd* (n 91 above) para 499.
94 Marson (n 82 above) para 7.
95 Calitz (n 63 above) 2455.
96 (2005) UKHL 73.
97 (2007) IRLR 178 EAT.
98 *Percy* (n 96 above) para 1.
99 *Percy* (n 96 above) para 23.
100 *Percy* (n 96 above) para 26.
101 J Duddington 'God, Caesar and the employment rights of ministers of religion' (2007) 159 *Law & Justice* 129.

of the ERA.[102] Employee status provides the minister with a wider range of protection than that of a worker.[103]

Therefore, courts following the *Percy* judgement would not allow as wide a variety of claims based on labour law to ministers as they would, were they to follow the *Stewart* judgement. Workers in terms of UK law are provided less protection that those with employment status. This conflict would result in a lack of legal certainty.

Duddington, in a journal article titled 'God, Caesar and the employment rights of ministers of religion' aims to show that there is no general principle affording religious leaders employment status.[104] In doing so, Duddington discusses the impact of the European Convention on Human Rights (hereafter the ECHR).[105] It should be noted that the UK's membership of the European Union (hereafter the EU) has initiated many protective mechanisms for those with employment status.[106] However, despite the legal stance of the EU, the domestic law of the UK and the interpretation thereof is of supreme importance.[107] In the case of *Diocese of Southwalk v Coker*[108] the court found that a minister was not an employee firstly due to the lack of an employment contract but secondly due to the ecclesiastical office held by the clergyman. It was stated that such an office should be governed by ecclesiastical law.[109]

Straughton LJ, in the majority judgment of *In re National Insurance Act 1911: In re Employment of Church of England Curates*[110] held: 'one can say that a minister of religion serves God and serves his congregation, but does not serve an employer.'[111] In agreement with this stance, The House of Lords in *Davies v Presbyterian Church of Wales*[112] held that a pastor's 'duties are defined and his activities dictated not by contract but by conscience… he is the servant of God.'[113]

Of all the cases discussed above, save for the *Stewart* case, it seems the UK courts prefer the stance that a pastor is not an employee for purposes of Labour law but is rather a servant of God held in his office by ecclesiastical/spiritual laws. It is evident that there is no set-in-stone rule for the status of religious leaders in terms

102 As above.
103 As above.
104 As above.
105 As above.
106 Marson (n 82 above) para 3.
107 As above.
108 (1998) ICR 140 (CA).
109 *Diocese of Southwalk* (n 108 above) as discussed in *Church of the Province of Southern Africa Diocese of Cape Town* (n 56 above) para 15.
110 (1912) 2 Ch. 563.
111 *In re National Insurance Act 1911* (n 110 above) paras 150E – 151B.
112 (1986) 1 All ER 705 (HL).
113 *Davies* (n 112 above) paras 709g - j.

of employment law. At this point, what does seem clear though, is that it is possible for religious leaders to be afforded protection in labour law in the UK. Perhaps this position can assist in deciding whether or not clergy should be afforded protection in terms of South African labour law.

In Australia, the main legislative guideline is the Workplace Relations Act.[114] The principle aim of this Act is to provide a legal framework for 'cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia …'[115] This Act defines an employee as: [116]

> an individual so far as he or she is employed, or usually employed, as described in the definition of employer in subsection 6(1), by an employer, except on a vocational placement.

An employer is defined as:[117]

> (a) a constitutional corporation, so far as it employs, or usually employs, an individual; or
>
> (b) the Commonwealth, so far as it employs, or usually employs, an individual; or
>
> (c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or
>
> (d) a person or entity (which may be an unincorporated club) so far as the person or entity, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:
>
> (i) a flight crew officer; or
>
> (ii) a maritime employee; or
>
> (iii) a waterside worker; or
>
> (e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or
>
> (f) a person or entity (which may be an unincorporated club) that carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person or entity employs, or usually employs, an individual in connection with the activity carried on in the Territory.

Despite these lengthy definitions, there is still often confusion as to who qualifies as an employee in Australian labour law. For this, there is a common law test to distinguish between employees and independent contractors. According to L&E Global in their publication

114 The Workplace Relations Act 1996.
115 Sec 3 of the Workplace Relations Act 1996.
116 Sec 5(1) of the Workplace Relations Act 1996.
117 Sec 6(1) of the Workplace Relations Act 1996.

entitled 'Employees vs Independent Contractors', the multi-factor test is a guiding principle in making this distinction.[118]

In an Australian case; *Knowles v Anglican Church Property Trust, Diocese of Bathurst*,[119] the court was faced with a case concerning an unfair dismissal of a priest of the Anglican Church. The judge held that the relationship between the priest and the church was a religious one, 'based on a consensual compact to which the parties were bound by their shared faith, based on spiritual and religious ideas, and not based on common law contract.'[120]

The Supreme Court of South Australia was faced with a similar issue in the case of *Greek Orthodox Community of South Australia v Ermogenous*.[121] The court focused on whether or not, with regard to religious leaders, there was a presumption of an intention to enter into contractual relations and the court answered this question in the negative.[122] The court took note of the spiritual nature of the relationship between the parties as well as the ecclesiastical purpose to which a priest is subject.[123] The court further discussed that determining whether the parties entered into an employment contract should be done with regard to the circumstances surrounding the relationship between the parties.[124] The court further stated the following:[125]

> No general principle will be established in this case for cases involving a contractual relationship between a minister of religion and a church or an entity that in some way retains a minister to exercise his or her ministry.

The court did eventually hold that the bishop was an employee of the church, after assessing the facts very closely. This case is a vital case in Australian labour law and it seems the outcome is that there is no presumption or general rule that a contract of employment is to be created, but rather that each case is decided on its own merits, taking into account the circumstances surrounding the situation.

Although these two cases may not totally be in agreement, what is clear is that there is no black and white conclusion in situations such as these. The court in Australian labour law has the discretion to decide whether or not a religious leader is an employee or not. This

118 L&E Global 'Employees vs independent contractors: Understanding the distinction between contractors and employees and the re-characterization of a contractor into an employee' *An L&E Annual Publication*.
119 (1999) 89 IR 47.
120 *Knowles* (n 119 above) 90.
121 99 – 653 (2000) SASC 329.
122 *Greek Orthodox Community of South Australia* (n 121 above) para 4.
123 *Greek Orthodox Community of South Australia* (n 121 above) as discussed in *Church of the Province of Southern Africa Diocese of Cape Town* (n 56 above) para 22.
124 *Greek Orthodox Community of South Australia* (n 121 above) para 40.
125 *Greek Orthodox Community of South Australia* (n 121 above) para 9.

decision is made after careful consideration of the nature of the relationship between the parties, which differs from case to case. This appears to be the deciding factor.

It is clear that in both the UK and Australia, there does not seem to be a clear-cut rule regarding the employment status, if any, of clergy. To further entrench the lack of general principles at hand, it seems that the surrounding circumstances of each case play a decisive role in determining employment status. This position may lead to legal uncertainty but until a solid set of principles which is applicable across the board is implemented, this will remain the legal standpoint.

What is overwhelmingly clear though, throughout the exploration of both countries' law, is that there is no general presumption that a contractual relationship exists between a priest and the church. Perhaps we can conclude that one would always need to provide evidence to this effect for the court to make such a finding. Interestingly, this is in direct contrast with the position in South Africa where there is a presumption of employment and one should try to disprove such a fact. One could go so far as to say that the default position in countries such as the UK and Australia is that religious leaders are not employees unless this is proven. However, in South Africa, on the basis of the aforementioned presumption,[126] it seems the default position may lean more toward clergy occupying an employment status. It is opined that perhaps a presumption against legal obligations should be created in South Africa in instances involving clergy. This may also allow for more self-regulation of churches as a legal framework will not automatically apply.

Furthermore, the golden thread through the jurisprudence of the UK and Australia is that the court will make a decision on the question at hand based on the merits of the case and the surrounding circumstances.

6 Conclusion

Determining the status of religious leaders in labour law is vital due to the protection afforded to persons with employment status. It is appreciated that should religious leaders not be categorised as employees, they will not have access to the protection against, for example, unfair discrimination. However, if clergy were to have such protection, this would result in the courts having the power to intervene in the life and functioning of the church. The doctrine of entanglement strongly advises against courts being involved in issues

126 Sec 200A of the Labour Relations Act.

of religious doctrine,[127] as such interference may burden the right to religious freedom as entrenched in the Constitution.[128]

It has been stated that the intention of the parties is pertinent in determining the status of each person involved. In the case of clergy, the overwhelming intention seems to be to serve God and fulfil the ecclesiastical calling to do so. This intention does not indicate a strong willingness to regulate such a situation with a legal framework. According to this deduction, it seems that the default position of the UK and Australia as discussed above may be suitable to the South African labour jurisprudence. This denotes that there is a general presumption against legal obligations arising between a church and a religious leader.

It is found more appropriate for religious leaders not to qualify as employees but to be governed by some law specifically created for their very unique positions. This could perhaps be a piece of legislation, which provides for regulation of employment-type-matters, but to be dealt with by the church internally and which gears away from the courts' involvement in such matters.

It is proposed that this legislation provides room for the policies and practices of the church, specific, of course to the religion at hand. This would allow churches to enforce these policies and practices upon religious leaders. Should a problem arise, these leaders would be able to rely on legislation providing for an internal remedy within the church. This protects job security which is not the main aim of religious leaders but is an inevitable consequence which impacts their and their dependent's lives.

Ultimately, law and religion are two indispensable elements of life in South Africa. It is my hope that the two will develop in the most positive light when they meet and operate as one.

127 *De Lange* (n 2 above) para 24.
128 Sec 15 of the Constitution.

‘BRIDGING THE GAP’: APPRAISAL OF THE FACTORS WHICH LIMIT AND IMPEDE THE REALISATION OF THE RIGHT TO WORK OF REFUGEES AND ASYLUM SEEKERS

*by Stephen Baidoo**

1 Introduction

An asylum-seeker, in terms of the Refugees Act 130 of 1998, is ‘a person who is seeking recognition as a refugee [in South Africa]’.[1] Subsequently, the legal definitions of the term refugee contained in the Refugees Act is derived, albeit strictly, from the Refugee Convention and the OAU Refugee Convention.[2] A refugee is a person who:

> Owing to well-founded fear of being persecuted by reason of his or her race, gender, tribe, religion, nationality, political opinion or membership of a particular group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or owing to external aggression, occupation, foreign domination or other events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin of nationality; or is a spouse or dependant of a person (recognised as a refugee).[3]

Essentially there are two aspects of this definition of a refugee. These are persons who: harbour a well-founded fear of persecution and are not protected in their country of origin. The elements of persecution and a lack of protection separates refugees from other groups of displaced persons or migrants who flee their country for reasons such as poverty, famine, or natural disasters. Mokgoro and O’Regan JJ, in reference to the vulnerable position of refugees, state as follows in

* Final year LLB student, University of Pretoria.

1 Sec 1(v) of the Refugees Act 130 of 1998.

2 Sec 3 of the Refugees Act; Art 1 of United Nations (UN) General Assembly, Convention Relating to the Status of Refugees, 28 July 1951; Art 1 of the Organisation of African Unity (OAU) Refugee Convention, adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session, Addis Ababa, 10 September 1969.

3 Sec 3 of the Refugees Act 130 of 1998.

the case of *Union of Refugee Women v Director, Private Security Industry Regulatory Authority*:

> Refugees had to flee their homes, and leave their livelihoods and often their families and possessions either because of a well-founded fear of persecution on the grounds of their religion, nationality, race or political opinion or because public order in their home countries has been so disrupted by war or other events that they can no longer remain there.[4]

In South Africa, asylum seekers and refugees are expected to integrate themselves into the society.[5] In order to integrate themselves into society, refugees and asylum seekers seek employment.[6] The employment of refugees and asylum seekers in South Africa is challenging. The right to work of refugees is guaranteed by section 27(f) of the Refugees Act,[7] whilst section 22 provides for the right to work of asylum seekers.[8] However, there is a noticeable gap between the provision of this right to work in terms of the Refugee Act and the actual recognition of this right by employers and professional councils. In practice, asylum seekers and refugees are frequently barred from exercising their right to work and thus do not enjoy these protected rights.[9]

This article, in analysing the difficulty of attaining employment, will firstly set a foundational basis in chapter 2. Chapter 3 will deal with the international framework governing the right to work of asylum seekers and refugees. Chapter 4 of this essay will then deal with the constitutional framework governing the right to work. In chapter 5, the implications of a limitation on the right to choose employment on the right to work will be dealt with. In chapter 6, the specific challenges faced by asylum seekers and refugees concerning their right to work will be discussed, along with recommendations for overcoming these challenges. Lastly, in chapter 7, there will be a summation of the main impediments and suggested palliatives for the realisation of the right to work of refugees and asylum seekers.

2 Historical background on asylum and refugee laws in South Africa

Pertaining to the historical development of the legislative and policy framework regulating rights of asylum seekers and refugees in South

4 2007 (4) BCLR 339 (CC) para 101.
5 C Kavuro 'Refugees and asylum seekers: Barriers to accessing South Africa's Labour Market' (2015) 19 *Law, Democracy and Development* 232 233-234.
6 As above.
7 Sec 27(f) of the Refugees Act provides that 'a refugee is entitled to seek employment.'
8 Condition 10 appearing on an asylum seeker's temporary permit, issued in terms of sec 22 of the Refugees Act.
9 Kavuro (n 5 above).

Africa, it may be said to have gone through a first and third legislative and policy generations.[10] These developments took place in response to the effects of migration within South Africa.

The first generation of asylum and refugee policies did not have refugee-specific laws and treated refugee matters under general immigration laws.[11] This approach was predominant during the colonial era but persisted in certain States years after.[12] This is known as the 'traditional common law approach.'[13] In terms of this approach, asylum seeker and refugee policies and laws focused primarily on entry and residence by refugees while saying little on other aspects of refugee protection.[14] This was the approach adopted by South Africa until the 1990s.[15] Until 1998, refugee matters in the country were governed by the Aliens Control Act 40 of 1973. According to scholars, the Aliens Control Act is considered the 'last draconian piece of legislation of the Apartheid Regime.'[16]

The Aliens Control Act was not a comprehensive form of refugee legislation and merely addressed selected aspects of refugee problems.[17] The Act was also the general Act for all immigration related matters and was primarily concerned with the control of immigration into South Africa. The Act sought to achieve this system of control through the development of the concept of a 'prohibited person.' These included amongst others: non-South African citizens who entered the country without a valid passport and visa; and those who left the country without a valid residence permit.[18] Asylum applicants and refugees in term of the Aliens Control Act were either granted temporary permits to enter the country as per section 41,[19] or granted exemption from the entry and residence requirements of the Act on grounds of 'special circumstances; under section 29.[20]

10 B Rutinwa *Asylum and refugee policies in Southern Africa: A historical perspective*, presented at SAMP/LHR/HSRC Workshop on Regional Integration, Poverty and South Africa's Proposed Migration Policy, Pretoria, 23 April 2002 para 3.
11 Rutinwa (n 10 above) para 1.
12 As above.
13 B Rutinwa *Review the law and policies relating to refugees and internally displaced persons in commonwealth countries*, Consultancy Report Commissioned by the Constitutional and Legal Division, Commonwealth Secretariat, London for the Summit of the Commonwealth Heads of States and Governments, Edinburgh, June 1997 para 2.
14 As above.
15 Rutinwa (n 10 above) para 3.1.
16 K Tessier 'The challenge of immigration policy in the new South Africa' (1995) 3 *Global Legal Studies Journal* 255.
17 J Crush & DA McDonald 'Introduction to special issue: Evaluating South African immigration policy after apartheid' (2001) 48 *Africa today* 4.
18 Sec 11(1) of the Aliens Control Act 40 of 1973.
19 Sec 41(1) grants the minister the discretion to 'issue a prohibited person a temporary permit on the prescribed form to enter and reside in the Republic for the purpose, and subject to the other conditions, mentioned herein.'
20 Rutinwa (n 10 above) para 3.1.

According to Rutinwa, this approach had two main shortcomings. First, in addressing refugee matters under general immigration laws, specific matters in refugee protection were not specifically dealt with.[21] As such the Aliens Control Act was silent on specific refugee matters such as how refugees were to be defined, whether asylum seekers and refugees were protected from refoulement,[22] by what standards refugees were to be treated and how their plight was to be resolved.[23]

Secondly, Rutinwa notes that reliance on general ordinary immigration law, when confronted with the refugee problem was problematic, particularly in situations of mass influx.[24] In addressing this shortfall further, Farris comments that the refugee problem has a certain level of specificity namely that it is essentially unrelated to general immigration laws or to the problems faced by other ordinary aliens.[25] Classification of refugees as ordinary aliens, as seen in the Alien Control Act's failure to define a refugee, fails to address the problem. A cursory reading of the migration patterns of ordinary aliens in relation to asylum seekers and refugees denotes that immigration laws are intended to cope with the admission of individuals and not a mass influx of people.[26] A negative consequence of a general application of immigration laws to refugees is a tendency to 'label all potential refugees as illegal immigrants with the attendant consequences.'[27]

These failings prompted the signing of the Basic Agreement between South Africa and the UNHRC (United Nations Human Rights Committee) of 1993 which, among other things, addressed the definition of a refugee.[28]

The third generation of asylum and refugee policies began in the 1980s and introduced protection oriented refugee legislation based on then recent international refugee instruments.[29] These laws and policies were geared towards governing all aspects of refugee protection. Such policies incorporated the basic principles espoused in any sound refugee regime, such as provisions for the definition of a refugee in accordance with the relevant international instruments at the time, institutions and procedures for refugee status

21 As above.
22 The forcible return of refugees or asylum seekers to a country where they are liable to be subjected to persecution.
23 As above.
24 Rutinwa (n 10 above) para 3.1.
25 JA Faris 'The Angolan refugees and South Africa' 2 *South African Yearbook of International Law* (1976) 185, quoted in n 10 above, para 3.1.
26 As above.
27 Rutinwa (n 10 above) para 3.1.
28 As above.
29 Rutinwa (n 10 above) para 4.

determination, non-refoulement and minimum standards of treatment.[30]

In this regard, South Africa enacted the Refugees Act. The Act makes provisions for the definition of a refugee, in line with accepted definitions under international instruments, establishes institutions for refugee status determination, and adjudication and lays down the procedures to be followed in this regard. The statute also makes provisions for the rights of refugees.

3 The International framework on the right to work of refugees and asylum seekers

The 1945 Charter of the United Nations introduced the right to work as a human right. This was done in view of the importance of this right as a 'mechanism to promote the conditions of a dignified life, socio-economic progress and development.'[31] The right to work is further entrenched in the Universal Declaration of Human Rights (the UDHR) as a fundamental right for the promotion of a high standard of living and as a safeguard against unfair or exploitative labour practices.[32] The UDHR today has the status of international customary law,[33] and has binding force on states such as South Africa.[34]

The right to work for refugees is guaranteed by the Refugee Convention and its Protocol.[35] The Convention obligates a host state to accord to refugees lawfully staying in a host country:

> (a) the most favourable treatment accorded to foreign nationals in the same circumstances, as regards the right to engage in wage-earning employment;[36] and
>
> (b) treatment as favourable as possible and, in any event, not less favourable than that accorded to foreign nationals generally in the same circumstances, as regards the right to engage in self-employment;[37] or the right to practise a liberal profession.[38]

30 As above.
31 Art 55(a) of the United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI http://www.refworld.org/docid/3ae6b3930.html (accessed 2 June 2016).
32 Art 23 of the United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) http://www.refworld.org/docid/3ae6b3712c.html (accessed 2 June 2016).
33 Kavuro *(*n 5 above) 235.
34 See A D'Amato 'Human rights as part of customary international law: A plea for change of paradigms' (1995) 25 *Georgia Journal of International and Comparative Law* 51, where he states that, 'custom is the only universal source, generating law that is binding on all nations (including new nations).'
35 The 1967 Protocol Relating to the Status of Refugees, General Assembly, Res 2198 (XXI) of 16 December 1967.
36 Art 17(1) of the Refugee Convention.
37 Art 18 of the Refugee Convention.
38 Art 19(1) of the Refugee Convention.

Therefore, in terms of the Refugee Convention, a host state should, by virtue of a refugee's status, accord refugees and asylum seekers favourable opportunities to earn a living through work. The Refugee Convention does not define what constitutes favourable treatment, although such treatment should be seen as 'favourable employment opportunities that are crucial and essential for refugee livelihood.'[39] The term 'refugees lawfully staying' refers to legally recognised refugees and by implication asylum seekers who are legally in a host country for reasons other than physical presence, brief presence, or whose stay is purely temporary.[40] Da Costa argues that the use of the term 'all refugees' entrenched under the Refugee Convention refers to:

> Recognised refugees, asylum seekers, undocumented (or illegal) asylum-seekers or those refugees who overstayed the period for which they were permitted to sojourn or have violated one or more conditions of their sojourn.[41]

Furthermore, the Refugee Convention requires that States must consider conferring upon refugees' similar rights to engage in wage earning employment.[42] The Refugee Convention notes that in most instances there are restrictions imposed on non-citizens in general, with regards to accessing certain aspects of the labour market, so as to ensure full participation from the citizens of a particular state in crucial labour sectors. Essentially, states are given a margin of discretion in determining the manner in which the right to work for non-citizens is framed. Article 2(3) of the ICESCR allows 'developing countries' to determine to what extent they would guarantee (the right to work) to non-citizens.[43] With regards to the imposition of these restrictive measures, the Refugee Convention precludes their application to refugees in certain instances, namely: where a refugee has completed three years' residence in the country, or is married to a citizen, or is a parent to one or more children possessing the nationality of a host country.[44] Therefore, the measures adopted to safeguard the national labour market, should not apply as severely to refugees who comply with these categories, as it does to other non-citizens.[45]

39 Kavuro (n 5 above) 237.
40 R Costa 'Rights of refugees in the context of integration: Legal standards and recommendations' prepared on behalf of United Nations High Commissioner for Refugees, Legal and Protection Policy Series, POLAS/2006/02.
41 As above.
42 Art 17(3) of the Refugee Convention.
43 Kavuro (n 5 above) 237.
44 Art 17(2) of the Refugee Convention.
45 A Edwards 'Gainful employment' in A Zimmermann (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A commentary* (2011) 954.

Human rights treaties have entrenched the right to work for the purpose of 'promoting social progress and a better standard of life.'[46] Therefore, any denial of this right essentially prevents individuals from attaining this satisfactory standard of living envisioned in the various human rights treaties mentioned above. Furthermore, the 1986 Declaration on the Right to Development, along with the 1993 Vienna Declaration and Programme of Action, recognise that only through respect for and observance of recognised human rights can individuals essentially live fulfilled lives. Both declarations recognise the interdependence of fundamental human rights and the need for equal observance of such rights in order to ensure their realisation.[47]

The right to work therefore is a fundamental human right derived 'from the inherent dignity of the human person.'[48] The right includes the right of 'everyone to the opportunity to gain his or her good living by work.'[49] It is furthermore, interdependent on other fundamental rights, as the right to life, equality, and dignity.[50] Therefore, a state cannot deny refugees or asylum seekers the right to work as it forms an integral part of various basic human rights.[51] Fundamental human rights are afforded to and should be enjoyed by 'all people in all places.'[52] Therefore, its enjoyment should not be restricted to citizens, as categorisation based on place of birth or origin cannot act as a basis upon which this right is denied.

4 The national framework on the right to work of refugees and asylum seekers

Section 22 of the Constitution states that: 'Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.'[53] This particular provision in the Constitution is problematic in that it seems

46 Kavuro (n 5 above) 237.
47 Art 6(2) of the Declaration on the Right to Development, General Assembly, Res 41/128 of 4 December 1986, states that '[a]ll human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights'. This view is shared in art 5 of the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, Vienna, 25 June 1993.
48 Kavuro (n 5 above) 237.
49 Art 6 of the International Covenant on Economic, Social and Cultural Rights, General Assembly, Res 2200A (XXI) of 16 December 1966, (the ICESCR).
50 Art 2(1) of the International Covenant on Civil and Political Rights, General Assembly, Res 2200A (XXI) of 16 December 1966 (the ICCPR).
51 Kavuro (n 5 above) 237.
52 As above, citing J Chapman *et al* 'Rights based development: The challenge of change and power' (2005), Global Poverty Research Group, paper written for the 2005 conference, Winners and Losers from Rights-based Approaches to Development.
53 Constitution of the Republic of South Africa, 1996 (the Constitution).

to exclude refugees, asylum seekers and non-citizens in general from participation in the South African labour market.

In response to this, South African courts (the Constitutional Court and the Supreme Court of Appeal respectively) have reviewed the constitutionality of section 22 concerning the restriction on refugees' rights in respect of accessing the labour market in the *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* case and the *Somali Association of South Africa v Limpopo Department of Economic Development Environment & Tourism* case.[54] In terms of the court's decisions, there is an aversion to the State's argument that refugees and asylum seekers are totally prohibited from the right to work on the basis of section 22 of the Constitution. In the *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* case the Constitutional Court articulated the steps necessary for a legitimate limitation of this right in regards to refugees and asylum seekers, the court stated that.[55]

> Any restrictive measures imposed on refugees and asylum seekers for the protection of national security or the broad public interest must be rational, reasonable and justifiable in terms of the limitation clause or should not have the potential to impair the essential content of dignity

As such the right to work of refugees and asylum seekers in not explicitly prohibited in terms of the Constitution.

The main arguments against the right to work have been directed at asylum seekers. It has been argued that apart from basic humanitarian assistance asylum seekers enjoy only the right to basic education.[56] Prior to the 2008 amendment to the Refugees Act, the Standing Committee for Refugee Affairs (the SCRA) determined the conditions of an asylum seeker's stay in the country whilst a decision on the approval or rejection of their application was pending.[57] The conditions adopted by the SCRA precluded an asylum seeker from enjoying the rights to work and to education for the first 180 days from the date of their application for asylum.[58] After the 180 days, an asylum seeker could apply for special consideration to be permitted to work while the outcome of the application for asylum was still pending. In 2008 this position changed, when the Refugees Act was revised in response to gaps in the refugee framework. The amendments prescribed the conditions of asylum seekers' stay and

54 2015 (1) SA 151 (SCA).
55 *Union of Refugee Women (*n 4 above) paras 34 & 66-77; sec 28 of the Constitution.
56 GS Goodwin-Gill & J McAdam *The refugee in international law* (2007) 298-299.
57 The main conditions of asylum are provided on the asylum seeker permit issued in terms of sec 22 of the Refugees Act. Reg 7 of the Refugee Regulations (Forms and Procedures) of 2000 read together with the form prescribed by annex 3, provide the other conditions of their stay.
58 *Minister of Home Affairs v Watchenuka* 2004 (1) All SA 21 (SCA) para 23.

provided for the recognition of their rights.[59] These are the rights contained in the Bill of Rights insofar as they apply to everyone.[60] The 2008 revision still fails to expressly state that asylum seekers are 'fully' protected. On this basis, some scholars argue that asylum seekers, in principle, are merely granted the right to stay in South Africa and not to work and study while waiting for recognition as refugees.[61] This view is not tenable considering that asylum seekers are 'jurisprudentially and statutorily allowed to work.'[62]

With regards to the jurisprudential recognition of the right to work of asylum seekers, the case of *Minister of Home Affairs v Watchenuka* was a landmark decision. The prohibition on the rights of asylum seekers to work was judicially reviewed for the first time in the case of *Watchenuka*. In this case, a Congolese national and her disabled son sought employment in order to pay for the son's tuition when, in terms of the conditions set by the SCRA, they were both deemed by the state as prohibited from seeking employment. In its analysis of this prohibition, the SCA took cognisance of the fact that there were no refugee camps in South Africa and that little to no humanitarian and social assistance was offered by the government to asylum seekers. Accordingly, the SCA ruled that such a general prohibition was unlawful and fundamentally violated the right to human dignity on the basis that:[63]

> Where employment is the only means for the person's support and where education offers an opportunity for human fulfilment at a critical period, the right to dignity is implicated.

With regard to the right to work, the SCA articulated that the denial of the right to work 'severely restricts asylum seekers' ability to support themselves and their families and to live without positive humiliation and degradation.'[64] The SCA reasoned further that such a denial would:[65]

> Aggravate and perpetuate their destitution and have the effect of objectifying and debasing asylum seekers in the context of compelling them to resort to crime, or to begging, or to foraging.

The SCA stated that the 'general prohibition of employment and study for the first 180 days after a permit to sojourn in South Africa has been issued is in conflict with the Bill of Rights.'[66] In light of the case of

59 Refugees Amendment Act 33 of 2008.
60 Sec 27A of the Refugees Act.
61 P Rugunanan & R Smit 'Seeking refuge in South Africa: challenges facing a group of Congolese and Burundian refugees' (2011) 28 *Development Southern Africa* 708.
62 Kavuro (n 5 above) 242.
63 *Watchenuka* (n 58 above) paras 32-36.
64 *Watchenuka* (n 58 above) para 32.
65 As above.
66 *Watchenuka* (n 58 above) para 24.

Watchenuka, the SCRA changed its original position and allowed asylum seekers to undertake employment and education.[67] As such the right to work of refugees and asylum seekers is provided for in South African legislation.

5 The right to work in the context of the freedom to choose employment for refugees and asylum seekers

The choice of employment has an impact on the right to work of refugees and asylum seekers. Enforcing the right to work does not guarantee the right to choose any form of employment. States faced with the responsibility of raising the living standards of their citizens enjoy unfettered discretion to include or exclude non-citizens.[68] In the *Watchenuka* case, the court highlighted that in various jurisdictions it is generally held that the 'freedom to choose employment is not universally accepted as a universal right.'[69] Thus, although international law views the right to work as a fundamental human right it can still be restricted to safeguard national interests and development.[70]

In the Constitutional Court judgement in the *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* case, the Court was tasked with dealing with the constitutionality of the state's prohibition of refugees rendering a 'security service as security service providers [without] permanent residence statuses.'[71] The court determined that this prohibition was constitutional. It amounted to fair discrimination and did not 'materially invade their dignity because the private security industry framework offered a reasonable measure of flexibility, allowing refugees to engage in the security service industry, on good cause shown.'[72]

As such, if there is no express restriction on a sector in the labour market refugees and asylum seekers are free to choose employment opportunities within that sector.[73] However, these restrictions should not be absolute. Legislation should in such an instance be flexible to

67 Condition 10 appearing on an asylum seeker's temporary permit, issued in terms of sec 22 of the Refugees Act now allows asylum seekers to work, this condition was not present prior to the *Watchenuka* case.
68 Kavuro (n 5 above) 236.
69 *Watchenuka* (n 58 above) para 30.
70 Kavuro (n 5 above) 236.
71 *Union of Refugee Women* (n 4 above) paras 1-3.
72 *Union of Refugee Women* (n 4 above) para 86.
73 Kavuro (n 5 above) 240.

accommodate for deviations in certain circumstances to ensure that there is no violation of the equality provision in the Constitution.[74]

In the *Somali Association of South Africa v Limpopo Department of Economic Development Environment & Tourism* case in 2015, the Supreme Court of Appeal condemned the restrictive labour policies practised by the state. In this case, the state argued that its refusal to issue licenses to refugees and asylum seekers so as to prevent them from trading in *spaza* and 'tuck' shops and further, that closing down their businesses was legal as it was in line with section 22 of the Constitution.[75] The state argued that section 22 of the Constitution restricts the freedom of non-citizens to choose an occupation.[76] The state further argued that asylum seekers' and refugees' right to seek employment in terms of section 27 of the Refugees Act, did not include a right to engage in self-employment.[77] The court in response made reference to Articles 17(2) and 17(3) of the Refugee Convention and read them together with section 27(f) of the Refugees Act, the court on that basis held that, both frameworks 'grants refugees exemption from restrictive measures under certain circumstance' and demands a host state to 'give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals,' respectively.[78] The courts viewed such a deprivation as an attempt on the part of the state to 'impoverish refugees and asylum seekers' so as to ensure their destitution, thus, indirectly forcing them to leave South Africa.[79] The Court held that the attitude of the state in this regard defeated its international obligation to refugees and asylum seekers.[80]

Essentially these cases illustrate that refugees and asylum seekers are not barred from seeking and gaining employment or engaging in self-employment and any legal restriction with regards to the choice of employment is to be challenged unless reasonably and rationally justified.

74 *Union of Refugee Women* (n 4 above) para 67; secs 9, 22 and 23 of the Constitution.
75 *Watchenuka* (n 58 above) paras 1-2.
76 As above.
77 As above.
78 *Watchenuka* (n 58 above) para 37.
79 *Watchenuka* (n 58 above) paras 22, 36 and 44.
80 *Watchenuka* (n 58 above) para 44.

6 Specific factors which impede the realisation of the right to work of asylum seekers and refugees and suggested palliatives

6.1 Legal security

Refugees and asylum seekers need greater legal security to effectively integrate into South Africa. The lack of legal security surrounding their legal status affects their ability to engage in income-earning activities in a legal manner. Their legal security in this instance refers to the provision of legal and valid documentation.[81] The legal security of refugees and asylum seekers is of importance in that they cannot apply for employment or register with professional councils 'unless they possess lawful and valid documents provided in terms of the Refugees Act.'[82] Therefore, there is an impediment to realising their right to work when acquiring these documents becomes difficult.

The Department of Home Affairs is tasked with issuing refugees and asylum seekers with the necessary documentation, in terms of the Refugees Act, in a timeous manner. This was confirmed in the *Kiliko v Minister of Home Affairs* case,[83] where it was indicated that the Department is tasked with the 'processing of asylum applications within a reasonable time.'[84] Regardless of this legal obligation, most asylum applicants wait for 5 years or longer for the outcome of the adjudication of their cases.[85] The problem regarding the backlog in asylum applications was also recognised in the *Somali Association of South Africa v Limpopo Department of Economic Development Environment & Tourism* case. In this case, parties involved in the asylum determination process accepted that in most instances asylum applications take up to three years to be finalised.[86] The *Somali Association of South Africa v Limpopo Department of Economic Development Environment & Tourism* case was decided nine years after the *Kiliko v Minister of Home Affairs* case, this shows that the backlog problems still continue. *IOL* in 2009 reported that Home Affairs would face up to 30 years to clear the backlog.[87]

This backlog in asylum applications severely impacts on the ability of asylum seekers to integrate into society, specifically with regards

81 Kavuro (n 5 above) 255.
82 As above.
83 2006 (4) SA 114 (C).
84 *Kiliko* (n 83 above) para 25.
85 LB Landau 'Urbanisation, nativism, and the rule of law in South Africa's forbidden cities' (2005) 26 *Third World Quarterly* 1121-1123.
86 *Watchenuka* (n 58 above) para 44.
87 L Jones 'Home Affairs needs 30 years to clear backlog' *IOL* 11 October 2009 21.

to accessing and competing in the national labour market.[88] Registration with some professional councils is limited to those with refugee status and does not include asylum seekers.[89] Therefore, backlogs in the asylum process affect the transition from asylum seeker to refugee and therefore place many asylum seekers in a position where they are relegated to a small portion of the labour market. Therefore, a backlog in the asylum application process affects thousands of asylum seekers from qualifying as refugees and registering for certain professional councils and in applying for employment.

The backlog also affects refugees as it severely impacts their ability to renew and validate their stay upon the expiry of their refugee permit (which prescribes a stay period in South Africa). If the documents of refugees are invalid, they cannot be registered and can thus not seek employment.[90] Even if they are employed, they cannot legally work as they will be deemed illegal foreigners.[91]

Furthermore, a refugee permit is in the form of a refugee identity document. This document is maroon and thus different from the green bar-coded identity document owned by South Africans and permanent residents.[92] The difference in colour and form has created the impression that they are not legitimate.[93] The maroon identity document creates a situation where refugees are automatically not considered for employment by various companies or institutions.[94]

Lastly, the classification of refugees in the labour market affects their ability to fully realise their right to work. A case in point is the Health Recruitment Policy which categorises refugees as temporary residents.[95] This Policy was challenged in the *Ndikumdavyi v Valkenberg Hospital and Others* case.[96] Generally, temporary residents are only eligible for 'fixed term contracts' or 'part-time employment' but not permanent employment, regardless of whether the job offered is in the public or private sector.[97] In the *Ndikumdavyi v Valkenberg Hospital* case the applicant argued that the Health Recruitment Policy was discriminatory, however the court left this question open.[98] The Labour Court in *Ndikumdavyi v Valkenberg Hospital* case, however, endorsed the restriction of eligibility to

88 Kavuro (n 5 above) 256.
89 As above.
90 As above.
91 As above.
92 As above.
93 As above.
94 As above.
95 Rule 3.5 of the Policy of the Department of Health on Recruitment and Employment of Foreign Health Professionals in the Republic of South Africa of 2006 (Health Recruitment Policy).
96 2012 (8) BLLR 795 (LC).
97 *Ndikumdavyi* (n 96 above) para 6.
98 *Ndikumdavyi* (n 96 above) paras 14 & 27.

citizens and permanent residents.[99] However a prohibition on the recruitment to a permanent position of a refugee who has fulfilled one of the requirements of section 17(2) of the Refugee Convention would amount to a violation of the Refugee Convention.[100]

6.2 Restrictive requirements for employment

Non-citizens (who do not have a permanent residence status) are required by the Immigration Act to apply for a work permit before undertaking any self-employment activities or wage-earning employment.[101] The work permits are further only granted if the individual fulfils certain employability conditions, namely, (i) being highly skilled and (ii) unavailability of a suitable citizen.[102]

Although highly-skilled qualifications or experience is required by the Immigration Act as a prerequisite to employment,[103] the Refugees Act sets a lower threshold.[104] However, in practice, most professional councils set similar requirements as the Immigration Act for all non-citizens regardless of their refugee or asylum-seeker status.[105] For example, the Health Recruitment Policy states that foreign health professionals can seek employment and be granted employment on condition that 'no qualified South African citizen or permanent resident is readily available or has applied for the position.'[106] On that basis, refugees and asylum seekers cannot be employed unless they are 'highly-skilled.' These stringent statutory conditions do not and should not apply to refugees and asylum seekers.[107] As stated previously, the Refugee Convention prescribes that labour restrictions imposed on other non-citizens should not be applied to refugees and asylum seekers.[108]

Regardless of this approach, employers and professional councils in South Africa still extend these restrictive measures to refugees and asylum seekers.[109] Most employers, according to the Consortium for Refugees and Migrants in South Africa (CorMSA), discriminate against refugees and asylum seekers – mainly because they are non-citizens

99 *Ndikumdavyi* (n 96 above) para 26.
100 Where a refugee has completed three years' residence in the country, or is married to a citizen, or is a parent to one or more children possessing the nationality of a host country.
101 Kavuro (n 5 above) 246.
102 Sec 19(2) (a) of the Immigration Act states that, 'a work permit or visa can be granted if no South African citizen with qualifications or skills and experience equivalent to those of the applicant can, despite a diligent search, be employed.'
103 Sec 2(1)(j)(i)(cc) read together with sec 19(2)(a) of the Immigration Act.
104 Kavuro (n 5 above) 259.
105 As above.
106 Rule 5.1.1 of the Health Recruitment Policy.
107 Kavuro (n 5 above) 246.
108 Art 17(2) of Refugee Convention.
109 Kavuro (n 5 above) 247.

and further that, employers are not informed about refugee rights.[110] There is a general fear amongst employers of a possible criminal sanction that might be imposed on them if they employ refugees and asylum seekers.[111] This approach, therefore, makes it almost impossible for refugees and asylum seekers to gain employment.

6.3 Difficult registration requirements of professional councils

Most foreign and national professionals alike have to register with a professional council in order to be able to undertake certain professions.[112] Thus, the opportunity to register with a professional council is an integral component of realising one's right to work within South Africa.

Some professional councils place the onerous requirement of permanent residence status as a requirement for registration. These include the Law Society of South Africa (LSSA) and the Security Industry Regulatory Authority (SIRA).[113] This effectively ensures that refugees and asylum seekers cannot work as attorneys or security service providers. Although their freedom to work is limited, this article argues that refugees cannot be 'wholly deprived of the right to work as attorneys or security service providers.'[114]

The right to work ensures effective integration into society, and as stated in those chapters, any limitation on this right should be reasonable and justifiable in light of the values of human dignity, equality and freedom. This article argues that the requirements for registration in these professional councils should be flexible so as to include as a minimum, refugees, noting the similar legal position refugees share with permanent residents.[115] This was observed by the court in the *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* case.[116]

As such, in light of this similarity, refugees and permanent residents should enjoy the right to work in a similar manner. Otherwise, the requirement on refugees to be permanent residents before they have a right to work violates section 27(f) of the Refugees

110 CorMSA 'Protecting Refugees, Asylum-Seekers and Immigrants' (2009) 106, states that refugees and asylum seekers are denied employment on the basis of being non-citizens; L Mazzocchini 'Policy implication learned from the analysis of the integration of refugees and asylum seekers at tertiary education in Cape Town' unpublished Master's thesis, University College Dublin, 2007/2008 43, states that, 'employers ... are neither familiar with the documentation issued to refugees and asylum-seekers nor with the rights derived from such documentation.'

111 The stipulated penalty in terms of sec 49(3) of the Immigration Act for an offender is a (just) fine or imprisonment not exceeding one year.

112 Kavuro (n 5 above) 247.

113 Kavuro (n 5 above) 257.

114 As above.

115 Kavuro (n 5 above) 257.

116 *Union of Refugee Women* (n 4 above) para 99.

Act. Refugees are traditionally encouraged to apply for permanent residence after five years of continuous residence in South Africa from the date on which they were granted a refugee permit. Upon attaining permanent residence, a refugee is no longer governed in terms of the Refugees Act, as they become permanent residents for the purposes of the Immigration Act. Regardless of this traditional approach, in light of the right to work, the Refugees Act requires that professional councils should allow recognised refugees to register. Therefore, in doing so, the permanent residence and citizenship requirements for registration with professional councils will not act as a barrier for refugees.

Registration with some professional councils is limited to those with refugee status and does not include asylum seekers.[117] As stated in chapter 3, previously refugees were allowed to work to the exclusion of asylum seekers. This position changed in the *Watchenuka* case. In light of the change in the position concerning the right to work of asylum seekers, this article argues that professional councils that permit registration to those with refugee status should also include asylum seekers.

Professional councils such as the engineering sector, allow refugees but prevent asylum seekers from registering.[118] Furthermore, the Health Recruitment Policy does not extend eligibility to asylum seekers. The Policy states that asylum seekers cannot be employed 'on a full-time basis on the fixed establishment or enrolled for the examination processes by a Health Professional Council in South Africa (HPCSA).'[119] Even if asylum seekers are offered jobs, their employment will not be endorsed by the HPCSA until they become recognised as refugees.[120] The Policy further prohibits their recruitment as interns or in the community services.[121] These prohibitions violate the Refugee Convention, the amendments to the Refugees Act and are not in line with the *Watchenuka* case.[122]

Thus, professional councils should consider that asylum seekers need work to survive. Total exclusion forces asylum seekers to result to illegal activities as a coping mechanism. Where asylum seekers have much-needed skills, the state should seek to utilise these skills for its benefit.

117 Kavuro (n 5 above) 256.
118 Kavuro (n 5 above) 258; Sec 6(1) (a) & (g) of the Engineering Profession Act 46 of 2000.
119 Rule 3.5.2 of the Health Recruitment Policy.
120 As above.
121 Rules 10.1 and 11.3 of the Health Recruitment Policy.
122 As argued by Kavuro (n 5 above) 258.

To fix this issue this article argues that the rights of refugees should be given the appropriate attention when professional councils, design and develop their recruitment and registration policies.[123] Preferably a general 'policy on recruitment, employment and registration' developed in compliance with the Refugees Act should act as the template when professional councils frame their policies regarding refugees and asylum seekers.[124] This will avoid inconsistencies and will ensure the full realisation of the right to work of refugees and asylum seekers.

7 Conclusion

In terms of international law, the right to work is a fundamental human right and should therefore be afforded to refugees and asylum seekers. Constitutionally South Africa is a party to the Refugee Convention. The Refugees Act is, therefore, the legislative realisation of the State's international obligations. The Refugees Act essentially guarantees the right to work of refugees and asylum seekers. The limitation on the freedom to choose employment has affected the realisation of the right to work. Due to this limitation, professional councils have been ready to disregard the right to work of asylum seekers and refugees on the basis of section 22 of the Constitution in the supposed interest of citizens.

The resultant effect of the limitation of the right to work in the context of the choice of employment has been that certain restrictions have been placed in various labour sectors which effectively exclude asylum seekers and refugees.

The backlog in the asylum application process, the classification of asylum seekers and refugees in certain professions and the aesthetic difference of the asylum seeker and refugee permits affects the ability of asylum seekers and refugees to effectively participate in the labour market. The highly restrictive labour requirements placed on general non-citizens has been incorrectly applied to refugees and asylum seekers by employers and professional councils. Lastly, the stringent requirement for registration in a professional council makes it nearly impossible for asylum seekers and refugees to find employment.

This article argues that the limitation on the right to choose employment should never be absolute and as such, all employers and professional councils must make provision for employment of refugees and/or asylum seekers in various labour sectors. Further, that the

123 Kavuro (n 5 above) 300.
124 As above.

asylum application process needs to clear its backlog in order to allow asylum seekers and refugees to timeously acquire and renew their permits so as to lawfully apply for work. Furthermore, the restrictive skills requirements should not apply at all to refugees who comply with article 17(2) of the Refugee Convention and should be relaxed in the case of other refugee and asylum seekers. Lastly, professional councils which permit refugees to register should similarly permit asylum seekers in light of the *Watchenuka* case and the similarly vulnerable position occupied by both asylum seekers and refugees. It is imperative that the right to work of refugees and asylum seekers is realised so as to afford them the chance to change and improve their standing in society.

A CRITICAL ANALYSIS ON THE LAW'S ABILITY TO ERADICATE RACISM IN (POST) APARTHEID SOUTH AFRICA

*by Akhona Boloko**

1 Introduction

It has been over two decades since apartheid, which was declared a crime against humanity, ended. A Truth and Reconciliation Commission (hereafter TRC) was established in 1995 with the hopes of, amongst other things, promoting national unity and reconciliation.[1] Whilst the TRC received many criticisms, it was also praised for promoting national unity and reconciliation. However recent social media posts which were seen as racist have shattered the picture of a reconciled nation free from racism.[2] The government's response to these manifestations of racism is of particular interest in this article. The government wants to enact legislation to criminalise racism as a way to not only deter, but to eradicate racism.[3] In this article I will be critically analysing the law's ability to eradicate racism and ultimately argue that while legislation may address individual discriminatory acts, it fails to address racism as a structural power system. I will do this by firstly determining the success of the TRC in achieving national unity and reconciliation. Secondly, I will briefly analyse post-apartheid South Africa through Antjie Krog's book 'A change of tongue'. Lastly, I will critically discuss the need to utilise a Critical Race Theory and African Jurisprudence in post-apartheid South Africa.

* Third year LLB student, University of Pretoria.

1 Promotion of National Unity and Reconciliation Act 34 of 1995.

2 Recent incidences on social media include a real estate agent, Penny Sparrow, likening black beach-goers to monkeys, an economist Chris Hart stating that apartheid victims are becoming more entitled and fostering hate against minorities and Kelly-Ann Wade stating that an ape has more intelligence than Jacob Zuma. See Banks 'Social media and the reawakening of racism in South Africa' http://buzzsouthafrica.com/social-media-reawakening-racism-south-africa/ (accessed 18 October 2016). The law profession has not been immune as evidenced by comments made by high court judge Mabel Jansen who claimed that rape is part of black culture. See D Bendile & M Lindeque 'Judge Jansen's rape comments spark calls for effective transformation' http://ewn.co.za/2016/05/10/ANC-More-needs-to-be-done-to-transform-judiciary (accessed 18 October 2016).

3 M Mothapo 'Specific law needed to criminalise racism and promotion of apartheid — Office of ANC Chief Whip' http://www.politicsweb.co.za/news-and-analysis/specific-law-needed-to-criminalise-racism-and-prom (accessed 28 April 2016).

I will adopt the approaches of Critical Race Theory (CRT) and African Jurisprudence, because I believe that these two approaches are both necessary to address racism through their different perspectives. CRT as discussed later specifically involves the critique of the law and its role in constructing, producing and rationalising racial inequality whilst African Jurisprudence provides practical steps that need to be taken by government.

It is important that I define and clearly set out my understanding of the racism that I propose is still rife in South Africa. In this regard Alfred Moraka provides some guidance. Moraka defines racism as a functioning structural power system that operates through historical, political, social, and economic power that privileges, secures and protects the interests of those that are positioned as white in the world at the expense of those who are positioned as black.[4] Since racism is a structural power system the absence of obvious racial discrimination creates the impression of racial neutrality, which persuades white and privileged black people to believe that racism is no longer an issue.[5] If racism is a structural power system, then it will require more than mere enacted legislation to dismantle it.

2 The success of the TRC in achieving national unity and reconciliation

The TRC was tasked with the difficult task of picking up the broken pieces of South Africa left by the oppressive system of apartheid and finding a way to move the country forward whilst still acknowledging the traumatic past. The TRC decided to focus on uncovering the truth and reconciling the country.[6] In order to achieve the above goals the Human Rights Violation Committee, the Reparation and Rehabilitation Committee and the Amnesty Committee were established.[7] The Amnesty Commission focused on the perpetrators by providing amnesty to those perpetrators who committed politically motivated crimes and provided full disclosure about such crimes. On the other hand the other two commissions focused on the victims.[8] What is interesting to note about these committees is that the Amnesty Committee gave decisions that were binding on the TRC and the

4 A Moraka 'Reflections on the Mabille saga and the Anti-Racist Forum at the University of Pretoria' (2014) 8 *PULP Fictions: Race, Ideology and the University* 8.

5 J Modiri 'Towards a "(post-)Apartheid" critical race jurisprudence: "divining our racial themes"' (2012) 27 *SA Public Law* 235.

6 Promotion of National Unity and Reconciliation Act 34 of 1995.

7 A Allan & MM Allan 'The South African Truth and Reconciliation Commission as a therapeutic tool' (2000) 18 *Behavioural Sciences & the Law* 466.

8 M Mamdani 'A diminished truth' in WG James & L Van de Vijver *After the TRC: reflections on truth and reconciliation in South Africa* (2001) 58.

government while the other two committees gave decisions that were merely labelled as recommendations.[9]

The result of the Amnesty Committee was that a total of 5392 applications were refused and 849 applications were granted.[10] The TRC further declared that approximately 20 000 people were victims and fewer than 10 000 people were perpetrators.[11] The TRC ultimately only focused on what was considered gross violations under apartheid and other violations, such as land dispossession and forced removals, were not addressed because they were legal under the apartheid regime.[12] The result of the TRC was that it only focused on political reconciliation between state agents and political activists and therefore social reconciliation between the beneficiaries of apartheid and victims was largely not achieved.[13]

Albie Sachs is one of the people who believe that the TRC was successful. Sachs maintains that the TRC allowed the country to develop a single narrative and common history and as a result foundations of national reconciliation were largely achieved.[14] However this positive outlook does not reflect the true state of affairs as seen in a study done on Afrikaner, Xhosa and English people in 2004 where all three groups of people believed that the TRC was not effective in bringing about reconciliation.[15] Whilst the TRC did not directly have the eradication of racism as its mandate, I argue that achieving national unity and reconciliation requires that racism no longer be a barrier between people. The fundamental question that the TRC left unanswered was how those who continue to be the beneficiaries of apartheid can reconcile and live together with those people who continue to be the victims of apartheid.[16]

However, there are those whose views about the success of the TRC in achieving reconciliation are more in line with the actual effectiveness of the TRC in achieving reconciliation. Firstly, Krog questions the whole purpose of even embarking on a mission for reconciliation when there has been no previous relationship that was in place that has to be reconciled.[17] Krog rather suggests that

9 Mamdani (n 8 above) 58.
10 Department of Justice & Constitutional Development http://www.justice.gov.za/trc/amntrans/index.htm (accessed 11 September 2016).
11 TA Borer 'A taxonomy of victims and perpetrators: human rights and reconciliation in South Africa' (2003) 25 *Human Rights Quarterly* 1102.
12 Mamdani (n 8 above) 60.
13 As above.
14 A Sachs *The strange alchemy of life and law* (2009) 87.
15 E Vora & JA Vora 'The effectiveness of South Africa's Truth and Reconciliation Commission perceptions of Xhosa, Afrikaaner and English South Africans' (2004) 34 *Journal of Black Studies* 310.
16 Mamdani (n 8 above) 59.
17 A Krog *Country of my skull* (2002) 109.

'conciliation' be used as it would be more appropriate than 'reconciliation'.[18] Krog further makes a distinction between what reconciliation means for Desmond Tutu and Thabo Mbeki. For Tutu reconciliation is the beginning of the transformative process whilst for Mbeki reconciliation can only occur after total transformation has taken place.[19] If we are to look at reconciliation through Mbeki's eyes then reconciliation has certainly not taken place because there has been no total transformation. The lack of transformation is easily evident in the fact that the income gap between rich and poor has increased between 2000 and 2011.[20] In addition 54% of South Africans according to latest statistics live below the poverty line which translates into 27 million people living on R779 or less per person every month.[21] Therefore, in terms of transformation, South Africa still has a long way to go.

Mogobe Ramose further takes away from the credibility of the TRC in achieving reconciliation by specifically highlighting the absence of justice from the process of reconciliation.[22] Ramose believes that issues of natural and historical justice are to be resolved and therefore the absence of justice in the reconciliation process amounts to the continuation of enslavement of the colonised.[23] This omission of justice in the TRC was further questioned in the *Azanian People's Organisation v The President of the Republic of South Africa* case where victims or the dependents of the victims of politically motivated crimes were not allowed to hold perpetrators civilly or criminally liable, because of the amnesty granted by the TRC.[24] The court found that amnesty against criminal and civil liability was justified, because it was a means to an end in the sense that perpetrators would only reveal the truth if they were protected from punishment.[25]

The South African Reconciliation Barometer is an annual public opinion survey which provides a very good indication on where South Africans stand when it comes to reconciliation. The 2015 survey found that most South Africans believed that reconciliation will remain

18 Krog (n 17 above) 109.
19 Krog (n 17 above) 110.
20 AN Hodgson 'South Africa — The most unequal income distribution in the world' http://blog.euromonitor.com/2012/06/south-africa-the-most-unequal-income-distribution-in-the-world.html (accessed 12 September 2016).
21 L Grant 'Infographic: Poverty in South Africa' http://mg.co.za/data/2015-02-05-infographic-poverty-in-south-africa (accessed 12 September 2016).
22 MB Ramose 'Reconciliation and reconciliation in South Africa' (2012) 5 *Journal on African Philosophy* 21.
23 Ramose (n 22 above) 21.
24 1996 (4) SA 671 (CC) para 7.
25 *Azanian People's Organization* (n 24 above) para 36.

impossible as long as those who were disadvantaged by apartheid remain poor.[26] This echoes the sentiments of Thabo Mbeki that reconciliation cannot take place without total transformation. The survey further revealed that 61.4% of South Africans believe that race relations since 1994 have either remained the same or deteriorated, only 35.6% felt that they do not experience racism in their daily lives and 67.3% of people admitted to having little or no trust in people of other racial groups.[27] These results highlight the fact that reconciliation has not taken place and will continue to be delayed until South Africa makes a concerted effort to address and correct the disastrous effects of apartheid. This will include doing more than simply creating legislation to deter individual acts of racism.

Ramose expresses concern about the fact that the Convention for a Democratic South Africa (CODESA) talks, which resulted in the interim constitution and ultimately gave effect to the TRC, were labelled as 'negotiations'.[28] Firstly, the negotiations were concluded in South Africa and not on neutral grounds and therefore the weaker party was unable to fully express themselves because they were in the environment of the stronger party.[29] Secondly, Ramose describes these negotiations as undemocratic because not everyone was consulted about the negotiations and important issues of natural and historical justice were not addressed.[30] If the foundation upon which the constitution was based on was itself problematic, then it can only be expected that the TRC would itself lay a poor foundation for reconciliation and national unity. The TRC laid a poor foundation, because it did not provide for justice nor did it provide an effective way to move from a racist society to a society free from racism. Whilst the TRC did provide reparations for political activists and their families, I do not believe that this qualifies as justice for the rest of the previously disadvantaged people, who suffered through apartheid and continue to suffer and live with the consequences.

In *Apartheid Futures and the Limits of Racial Reconciliation* the author, Achille Mbembe, illustrates how post-apartheid South Africa still lacks racial reconciliation despite the efforts of the TRC. Firstly, he highlights that for white beneficiaries, reconciliation means that blacks should forget about the past injustices and that the present white generation can no longer be held responsible for racial discrimination committed before they were born and, because of this,

26 R Govender & J Hofmeyr 'SA Reconciliation Barometer 2015' http://www.ijr.org.za/uploads/IJR_SARB_2015_WEB_002.pdf (accessed 12 September 2016).
27 Govender & Hofmeyer (n 26 above).
28 Ramose (n 22 above) 25.
29 As above.
30 Ramose (n 22 above) 26.

white people retreat into a comfortable position of personal non-culpability.[31]

Secondly, Mbembe maintains that despite white people being born into positions of economic and social advantage, they are reluctant to wash their hands of the privileges they accumulated but instead believe the liberal conservative ideology of the self-reliant and self-made subject and pretend that white racism can no longer be considered the most fundamental cause of black poverty.[32] Instead white people believe that since blacks now have equality before the law no further action is required and therefore any advocacy for further redress measures or calling for the undoing of a racist legacy all amount to reverse racism.[33] Such views hinder South Africa's ability to overcome racism because the focus on the part of most white people is on defending their privileged positions in society instead of accepting it as a reality and rather focusing on contributing to finding a solution on how we can improve the disadvantaged position that black people currently occupy in society.

Mbembe finally highlights that white people seem to believe that racial disparities in South Africa are either the result of misguided policies of a corrupt and incompetent black government or the moral failure of blacks who do not work hard enough, do not go to school or are involved in crime and corruption and because of this mentality they are encouraged to absolve themselves from the sins of the past and perceive themselves as the new victims of a corrupt and incompetent black government.[34] These reactions by white people only serve to perpetuate racism. The TRC aimed to achieve national unity and reconciliation and if achieved I would venture to argue that it should have fostered some willingness on the part of apartheid beneficiaries to change the status quo and improve the quality of life of black people.

3 A brief analysis of post-apartheid South Africa through Antjie Krog's '*A change of tongue*'

Krog makes a distinction between the terms 'transformation' and 'change'. She believes that transformation and change are two completely different terms. In South Africa there has been change in the sense that the apartheid government with its racist laws have been officially replaced by the ANC and democracy, but despite this

31 A Mbembe 'Apartheid futures and the limits of racial reconciliation' http://wiser.wits.ac.za/system/files/documents/Mbembe%20-%202015%20-%20Public%20Positions%20-%20Apartheid%20Futures.pdf (accessed 28 April 2016).
32 Mbembe (n 31 above) 6.
33 As above.
34 Mbembe (n 31 above) 10.

there has been no transformation.[35] Transformation for Krog is undergoing an internal change which means changing the structures, systems, visions and attitudes that have previously maintained the apartheid system.[36] If transformation requires an internal change then simply creating legislation to criminalise acts of racism amounts to treating the symptoms and not the disease because the structures, systems, visions and attitudes that inform racism are left unchanged and such an endeavour may prove redundant.

Transformation for Krog is further divided into three phases, namely: the society must be inclusive by providing resources to all those who have been previously excluded, everyone must participate in processes and power structures and there must be consolidation of democracy in all economic, political and social spheres.[37] If we then apply these standards of transformation to South Africa then it's easy to determine that South Africa has not been transformed, since it has failed to meet each of these phases of transformation. This is clearly depicted in the fact that there is extensive material inequality between blacks and whites, which exists despite formal legal equality being entrenched in South Africa.

Krog in her book discusses the four psychological consequences of racism that can clearly be seen in South Africa today. The first consequence is an intense intra-psychic pain which is caused by internalising the racist messages of the dominant group. This pain leads to the second consequence which is attempting to defend yourself against the racist message.[38] However since the dominant group is protected by privilege and cannot be attacked, those that are dominated then turn inwards towards themselves and their communities and this results in the abuse of women by men in an attempt to vent their frustration at their circumstances.[39] It is no coincidence then that in South Africa violence against woman and children is a major problem that continues to plague the country. Violence against women in South Africa has been described as being 'widespread, common and deeply entrenched'.[40]

In terms of the effects of racism on white people, Schutte refers to 'the whiteness default', which is created by the deeply held conviction that is entrenched in the white psyche from birth that to be human is to be white.[41] She acknowledges that the first step for

35 A Krog *A change of tongue* (2003) 126.
36 As above.
37 Krog (n 35 above) 127.
38 Krog (n 35 above) 150.
39 As above.
40 G Eagle & L Vogelman 'Overcoming endemic violence against women in South Africa' (1991) 18 *Social Justice* 209.
41 G Schutte 'The whiteness default: Deconstructing our race indoctrination through a psychoanalytical lens' (2014) 8 *PULP Fictions: Race, Ideology and the University* 39.

white people is to admit to their racist indoctrination and unconscious racism and realise that they are part of the global system of dominance which ensures that they are never not benefiting from their whiteness.[42] Schutte argues that because unconscious racism is still very prevalent it ends up reflecting itself in racial outbursts as seen on social media, therefore it's important to firstly acknowledge its existence and secondly to deconstruct this racism and render it powerless.[43]

The third consequence of racism is the psychological double bind which occurs when the dominated group is expected to remain agreeable, pleasant and subservient to the dominant group and if they don't meet these expectations the dominated group is labelled as being problematic and racist.[44] This psychological double bind then leads to the fourth consequence of racism, which is when the dominated group experiences anger at the psychological double bind that they are in.[45] Anger is then expressed through violence, addiction and other destructive behaviour.[46] It is then no surprise that addiction to drugs and alcohol is also a major issue in South Africa as statistics have revealed that roughly one in four adult males and one in ten adult females experience alcohol problems.[47]

An important theme that flows from Krog's book is that of the importance of memory and the importance of not forgetting the past because it is only in remembering and understanding the past that we can understand the present and how to deal with present day issues.[48] The problem South Africa now faces after apartheid is that the country is in such a rush to build a united rainbow nation that it tends to choose to forget the past and is shocked when remnants of racism emerge. If the country instead of choosing to forget the past focused on moving forward whilst keeping in mind that the events of the past still haunt us in the present, then we would be better equipped to deal with racism. But the question that then arises is if racism remains a valid issue how then do we proceed? I tackle this difficult question next.

4 Utilising Critical Race Theory and African jurisprudence in (post-)apartheid South Africa

Kok provides that law not only has a limited impact on society, but that it will take time for that impact to be made and the intended

42 Schutte (n 41 above) 38.
43 Schutte (n 41 above) 39.
44 Krog (n 35 above) 151.
45 As above.
46 As above.
47 CD Parry 'South Africa: alcohol today' (2005) 100 *Addiction* 426.
48 Krog (n 35 above) 153.

aims may not even be reached.[49] According to Kok, law plays a very small role in maintaining social order, therefore it has a marginal effect on changing society.[50] Therefore only using legislation to try and eradicate racism is problematic because legislation may deter the obvious discriminatory acts of individuals, but fails to address racism as a structural power system. If legislation alone is not sufficient then how do we then tackle racism as a structural power system?

4.1 Critical Race Theory

An appropriate response to racism as a structural power system would be to utilise CRT, a legal philosophical discipline, which is yet to be formerly adopted in South Africa.[51] The post-apartheid jurisprudence shows that years of colonialism and apartheid cannot be simply fixed by legislation, but a more radical transformation will be necessary.[52] CRT is highly useful in the sense that it has aspirations to transform the relationship between race, law and power in order to discontinue the marginalisation of black people.[53] Critical race perspectives are an important part of any analysis of the South African political, social and legal context because transformation cannot occur without an informed analysis of the current status quo in the country.[54]

Critical race theorists follow the approach of 'racial reconstructionism'. This provides that it is still necessary to engage with the concept of race and the implications it has on people and society.[55] This is especially important, because white people have been taught not to recognise their white privilege and the longer white privilege remains, any effort at equality or transformation will prove unsuccessful.[56] Therefore CRT rejects the popular colour-blindness ideology because despite white people playing a significant part in the construction and replication of racial categories, they now claim to be beyond race and this has the effect of denying black people the right to express their experience of being positioned as black in society.[57]

One of the theoretical perspectives of CRT is the critique of liberalism. Liberalism views racism as a rare, irrational and individual problem, while CRT views racism as a systemic and entrenched power

49 A Kok 'Is law able to transform society?' (2010) 1 *South African Law Journal* 62.
50 Kok (n 49 above) 64.
51 J Modiri 'The Colour of Law, Power and Knowledge' (2012) 28 *South African Journal on Human Rights* 406.
52 Modiri (n 51 above) 409.
53 Modiri (n 51 above) 414.
54 K Van Marle 'Reflections on teaching critical race theory at South African universities/law faculties'(2001) 1 *Stellenbosch Law Review* 86.
55 Modiri (n 51 above) 412.
56 Modiri (n 5 above) 241.
57 AE Lewis 'What group? Studying whites and whiteness in the era of colour-blindness' (2004) 22 *Sociological Theory* 624.

system which discriminates and excludes black people.[58] As a result of this CRT rejects liberalism's exclusively rights-based approach like anti-discrimination legislation as a way of dealing with racism because such an approach does not address racism as a structural power system.[59]

In South Africa the response to years of discrimination was the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA). PEPUDA was ambitious in its scope as it aimed to criminalise unfair discrimination in all spheres of society and in addition aimed to prevent and prohibit harassment and hate speech.[60] However, CRT critiques the use of anti-discrimination legislation such as PEPUDA, because while it may address the most blatant forms of racial discrimination, it offers no insight on the structural nature of racism as an ingrained part of society.[61] PEPUDA came into force in 2003 and the fact that thirteen years later in 2016 the government wants to again enact legislation to criminalise racism as a form of discrimination implies that anti-discrimination on its own is proving ineffective in not only dealing with racism as an ingrained structural power system, but also the blatant discriminatory acts. I do not argue against the creation of legislation criminalising racist acts, but argue against this being the only method of addressing racism because, as stated before, racism is more than discriminatory acts. Therefore some focus should also be directed at racism as a structural power system.

An important element of CRT is intersectionality. CRT understands that people do not only experience racism based on race and, as a result, other factors such as gender and class also play a role in the experience of discrimination and oppression.[62] In this way different types of discrimination and disadvantage can be identified and appropriate remedies can be applied.[63] A good example of this would be Critical Race Feminism which acknowledges the racial element of gender oppression, which is very relevant in South Africa where black women not only experience oppression for being black, but also for being female; therefore to simply categorise their experience to racism would not be staying true to the actual oppression they experience.[64] We need to be aware of the different ways in which people experience rights so as to not exclude the experience of others and produce critiques that are not relevant to all

58 Modiri (n 51 above) 415.
59 As above.
60 A Kok 'The Promotion of equality and prevention of unfair discrimination act 4 of 2000: Proposals for legislative reform' (2008) 24 *South African Journal on Human Rights* 445.
61 Modiri (n 51 above) 416.
62 Modiri (n 51 above) 418.
63 As above.
64 Modiri (n 51 above) 418.

people.[65] If South Africa then simply follows the narrow liberal approach of enacting legislation to fight against racism then the element of intersectionality will not be applied and therefore other factors such as gender and class will be ignored despite also playing a role in the oppression people experience.

An important element of CRT is structural determinism, which is concerned with how post-apartheid transformation can take place in a legal culture that maintains the racial status quo.[66] A conservative legal culture in legal education, adjudication and legal practice hinders justice in the sense that the approach to law tends to be very formalistic and not take into account the different circumstances of people in society.[67] Justice, in this context, meaning: a racially just society where racial categories will have to be identified so as to ensure that the law is applied in such a manner that substantive equality is applied and the status quo of black people is improved. The problem we face in post-apartheid South Africa is that we are in such a rush to deny that we are still a society that is racist and sexist, that we tend to deny that law and legal institutions are also deeply racist and sexist.[68]

Karl Klare describes the South African legal culture as conservative.[69] By legal culture he refers to the 'professional sensibilities, habits of mind, and intellectual reflexes' that occur in the legal setting.[70] This is not necessarily saying that the legal culture is racist, but that it is not open to transforming the status quo of racial inequality. According to Klare, the danger of having a conservative legal culture is that it creates caution which discourages innovative ways of interpretation and application of the constitution.[71] Klare describes transformative constitutionalism as being a long-term project aimed at transforming 'a country's political and social institutions and power relationships'.[72] However, transformative constitutionalism becomes a pointless mission if the legal culture in South Africa remains conservative, because a conservative legal culture allows a judge to avoid substantive reasoning and evade a search for justice and presents the law as neutral and objective, when in reality it expresses particular politics and perpetuates the status quo.[73]

65 Van Marle (n 54 above) 87.
66 Modiri (n 51 above) 419.
67 P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 357.
68 Van Marle (n 54 above) 89.
69 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 168.
70 Klare (n 69 above) 166.
71 Klare (n 69 above) 167.
72 Klare (n 69 above) 150.
73 Langa (n 67 above) 357.

Jurisprudence is described as being the conscience of law and entails exploring law's justice and determining an 'ideal law'.[74] There are two perspectives upon which the law can be viewed, namely through the lens of restricted jurisprudence or through the lens of general jurisprudence. The current dominant lens through which we currently view the law is through restricted jurisprudence which involves an endless inquisition aimed at determining what the law is and determining its essence.[75] General jurisprudence on the other hand goes back to classical legal philosophy and encompasses a much wider concept of legality and also scrutinises the legal aspects of social reproduction in and outside of state law.[76] The question that then arises is through which lens a post-apartheid South Africa should be looked at.

The movement from a general jurisprudence to a restricted jurisprudence has been described as being a story of decline owing to the fact that this movement to restricted jurisprudence has resulted in the moral and cognitive impoverishment of legal theory.[77] With this in mind it's clear that a return to a general jurisprudence is very necessary because no real transformation will take place in South Africa if legal theory is morally and cognitively impoverished. General jurisprudence includes the political economy of law and the ways in which gender, race or sexuality create forms of identity.[78] It is important to rethink the way law is looked at before we even examine how law actually perpetuates forms of oppression on groups of women, black people, homosexuals, etc., because the way in which the problem is approached has an effect on the solution that is chosen. Therefore, a general jurisprudence perspective to the law is essential to attaining real transformation in South Africa.

In order to fully understand how racism has been created and maintained CRT relies on the social science insights, historical analysis and multidisciplinary thinking, in other words general jurisprudence to gain this understanding.[79] This interdisciplinary approach is applied because racism itself is the result of interdisciplinary effects from different sources and only through this interdisciplinary approach can we fully understand the true extent of racism and ultimately it's the only way to achieve the kind of large scale transformation that is still lacking in post-apartheid South Africa.[80]

74 C Douzinas & A Gearey *Critical jurisprudence: a textbook* (2004) 2.
75 Douzinas & Gearey (n 74 above) 10.
76 As above.
77 Douzinas & Gearey (n 74 above) 4.
78 Douzinas & Gearey (n 74 above) 10.
79 Modiri (n 51 above) 420.
80 As above.

4.2 African Jurisprudence

One of the shortfalls of the TRC, as discussed above, is the absence of justice which ultimately hinders reconciliation. If we are to one day truly be reconciled, then the detrimental effects of racism need to be confronted, because it is pointless to embark on a mission to eradicate racism without providing a remedy to the wounds it has inflicted. Applying African jurisprudence is the first step. The majority of the South African population is nurtured and educated based on the basic principles of Ubuntu.[81] Furthermore Ubuntu forms the basis of African Jurisprudence.[82]

The United Nations defined apartheid as a crime against humanity, however in the advent of the constitutional democracy by means of the TRC the crime was not altered, but forgiven.[83] African jurisprudence firstly requires understanding that racism is an example of the dehumanising effects of colonisation where there was forcible expropriation of land from Africans and, as a result, Africans were forced to enter into the economy and ultimately pushed into a state of poverty.[84] The constant emergence of racism through mere individual acts of racism to racism as an entrenched power system signifies the fact that we need to remedy the dehumanising effects of colonisation.[85]

The main objective of law is to achieve justice and in terms of Ubuntu philosophy justice requires restoring the equilibrium.[86] Ramose highlights that in terms of Ubuntu philosophy, South Africa should follow a process of decolonisation so as to restore the equilibrium, but it is important to note that decolonisation will entail disregarding the concept of prescription in favour of restoration of title to territory and the reversion of sovereignty over that territory.[87] Ramose maintains that the processes of democratisation and deracialisation in South Africa have been such a poor success because of the absence of justice through decolonisation.[88] According to the Ubuntu philosophy, time does not change the truth nor does it correct a wrong, therefore prescription can never justify the forcible

81 MB Ramose 'I conquer, therefore I am the sovereign: Reflections upon sovereignty, constitutionalism, and democracy in Zimbabwe and South Africa' in PH Coetzee & APJ Roux (eds) *The African Philosophy Reader* (2003) 487.
82 I Keevy 'Ubuntu versus the core values of the South African Constitution' in S Magadla & L Praeg (eds) *Ubuntu: Curating the archive* (2014) 55.
83 MB Ramose 'Historic titles in law' in PH Coetzee & APJ Roux (eds) *The African Philosophy Reader* (2003) 462.
84 MB Ramose *African philosophy through ubuntu* (2005) 6.
85 MB Ramose 'An African perspective on justice and race' (2001) 3 *Polylog: Forum for Intercultural Philosophy* 12.
86 Ramose (n 85 above) 7.
87 Ramose (n 85 above) 20.
88 Ramose (n 85 above) 22.

expropriation of land from Africans.[89] Ramose further argues that prescription is philosophically and materially inconsistent with black peoples' understanding of historical justice.[90] Prescription is further inconsistent with the legal philosophy of black people as it is deemed to be contrary to natural and fundamental justice.[91] If the constitution reflects the moral and political convictions of people, then there is no reason as to why Ubuntu should not be the basic philosophy for constitutional democracy in South Africa.[92] Therefore in order to correct the effects of racism through Ubuntu it will require justice through restoring the equilibrium.

Black consciousness as a form of African philosophy, which was created by Steve Biko, is still very much relevant in post-apartheid South Africa. Biko highlights the fact that the colour issue was originally introduced for economic reasons.[93] However racism has progressed to become institutionalised and has ultimately become an ordinary part of life with the result that black inferiority is created and is a serious problem.[94] But any attempts by black people to propose ways of solving the race issue is met with indignation whilst white liberals suggest integration as being the best solution.[95]

Black consciousness suggests that there should be strong solidarity among blacks as the victims of white racism and a realisation that racism is not a mistake but an intentional act. Therefore no amount of moral reprimanding will persuade white people to fix the situation.[96] According to black consciousness it is important for black people to examine and question old concepts, values and systems and ultimately come up with their own schemes, forms and strategies that will remedy the situation that they are in.[97] Black consciousness places a duty on black people to come together and fight the position that they have been placed in by racism.

5 Conclusion

In this article I critically discussed the law's ability to address racism. In this discussion I established how racism is still an issue despite the efforts of the TRC to achieve reconciliation. The TRC was unsuccessful in achieving reconciliation, firstly, because it did not aim to achieve justice and secondly, total transformation has yet to take place. Only

89 Ramose (n 85 above) 7.
90 Ramose (n 85 above) 20.
91 Ramose (n 81 above) 491.
92 Ramose (n 81 above) 488.
93 S Biko 'Black Consciousness and the quest for a true humanity' in PH Coetzee & APJ Roux (eds) *The African Philosophy Reader* (2003) 79.
94 Biko (n 93 above) 79.
95 Biko (n 93 above) 80.
96 As above.
97 Biko (n 93 above) 82.

once justice and transformation is made a priority can those who have been adversely affected by the structural power system of racism be able to reconcile, but as along as justice remains an issue and transformation is neglected then racism will persist. Krog's 'A Change of Tongue' further highlighted the lack of transformation that has taken place after apartheid and the TRC as well as the effects racism has had on the country.

In order to address the issue of racism as a structural power system that is still in full effect in South Africa I argued that four things need to be taken into account: firstly, we need to formally adopt Critical Race Theory as a legal philosophical discipline so as to understand and be able to correctly deal with how racism still persists despite being morally and legally condemned. Secondly, I argued that the constitution be used to transform society through the transformative constitutionalism project but in order to do this we need to move away from the current conservative legal culture that still applies, because it hinders transformative constitutionalism. Thirdly, I argued that as long as we still look at law through the lens of restricted jurisprudence which gave rise to an impoverished legal theory we cannot achieve transformation, therefore a return to general jurisprudence is necessary. Lastly, we need to invoke African jurisprudence, because in terms of Ubuntu philosophy justice requires restoring the equilibrium and embarking on a process of decolonisation by undoing the dehumanising effects of racism. In addition, the principles of black consciousness should be employed by black people so as to empower black people to remove themselves from the position that they have been placed in through centuries of oppression. Jurisprudence after the TRC should entail giving effect to the demands of justice and transformation as these two things hinder the country from truly being past apartheid as opposed to simply being 'post' apartheid.

Finally, I must agree with the assessment that post-apartheid jurisprudence should include that 'the complexities and tensions of the past, present and future to be heeded and not too easily to be boxed, recorded, methodologised in the guise of practical relevance'[98] because there is no quick, simple and clear cut solution on how to move on from racism as a structural power system that has been entrenched within society through decades of colonialism and apartheid. Whilst legislation criminalising individual acts of racism may be an available solution, it does not mean that other means of addressing racism such as invoking CRT or applying the principles of African jurisprudence should not be investigated and applied. There should be a constant open dialogue on issues of race and how the

98 K van Marle 'Jurisprudence, friendship and the university as heterogeneous public space' (2010) 127 *South African Law Journal* 636.

embedded structural power system of racism can be deconstructed and ultimately dismantled as current legislation and policies whether it be PEPUDA or affirmative action have proved insufficient in addressing the effects of systemic oppression which include but are not limited to racism and poverty.

QUEER WOMEN OF COLOUR: THE INTERSECTION OF CULTURE AND IDENTITY

*by Nosipo Goba**

1 Introduction

> Currently we look to our Constitution for protection as legitimate citizens in our country. However, the reality is that Black Lesbians are targeted with brutal oppression in the South African townships and surrounding areas. We experience rape from gangs, rape by so-called friends, neighbours and sometimes even family members. Some of the 'curative rapes' inflicted on our bodies are reported to the police, but many other cases go unreported. At present South Africa has no anti-hate-crime legislation. Rampant hate crimes make us invisible. Coming out exposes us to the harshness of patriarchal compliance. We are also at risk when we challenge the norms of compulsory heterosexuality.
>
> – Zanele Muholi[1]

Black Queer women exist in intersecting spaces of oppression; they are discriminated against because they are Black, Queer and women and are often pathologised within the African diaspora. As bell hooks *[sic]* brilliantly and succinctly put forward in her book, feminism is 'a movement to end sexism, sexist exploitation and oppression.'[2] In the same way that race cannot be separated from gender and vice versa, Queer rights cannot be separated from women's rights. As a black lesbian in post-apartheid South Africa, I had to consider the way in which Queer Blackness in particular troubled feminism.[3] Although the concepts of identity and the desire for belonging are a shared journey

* Final year LLB student, University of Pretoria.

1 Presenting her exhibition *Faces and phases* in 2007 in the Michael Stevenson Gallery.

2 B hooks *Feminism is for everybody* (2000) viii.

3 Following Judith Butler who describes 'Queer' as a: 'site of collective contestations, the point of departure for a set of historical considerations and future imaginings' I acknowledge that Queer is not only a sexual orientation, but it caters to identity beyond sexual orientation as a means of critiquing social classifications. 'Queer' can be understood to mean non-normative, and as such, in this instance, it will be used as a description for sexual and gender expressions that do conform to hegemonic heteronormative and gender-normative identities. In other words, it is used as an umbrella term for Lesbian, Bisexual and Transgender women.

for members of the LGBTQI+[4] community in many ways, this identity had to be considered because it is negotiated and navigated under conditions of exclusion, invisibility, invalidity, misunderstanding and cultural rejection. The author had great difficulty in trying to establish what could stabilise this troubling condition and was subsequently drawn to looking at Black Queer women's identity by considering their socio-politico-legal standing through an *ubuntu* framework. A framework that is rooted in our traditions and reflects our culture and is thus an organic social and political justice that can address and redress the systems that mean to oppress and suppress such an identity; paying attention to the connectedness and interrelatedness of African communities and the possible ethical duty to protect vulnerable members of the community and society at large.

Through the use of photographs taken by human rights activist Zanele Muholi, a self-proclaimed visual activist and feminist artist, a visual narrative of the lives of Black Lesbians in post-Apartheid South Africa taken since 2006 until present, will be created. Muholi's photographs represent Black Queer South Africans who find themselves in the precarious position of not identifying themselves within the binary and limiting restrictions of the gender-normative and heterosexual majority and as such, are a meaningful contribution to the discourses surrounding the LGBTQI+ community which often ignore or silence race, age, socio-economic standing and women's experiences. The author will attempt the complex and nuanced task of contextualising and problematising concepts surrounding Black gender and sexual identities. In this article the author offers an analysis and critique of the positionality of Black Queer women within modern identity politics in order to unpack and demonstrate the ways in which their identity and the multiple forms of oppression and violence attached to these identities need an integrated and intersectional approach that extends beyond the bounds of the law to resist and address oppressive systems of power which Western conceptions of liberation and emancipation fail to do.[5]

4 This acronym stands for Lesbian, Gay, Bisexual, Transgender, Queer/Questioning and Intersex and is expanded to include 'A' and 'P' respectively denoting Asexual/Aromantic and Pansexual. This however, is not a closed list as the acronym is fluid and expands with an ever-changing understanding of and interaction with identity.

5 The term intersectionality was first coined by K Crenshaw 'Demarginalising the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' (1989) 139 *University of Chicago Legal Forum* 139.

2 Black queer identity

> Being alive & being a woman & being colored is a metaphysical dilemma/ I haven't conquered yet/ do you see the point/ my spirit is too ancient to understand the separation of soul and gender/ my love is too delicate to have thrown back in my face. [sic]
>
> – Ntozake Shange[6]

2.1 Identity

'Faces and Phases' is a portrait series created between 2007 and 2014 and is a long-term project of Muholi's that she describes as:

> … an insider's perspective that both commemorates and celebrates the lives of the Black Queers I have met in my journeys. Some of their stories gave me sleepless nights as I tried to process the struggles that were told to me. Many of the women I have met have been violated and I endeavoured not to exploit them further through my work. I set out to establish relationships with them based on mutual understanding of what it means to be female, Lesbian and Black today. Faces and Phases is about our histories and the struggles that we continue to face.[7]

The purpose of 'Faces and Phases' for Muholi is to use portraiture to present Black Queer existence and resistance through positive imagery. The photo series is an invitation to viewers to engage in existential contemplations about African Queer people and the way their racialised, classed and gendered selves are expressed in meaningful and varied ways. 'Faces and Phases' is significant for this article in that it represents the author's socio-political aim to delve into how one understands oneself to be a woman, being both Queer and Black, how one acts in accordance with such understanding and how one relates to others as a result of that understanding.

In his 1994 work, Craig Calhoun's theoretical development of identity politics starts out by referring to the work of Hannah Arendt and Charles Taylor in saying that the human condition is that we are distinct from each other and yet that distinctness can tacitly create commonality with other humans who are similarly distinct and that, to some degree, that distinctness is dependent on common recognition.[8] That is to say, on a distinction between self and other. For Calhoun, the discourse of identity is distinctively modern. It is an effort to reinforce selfsameness and secure individual and categorical

6 An excerpt from the poem 'no more love poems #4' which formed part of the 20 separate poems contained in the choreo-poem by N Shange *for colored girls who have considered suicide/when the rainbow is enuf* (1977) 45.

7 Culture reporter 'Faces and Phases 10' http://www.culture-review.co.za/faces-and-phases-10 (accessed 24 October 2016).

8 C Calhoun *Social theory and the politics of identity* (1994).

identities and the ways in which modernity have made identities problematic in the difficulty of establishing and maintaining our own identity adequately in the face of a move away from all-encompassing identity schemes. Social construction theory is useful beyond the realm of sociology and challenges an essentialist idea that identity is produced by individual will and is singular and unproblematic. Under political and possibly intellectual circumstances, feminist thinkers have claimed a fundamental and shared identity at the "risk" of essentialism. The purpose of this is to claim value for all those falling within a specific category of identity that has been devalued, repressed or delegitimised in dominant discourse through the implied invocation of essentialism. A post-structuralist approach to identity is a project to deconstruct essentialist categories of identity.[9] Recognition proves to be problematic because the way we consider and constitute ourselves is shaped by dominant social discourses which can define who it is possible or appropriate or valuable to be. This understanding is important for a consideration of the categories of identity that follow.

2.2 Gender identity

> That man over there says that women need to be helped into carriages, and lifted over ditches, and to have the best place everywhere. Nobody ever helps me into carriages, or over mud-puddles, or gives me any best place! And ain't I a woman? Look at me! Look at my arm! I have ploughed and planted, and gathered into barns, and no man could head me! And ain't I a woman? I could work as much and eat as much as a man – when I could get it – and bear the lash as well! And ain't I a woman? I have borne thirteen children and seen most of them sold off to slavery, and when I cried out with my mother's grief, none but Jesus heard me! And ain't I a woman?
>
> – Sojourner Truth[10]

The distinction between sex and gender find expression in the writings of Simone de Beauvoir who argues that gender is an aspect of identity that is gradually acquired through social construction. Her argument is that 'one is not born a woman, but rather becomes a woman.'[11] Queer theorist Judith Butler's theories of gender elaborate on those of de Beauvoir and further suggests that the categories of 'sex' and 'gender' are constructed and need repeated performance, as a result of which, there is no natural or unnatural gendered behaviour as all

9 Calhoun (n 8 above) 1-16.

10 An excerpt from her speech "Ain't I a woman" delivered in 1851 at the Women's Convention in Ohio.

11 De Beauvoir rejects the claim that anatomy is destiny in S de Beauvoir *The second sex* (1949) 46.

gender is by definition unnatural;[12] thus heterosexuality is not natural and homosexuality is not deviant.

Toril Moi makes her stance on femininity and femaleness abundantly clear. She approaches 'femaleness' as a biological matter and 'femininity' as a set of culturally defined characteristics.[13] 'Masculine' and 'feminine' are social constructs, that is to say, they are sexual and behavioural patterns imposed on bodies by cultural and social norms. 'Female' and 'male' on the other hand should only be referred to when dealing with the biological aspects of sexual difference. Thus in the on-going nature versus nurture debate, 'feminine' represents nurture and 'female' represents nature. This approach aligns itself with de Beauvoir's stance. It can be said that one of the ways patriarchy operates and maintains its power is through subjecting biological women to strict standards of femininity to reinforce the belief that these imposed standards are natural. The result of this is that women who resist against and reject these standards are seen as unfeminine and unnatural. The insistence of patriarchy that femininity is constitutive of femaleness is what needs to be resisted because not all women are female and being biologically female does not necessarily mean they will also be feminine.[14]

The essential or universal woman Western feminism conjures up, is oppressive to all the women who, because of race, class and sexual orientation etc., do not meet these standards of femininity because they are not protected and are then left vulnerable to patriarchal dictatorship of their bodies.[15] Feminism requires a non-essentialist theory of human sexuality and desire to achieve an understanding of the power relations between the sexes.[16]

12 Butler puts forward the idea of identity as free-floating and connected to a performance in J Butler *Gender trouble: Feminism and the subversion of identity* (1990) 25.

13 T Moi *The feminist reader: Essays on gender and the politics of literary criticism* (1989) 117.

14 The social meaning of gender for Mackinnon is created by the sexual objectification of women as stated in her book C Mackinnon *Toward a feminist theory of state* (1989) 113.

15 Moi (n 13 above) 122-124.

16 Moi (n 13 above) 131.

2.3 Racial identity

> Black women were rarely among those Blacks and females who gained access to literary and other acknowledged forms of artistic expression, this Black female bonding and Black woman-identification has often been hidden and unrecorded except in the individual lives of Black women through our own memories of our particular Black female tradition.
>
> – Loraine Bethel[17]

An individual's unique relationship to a racial identity can be conceptualised through the four parameters set out by Vetta Sanders-Thompson in her essay '*The complexity of African American racial identification,*' that combine to construct a multidimensional cohesive racial identity although they can operate to the exclusion of each other. Sanders-Thompson separates racial identity into four parameters: physical, cultural, psychological, and socio-political. The physical identity parameter refers to a person's degree of acceptance of the physical attributes of Black people. The cultural identity parameter refers to a person's knowledge of the contribution Black people have made to society. The psychological identity parameter refers to a person's concern for, commitment to and pride in their identified racial group. Lastly, the socio-political identity parameter investigates a person's views and stance on the social, economic and political issues affecting Black people.[18] As stated, these parameters can be present all together or separately. Harris, however, warns against 'racial essentialism' which she considers the belief in a solidly uniform 'Black experience'. For Harris, the Black woman will never be more than the losing end of a hierarchy of oppressions or the intersection of two kinds of domination if theories and dominant culture actively pursue a conceptual racial essence.

Race as an aspect of identity leads me to Black feminist writers such as Crenshaw who coined the phrase intersectionality, which can be understood to mean the simultaneous experience of multiple oppressions experienced by Black women as a single synthesised experience;[19] and Patricia Hill Collins who says that the intersecting oppressions of race, gender and class create contradictions about Black women that can lead to internalised oppression because Black women have been forced to act outside of gendered behaviour.[20]

17 Black Lesbian/feminist critic Lorraine Bethel in her essay writing on Zora Neale Hurston – L Bethel *This infinity of conscious pain: Zora Neale Hurston and the black female literary tradition* (1982) 179.

18 V Sanders-Thompson 'The complexity of African American racial identification' (2001) 32 *Journal of Black Studies* 158.

19 Crenshaw (n 5 above) 139.

20 P H Collins *Black feminist thought: Knowledge, consciousness and politics of empowerment* (2001) 11-12 where a matrix of domination is described.

Culture is a way in which race and gender are produced and performed as part of identity and power in a post-colonial and post-apartheid context. Culture produces and regulates what one does and how one understands oneself and thus serves as a well from which one draws understandings and performances of what it means to be a woman and how women are positioned.[21] The idea that Africans share a sexual culture distinct from the rest of the world is one of the ways colonial and apartheid homophobia are reproduced through the belief that homosexuality is un-African.[22] Cultural narratives are part of the construction and enforcement of social roles and thus play a role in defining and limiting the way rights are exercised and enforced, even when those rights are recognised by the law.

2.4 Political usefulness of claiming queer identity

> Those of us who stand outside the circle of this society's definition of acceptable women; those of us who have been forged in the crucibles of difference — those of us who are poor, who are Lesbians, who are Black, who are older — know that survival is not an academic skill. It is learning how to take our differences and make them strengths. For the master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change. And this fact is only threatening to those women who still define the master's house as their only source of support.
>
> – Audrey Lorde[23]

Calhoun argues that the political structure of heterosexuality is conceptually different from that of patriarchy in that, although they are intertwined, smashing patriarchy will not necessarily smash heterosexual dominance. The result being that dismantling gender subordination will not benefit Queer women and cisgender heterosexual women equally or in the same manner.[24] The political structure that most acutely oppresses Queer women is heterosexuality, while for cisgender heterosexual women it is patriarchy. Within a patriarchal society 'woman' has been constructed as the 'Other' and the inferior in relation to 'man' creating a state of 'woman' being equated with subordination to man.[25] The feminist's experience of the category 'woman' is the experience of *being* a woman in a classist, racist, male dominant

21 J Clark 'Looking back and moving forward' (2006) 68 *Agenda: Empowering women for gender equality* 8.
22 H Gunkel *Cultural politics of female sexuality in South Africa* (2010) 28.
23 A Lorde *Sister outsider: Essays and speeches* (1984) 2.
24 C Calhoun 'Separating lesbian theory from feminist theory' (1994) 104 *Ethics* 562.
25 Calhoun (n 24 above) 565.

society, which imposes ideals of what it means to be a woman that she rejects. She thus does not reject being a woman, rather she rejects being the kind of woman that a racist, classist, patriarchal society expects her to be.[26]

Cisgender heterosexual society creates and maintains the false impression of 'natural' gender identities by prescribing alternative gender performances. Butch Lesbians enact those same prescribed performances by performing masculinity and the desire for women through their intelligibly female bodies. The mere fact that masculinity exists outside of and apart from male bodies serves to challenge the naturalness of the categories 'man' and 'woman' and begs the question why Queer women share a subordinate and deviant status. In the absence of natural gender identities, it cannot reasonably be justified that Queer women are considered unnatural and deviant beings or why a heterosexual configuration of sexuality, romantic love, marriage and the family unit are seen as authentic and aspirational. The result is that the categories 'man' and 'woman' can be deconstructed and reconstructed to include multiple categories.[27]

3 The western marginalisation of black queer identity

> To be vocal, to be recognised, to be respected, to be included, because there is no way to deal with your issues without you being there. To make sure that there is a voice for your particular community. You cannot expect people to deal with your problems if you are not present and say: 'these are my issues, I need your support.
>
> – Zanele Muholi[28]

An important enquiry for the author at this stage is in what ways have liberal movements and socio-politico-legal systems marginalised and even excluded the identity of Black Queer women. 'Isibonelo/ Evidence' is Muholi's most comprehensive museum exhibition to date and features many of her on-going projects. It includes the captured lived experiences of living in a country where, despite constitutional protection, Queer people are not protected from targeted violence and systemic exclusion.

26 As above.
27 Calhoun (n 24 above) 571.
28 Movimientos 'Art and activism: Interview with Zanele Muholi' http://movimientos.org/es/dss/show_text.php3%3Fkey%3D6355 (accessed 19 October 2016).

3.1 Institutionalised heterosexuality

> … these weddings have a lot to do with masculinities and gender binaries: there is a bride and a groom. I noticed that with most of the same-sex marriages that I hardly see femme and femme getting married or butch and butch. The butchness and femininity is so well-defined and pronounced. It is gender within gender.
>
> – Zanele Muholi[29]

Van Zyl posits that, in order to understand social justice and equality, one must understand belonging as a measure of socio-political exclusions and as the social and psychological aspects of rights. Belonging can thus be the historical and social starting point in the method of inquiry into the cultural tensions of the claims that marriage is essentially heterosexual and thus 'homosexuality is unAfrican.'[30]

The constitutional prohibition of discrimination on the grounds of sexual orientation and the legal recognition of same-sex civil unions and domestic partnerships does not give Queer women authentic socio-politico-legal standing. The creation of the Civil Union Act serves to reaffirm that Lesbian and Gay unions do not fall within marriage law.[31] Jaco Bernard-Naudé considers the impact of the Civil Union Act on sexual minority freedom in South Africa through the Constitutional Court's decision in the *Minister of Home Affairs v Fourie* case.[32] The Constitutional Court's jurisprudence on sexual minority freedom has always placed great value on the concepts of human dignity and equality, which is why the common law definition of 'marriage' which excluded same-sex couples as well as the Marriage Act,[33] to the extent that it relied on that definition, were declared unconstitutional and Parliament was given one year to remedy the defect.[34] Parliament duly responded to the Constitutional Court's decision with the first draft of the Civil Union Bill.[35] The Bill provided for 'civil partnership' and not 'marriage,' which begged the question why the separate institution of civil partnership was secured for same-sex couples if it was materially the same as heterosexual marriage. The result being a legislative refusal to redefine marriage

29 A Lloyd 'Zanele Muholi's new work mourns and celebrates South African queer lives' http://africasacountry.com/2014/03/zanele-muholis-new-work-mourns-and-celebrates-south-african-queer-lives/ (accessed 19 October 2016).
30 M van Zyl 'Are same-sex marriages un-African? Same-sex relationships and belonging in post-apartheid South Africa' (2011) 67 *Journal of Social Issues* 376.
31 Civil Union Act 17 of 2006.
32 *Minister of Home Affairs v Fourie* 2006 3 BCLR 355 (CC).
33 Marriage Act 25 of 1961.
34 J Bernard-Naudé 'Sexual minority freedom and the heteronormative in South Africa' in Vilhena *et al* (eds) *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (2013) 322.
35 Civil Union Bill 26 of 2006.

as directed by the Constitutional Court and a denial of the same status as that of married heterosexual couples to same-sex couples. The legal recognition of same-sex couples created by the Bill was clearly inferior, or less-than, as an addition to the creation of a new institution; section 12 provided that upon registration in a separate register, same-sex couples would receive a registration certificate and not a marriage certificate. The Bill understandably came under pressure and was redrafted as a proposal that would later become the Civil Union Act as it stands today. The Civil Union Act is problematic because its enactment did not amend or repeal the 1961 Marriage Act, it allows heterosexual couples a choice between concluding a civil union through the Act or a marriage through the Marriage Act and it contains a provision that allows a state marriage officer to refuse to solemnise a same-sex civil union.[36]

3.2 Queer violence, state silence

> Some survivors have said that their male attackers told them they'd make them pregnant; that they'd prove to them they're not a man, they're a woman. It threatens and destabilises their male power.
>
> – Zanele Muholi[37]

Expressing our identities can be affirming and a great source of pleasure and pride. When the visible expression of that identity, however, does not conform to the gender expectation of our culture, it becomes dangerous and a source of fear. Within the cultural context of competing heteropatriarchies, gender and sexual non-conformity challenges and poses a threat to hegemonic masculinities – something that even a progressive Constitution would have trouble overcoming.[38]

In July of 2013 the research unit of the Parliament of the Republic of South Africa released a paper written by Jennifer Thorpe entitled 'Corrective rape', hate crimes, and the law in South Africa' which sought to provide a background to the prevailing issue of violence against Lesbian women, to show that such violence falls within the scope of hate crimes and assess the failure of the Department of Justice and Constitutional Development to present a draft bill addressing such violence. 'Corrective or curative rape' is a term given to the heterosexual rape of Lesbian and Bisexual women under the erroneous belief that the rape will have a 'healing' effect on these

36 Bernard-Naudé (n 34 above) 330-334.
37 Lloyd (n 29 above). Muholi describes her interactions with Black Lesbians from various townships who have survived 'curative or corrective' rape and finds that it is not a coincidence that most of the women who experience these attacks are masculine presenting or 'butch.'
38 Van Zyl (n 30 above) 371.

women and will return them to their natural 'straight' orientation and the rape of Transgender women to punish them for their transition. The definition of the crime has been expanded to include all members of the LGBTQI+ community. The perpetrators of this crime often make statements such as 'we will teach you a lesson' or 'show you how to be a real woman,' which is a clear indication of the belief that these identities are unnatural and immoral and that the crime is thus committed with a prejudice or hatred towards the victims. Prevailing narratives surrounding 'corrective or curative' rapes fail to acknowledge that poor Black women, living in townships and rural areas are most likely to be victims of this crime and that these women are made more vulnerable by the failure of the state to adequately provide for their socio-economic needs. In November 2010, the Minister of Justice made an announcement that the Department of Justice and Constitutional Development had already prepared a draft bill to address these crimes. In May 2011, the Department made a further announcement that they would establish a National Task Team to address 'corrective rape' after immense public outcry. Despite these promises, as of July 2013, no such draft bill had been presented and violence continues to increase.

Lea Mwambene and Maudri Wheal argue that it is necessary to define 'corrective or curative rape' as a crime in order to secure protection for those affected by it, who are mostly Black Lesbians. The authors say that of the numerous rapes, assaults and murders of Queer women as reported by non-governmental organisation, only two cases have successfully secured convictions and both were unreported. The first case, is that of 31-year-old Eudy Simelane, a well-known soccer star who played for Banyana-Banyana and out Lesbian, who was gang-raped, beaten and murdered on 28 April 2008 in the township of Kwa-Thema near Johannesburg. Her naked body was found discarded near a stream. Additionally, she was robbed of her cell phone, trainers and cash. She was stabbed 25 times in her face, abdomen and legs and died from abdominal wounds. Four suspects appeared in trial at the Delmas High Court in 2009, but only two were convicted and sentenced to life imprisonment and 32 years imprisonment respectively, whilst the other two were acquitted. The relevance of her sexual orientation to her killers' motives was ruled out by the court in the early stages of the trial. The judge stated that her sexual orientation had no bearing on the case despite outrage from various LGBTQI+ rights activists and organisations.[39] The second case, is that of 19-year-old masculine-presenting openly Lesbian Zoliswa Nkonyana who was brutally stabbed, kicked, stoned and beaten to death just meters away from her home in the township of

39 L Mwambene & M Wheal 'Realisation or oversight of a constitutional mandate? Corrective rape of black African lesbians in South Africa' (2015) 15 *African Human Rights Law Journal* 74-76.

Khayelitsha in Cape Town on 4 February 2006.[40] Although she was not raped, her case is significant to the author because her killers explicitly stated that they had killed her because of her sexual orientation. Their conviction was a long awaited triumph under the LGBTQI+ rights activist community. Her case was one of the longest in South African history as it was postponed fifty times. Zoliswa's case was heard in the Khayelitsha Magistrate's Court in 2011 and sentencing was set for 1 February 2012, almost six years later, to the day. Four of the nine accused were convicted on 7 October 2011. The sentencing was significant for the protection of victims as the magistrate said that it should serve as a deterrent to the accused as well as to the community at large by sending a message that such crimes would not be tolerated. However, the court did consider retribution and rehabilitation and held that:

> The court has a duty to enforce the ideology that violent intolerance of difference, whether it be based on race, whether it be based on sex, whether it be based on religion, [whether it be based on sexual orientation], it will not go unpunished and it will not go rewarded.[41]

The bold finding of the court in the Zoliswa case is a departure from the stance taken in the Eudy Simelane case and appears to be a step towards greater protection for Black Queer women in townships and rural areas, but it will prove difficult to implement. 'Corrective or curative' rape is currently not recognised as a separate category of crime and thus when a rape is reported no distinction is made as to the motive of the perpetrator and when motive is considered it only comes into consideration during sentencing as an aggravating factor.[42] The author argues that 'corrective or curative' rape should be considered a hate crime and not just a crime of rape and that, until that happens, South Africa will have failed to fulfil its constitutional mandate of protecting the victims.

40 Case number RCB216/06 (unreported).
41 Mwambene & Wheal (n 39 above) 80.
42 Mwambene & Wheal (n 39 above) 77-81.

4 *Ubuntu* and feminism as responses to oppression

> A person with ubuntu is open and available to others, affirming of others, does not feel threatened that others are able and good, for he or she has the proper self-assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are torture or oppressed, or treated as if they were less than who they are.
>
> – Archbishop Desmond Tutu[43]

In this part of this article I wish to consider what theoretical conception of and what practical approaches to the identity of Black Queer women are necessary in order to liberate and resist against the powers of oppression that haunt such an identity, taking into account the role that culture plays in African communities and the transformative potential of *ubuntu* to unite us. Muholi believes that 'we are in a time when we don't know what is African anymore. Who is African and who decides what is African? We, as Black communities, have not had our histories documented properly' and for her documenting Black Queers is a contestation of the belief that we are unAfrican.[44]

The law turns sexualities and gender identities into a space which the state can control and dominate. Apartheid regulations that criminalised homosexuality and sodomy and the criminalisation of prostitution are an example of the control and domination of men and women who do not conform to sexual hegemonic powers and imposed modes of identity, morality and behaviour.[45] Western theories on sexualities and gender identities dominate discourses because most of these theories and perspectives were generated by the West. To uncritically apply these theories in non-West contexts would not create culture-specific knowledge and would be limiting.

The problem that colonial language presents is that it is permeated with Western ideology and traditions.[46] This problem practically presents itself when trying to define African concepts such as *ubuntu*. Yvonne Mokgoro posits that, to attempt to define the African notion of *ubuntu* with any definitive precision in a foreign language would be unattainable and rather takes the approach of

43 D Tutu *No future without forgiveness* (1999) 34-35.
44 Lloyd (n 29 above).
45 S Tamale 'Introduction' in S Tamale (ed) *African sexualities: A reader* (2011) 2-3.
46 Tamale (n 45 above) 4.

putting forward views that relate to the concept. Mokgoro's view of *ubuntu* can be described as:

> a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness and morality; a metaphor that describes group solidarity is central to the survival of communities where such communities with a scarcity of resources, where the fundamental belief is that motho ke motho ba batho ba bangwe/umuntu ngumuntu ngabantu which, literally translated, means a person can only be a person through others. In other words the individual's whole existence is relative to that of the group: this is manifested in anti-individualistic conduct towards the survival of the group if the individual is to survive. It is a basically humanistic orientation towards fellow beings. [47]

The important social values of *ubuntu* make the meaning of the concept clearer. These values are: group solidarity, conformity, compassion, respect, human dignity, humanist orientation and collective unity. These values are shared with an ethic of care, the practical use of which may help facilitate a better understanding of *ubuntu* as forming the basis of our relationships.

4.1 An ethic of care as a demand of *ubuntu*

> Life is a gift from our ancestors that we borrow from our children/ Blessed are those guided by words moulded by the light of their vision/ Life is a gift from our ancestors that we borrow from our children/ Blessed are those guided by words woven with a ribbon of rhythm.
>
> – Lebogang Mashile [48]

Ubuntu is an ethical notion that underpins the meaning of dignity as ethically and legally significant, as they are both central to an ethical ideal of what it means to be a human being. *Ubuntu* demands respect and the recognition of the dignity of others, the impact and value of which are significant in areas of law pertaining to socio-economic rights such as constitutional development.[49] Jonathan Herring argues that caring is an essential dimension of human existence, it is central to our humanity.[50] To Herring, our identities, values and well-being as humans are intertwined with our relationships and the obligations that flow from them. He suggests that the values of freedom, justice and autonomy need to be utilised to allow and support caring. Herring

47 Y Mokgoro 'Ubuntu and the law in South Africa' (1998) 1 *The Potchefstroom Electronic Law Journal* 16.
48 Extract from poem *Every Child, My Child* featured in L Mashile *In a ribbon of rhythm* (2005).
49 D Cornell & N Muvangua *Ubuntu and the law: African ideals and post-apartheid jurisprudence* (2012) xi.
50 J Herring *Caring and the law* (2013) 2.

refers to an ethic of care which challenges the way legal rights and duties are commonly understood. He suggests that an ethic of care requires the rethinking of how we understand the role of law and the nature of rights. The core value of an ethics of care is *care*; it is a move away from an individualised view of rights to a norm of interlocking mutually dependent relationships.[51] One of the aims of an ethic of care is to bring practices of care to the forefront of ethical, social and legal analysis.[52] An ethic of care can be utilised in law in ways that extend beyond the court. The law can be used to facilitate and promote caring relationships between citizens and can also be used to create legal, political and social systems structured around an ethic of care which can require state intervention to facilitate caring relationships; this would undoubtedly benefit any attempt to end sexist oppression.[53] It appears than an ethic of care is in line with the basis of socio-political human relationships under the concept of *ubuntu*.

4.2 *Ubuntu* and feminism

> O, ye daughters of Africa, awake! Awake! Arise! No longer sleep nor slumber, but distinguish yourselves. Show forth to the world that ye are endowed with noble and exalted faculties.
>
> – Maria Stewart[54]

Cornell and van Marle offer *ubuntu* feminism as an answer to the paradoxes presented by Western feminism concerning identity politics. A fair question to ask is where our differences fall within *ubuntu* and how, if at all, they colour our socio-political human relationships, and whether essentialism is a legitimate concern. It is important to note that *ubuntu* is concerned with the moral obligations that underlie our relationships as people who were, are and will always be connected to each other.[55] The philosophy of *ubuntu* articulates a revised humanism that inherently challenges anti-Black racism. Through an *ubuntu* framework ethical feminism's foundational definition is the struggle against racism and all other forms of oppression that render people less than human. By understanding that to be human means to be intertwined with others, our point of departure cannot be individualism. That does not, however, mean a complete sacrifice of the self and assimilation into

51 Herring (n 50 above) 46-47.
52 Herring (n 50 above) 81.
53 Herring (n 50 above) 84-85.
54 Excerpt from an address given in 1831 by the first African-American woman to give public lectures to a mixed audience — MW Stewart *America's first black woman political writer; Essays and speeches* (1987) 30.
55 D Cornell & K van Marle 'Ubuntu feminism: Tentative reflections' (2015) 36 *Verbum et Ecclesia* 3-4.

the collective. Rather, it denotes a joint commitment to an imagined future in which the triumphs of the individual mark a triumph for all others. In this sense it becomes clearer that what is meant by the *ubuntu* expression 'people are people through other people,' is that the self is relational and that the way in which the individual becomes identified as distinguished from the others is through their support. Revolutionary *ubuntu* does not run the risk of either essentialism or allowing our differences to divide us. On the contrary, it requires a new understanding of belonging together that acknowledges our sameness and also the inequality and oppression experienced by so many of us, and requires us to commit ourselves to achieving equality and justice for all others. *Ubuntu* also forms a site of resistance because it is not rigid; it is dynamic, continuous and constantly in search of justice.[56]

In addition to an ethic of care, the author believes the philosophy of *ubuntu* feminism aligns with what bell hooks *[sic]* calls an ethic of love. An ethic of love calls for a collective transformation of society and an end to politics of domination even when we have suffered no domination or oppression ourselves because of the vested interest we have in the struggle of others against oppression and exploitation.[57] To choose an ethic of love is to denounce a culture of domination and commit oneself to enhancing the collective good; it means '*communion with the world beyond the self, the tribe, the race, the nation … a constant invitation for personal expansion and growth*'; it means a commitment to the service of others; it means making a move towards freedom and acting in ways that liberate ourselves and others.[58]

5 Conclusion

> Because each had discovered years before that they were neither white not male, and that all freedom and triumph was forbidden to them, they had set about creating something else to be.
>
> – Toni Morrison[59]

The aim of this article was to consider an *ubuntu* feminist framework as the most suitable means of bringing about social and political justice for Black Queer women as it takes into account the interconnectedness of African communities. South Africa was built on a foundation of racism, human rights violations and gender inequality that can only be redressed by moving away from an essentialist and

56 Cornell & van Marle (n 55 above) 5-6.
57 b hooks *Outlaw culture: Resisting representations* (2006) 244.
58 hooks (n 57 above) 246-250.
59 T Morrison *Sula* (1974) 52.

universal definition of 'woman', as the political and economic status of Black women has provided and continues to provide us with lived experiences that differ significantly from those of white women, as members of the subordinate and dominant group respectively. It was found that, following the social structure of the patriarchy, anti-racism movements focus on Black men. Due to the economic, social and political power created by white domination, it was found that feminist movements' focus on middle-class white women and, that LGBTQI+ movements focus on middle-class cisgender white men. The author found that Black Queer women occupy cultural spaces that do not adhere to Western ideals of gender liberation and thus that Black Queer women are under-represented in social justice movements and lack the protection and support provided by these projects.

Black Queer identities hold so many possibilities for transformation of sexual minority freedom and gender equality in that they challenge current categories of identities and put us to the task of imagining new ways of caring for each other and being human together. Butler suggests that the term Queer should not have a fixed meaning, rather:[60]

> If the term is to be a site of collective contestations, the point of departure for a set of historical reflections and future imaginings, it will have to remain that which is, in the present, never fully owned, but always and only redeployed, twisted, queered from a prior usage and direction of urgent and expanding political purposes. This also means that it will doubtless have to be yielded in favour of terms that do that political work more effectively

The concept of *ubuntu* and the term Queer engage each other in that neither is static, neither has been perfected, both are perpetually under construction, and both look to the commonality of human experience as the ground on which marginality and oppression can be challenged and interrogated and yet simultaneously the grounds on which such marginality and oppression reveal themselves as questionable. Queer exists as a testament to past, present and future self-identification beyond the restrictions of binary invocations and *ubuntu* is a testament to the endless and transformative potential of our being human together and the possibility of a re-imagined South African jurisprudence.

Zanele Muholi's photographs are a testament to the ingenuity of the Queer spirit. They represent resistance against heteropatriarchal domination and resilience in the face of exclusion from our families and communities. But most of all, they represent the joy and love we carry in our hearts and share with each other. We are bound to each other by so much more than shared exclusion and oppression. We are

60 J Butler *Bodies that matter: On the discursive limits of 'Sex'* (1993) 228.

bound by a mutual love for each other and the desire to see one another thrive. U*buntu* feminism can bring about the radical political transformation that Black Queer women require through its commitment to end sexist exploitation and anti-Black racism and unshackle society from systems, structures and institutions that fail to acknowledge the fullness of our humanity.

THE LEGITIMACY OF THE PHENOMENON OF THE ESCALATION OF COMMERCIAL RIGHTS PROTECTION FOR SPORTS MEGA-EVENTS THROUGH THE MEANS OF *SUI GENERIS* LAWS AND THE DEVELOPMENT OF 'ASSOCIATION RIGHTS' TO THESE MEGA-EVENTS

*by Primrose E.R. Kurasha**

1 Introduction

At the core of any society is a pursuit of harmony. Society is composed of human clusters and their interactions. One of these key interactions is in business. Sport is also a thriving 21st century business as it is a form of entertainment.[1] In order to realise this harmony in sports, the law, in the form of sports law, strives to bring about justice in sports by ameliorating unlawful competition such as ambush marketing between competitors through, for example, legislation which guards against ambush marketing and confers exclusive association rights on specific sponsors.[2] Be that as it may, many authors, such as Andre Louw, have advocated for a complete free for all approach towards the sponsorship of mega sporting events which is characterised by a zero regulation of sports mega-events and is usually in the form of awarding exclusive association rights to sponsors.[3] This has been met with intense criticism from the likes of Steve Cornelius who hold that a certain degree of protection of sponsors is obviously necessary lest the sponsors terminate their sponsorship contracts with sport federations and the world of sports is left to die a natural death.[4]

In this article, I am, from a legal perspective, going to critically evaluate the creation, nature and working of such 'association rights' as contained in the relevant provisions in legislation such as the Merchandise Marks Act 17 of 1941 (as amended) and the Olympics Act

* Final year LLB student, University of Pretoria.

1 A Louw *Sports law in South Africa* (2010) 418.

2 The focus of this article is unlawful competition in the form of unlawful parallel marketing and more specifically, ambush marketing. This is because ambush marketing is a component of parallel marketing.

3 A Louw *Ambush marketing and the mega-event monopoly: How laws are abused to protect commercial rights to major sporting events* (2012) 716.

4 S Cornelius 'Ambush marketing in sport' (2011) 4 *Global Sports Law and Taxation Reports* 12.

(Law 12035 of 2009) as passed for the 2016 Rio Olympic Games (Brazil).

I am going to critically evaluate the legitimacy of this phenomenon of escalation of commercial rights protection for sports mega-events through the means of *sui generis* laws, specifically in respect of its culmination in recent years with the development of so-called 'association rights' to these events.

In order to enable a deeper understanding of my position on the aforementioned issue, I am first going to define 'ambush marketing' and other key concepts as this will enable the reader and I to have a common foundation and understanding. Furthermore, I am going to give an important theoretical understanding of commercial rights and sponsorship in sports to enable the reader to understand what is at stake when legislation creating association rights is passed and to show that there is this phenomenal spike in the protection of commercial rights. I am then going to proceed to finalise the issue by critiquing and evaluating as aforementioned.

2 Definition of ambush marketing: What is ambush marketing?

Ambush marketing is defined as any activity which creates a false or unauthorised commercial association with an event thereby detracting from the rights of the official sponsors of the event.[5] Section 15A of the Merchandise Marks Act protects sponsors from having their events ambush marketed provided the event is an event which is designated by the Minister of Trade and Industry. This definition addresses the 'what' and the 'when' (ambush marketing occurs) questions concerning ambush marketing.[6]

There are two types of ambush marketing namely, ambush marketing by association of a specific event and ambush marketing by intrusion.[7] Each will be discussed separately. It is to be noted that with both types of ambush marketing, illustrations better define them as compared to mere theoretical definitions.

5 HB Klopper & P de W van der Spuy *Law of intellectual property* (2012) 55.
6 Act 17 of 1941 (as amended).
7 L Leone 'Ambush marketing: Criminal offence or free enterprise?' (2008) 3-4 *The International Sports Law Journal* 75.

2.1 Ambush Marketing by association[8]

Ambush marketing by association can be defined as the classic example whereby an ambusher seeks to create an association between itself and the event according to Meenaghan.[9] The best example of this form of ambush marketing is that of the Pringles chips at the 2009 Wimbledon games.[10] Pringles, a Procter & Gamble brand ambush marketed the Wimbledon games in 2009 by the packaging of their chips. As tennis fans lined up to head into Wimbledon's famous All England Club on 1 July 2009, representatives from Pringles distributed 24 000 specially marked Pringles 'crisps' tubes that read 'These are not tennis balls!!' (playing off the fact that Pringles tubes mirror the packaging that tennis balls are sold in). Pringles drew extra attention to the campaign by featuring Roger Federer and Bjorn Borg look-a-likes (termed 'doubles') on-hand to interact with consumers. The guerilla tactic worked because Pringles received so much exposure on the Daily Telegraph, the Daily Mail and the Washington Business Journal.[11] So not only does this give the consumer the false impression that Pringles is one of the sponsors of the Wimbledon Championship but a general public perception that Pringles is one of the sponsors of the Wimbledon Championships is also created, as was the case in this unfortunate incident.

2.2 Ambush Marketing by intrusion

According to Bartlett, ambush marketing by intrusion involves merely placing one's trademarks, or other indicia, in event spaces where they will be captured by television cameras or seen by those attending the event.[12] An apt example is when years ago, during mega sporting events, aircrafts would simply fly over a sporting venue with a banner or it would simply drop these bags of parachutes in stadia. These were parachutes which were branded, bearing the signs of a company. Another example is that of Paddy Power at the Ryder Cup golf tournament of 2010.[13] On 28 September 2010, Paddy Power, the biggest betting and gambling company in the UK, placed its enormous Paddy Power Cleeve Hill Sign near the golf holes in the Ryder Cup golf

8 DM Sandler & D Shani 'Olympic sponsorship v "ambush" marketing: Who gets the gold?' (1989) 29 *Journal of Advertising Research* 9-14.

9 T Meenaghan 'Ambush marketing: Corporate strategy and consumer reaction' (1998) 15 *Psychology and Marketing* 305-322.

10 B Gainor 'Pringles goes ambush at Wimbledon' http://www.partnership activation.com/sportsbiz/2009/8/5/pringles-goes-ambush-at-wimbledon.html (accessed 1 April 2016).

11 As above.

12 P Bartlett 'Ambush marketing' (2007) 3 *Convergence* 31-37.

13 S Lepitak 'Paddy Power head of mischief to speak at The Drum's conference on future marketing' http://www.thedrum.com/news/2012/10/05/paddy-powers-best-stunts-bookmakers-head-mischief-speak-drums-first-conference (accessed 1 April 2016).

tournament which was watched by hundreds of millions of people. They received tremendous exposure in this successful ambush marketing campaign.

3 How to prove ambush marketing

In litigation, the context test is what is applied by the courts in order to determine whether or not a party is guilty of ambush marketing.[14] According to the context test, the specific advertisement must be taken out of the context of the sports event and be considered against the backdrop of a normal everyday situation. If the message in the advert is still meaningful, then lawful parallel marketing would have taken place. However, if the message is rendered senseless after having taken it out of the context of the event, then this is tantamount to ambush marketing.

The final step would be for the judge or presiding officer to apply the context test to the particular advertisement. Firstly, the presiding officer should address the images and the wording used. Secondly, he should look at whether there is a direct or indirect reference made to the sporting event. Finally, he should ensure that it is one of the listed lawful techniques to advertise and compete, but should also be wary of any exceptions.

4 Body

Sport is a multibillion Rand industry. Sport is big business and is bigger than any company in the world based on its financial value. For example, according to IEG's annual report, the projected global sports sponsorship spend for 2015 was US$58 billion.[15] This is the value of sports sponsorship. The sponsorship market alone is clearly worth billions of dollars. Sponsors put in at least US$100 million to US$200 million to become involved in major games for example, the Olympics.[16] Hence commercial rights is the heartbeat of the sports fraternity. Colloquially, one would say, 'it's what makes sports tick'.

The protection of sponsors' investments, in the form of legislation granting sponsors 'association rights' or commercial rights, was

14 Klopper & van der Spuy (n 5 above) 105. This context test was applied in the case of *Federation Internationale de Football Association (FIFA) v Bartlett* 1994 (4) SA 722 (TPD). Although the principle in question was that of passing on, the same context test as that of ambush marketing was applied because the goodwill of a company had also been prejudiced because of unlawful competition.

15 International Events Group (IEG) *Sponsorship spending report: Where the dollars are going and trends for 2015* (2015) 2.

16 DL Yohn 'Olympics advertisers are wasting their sponsorship dollars' http://www.forbes.com/sites/deniselyohn/2016/08/03/olympics-advertisers-are-wasting-their-sponsorship-dollars/#6177513a6c65 (accessed 19 October 2016).

necessitated by unlawful competition which was mainly in the form of ambush marketing at sports mega-events.[17] This concept of unlawful competition, which can alternatively be labelled as 'unfair competition', was discussed in the cases of *New Zealand Olympic and Commonwealth Games Association Inc. v Telecom New Zealand*;[18] and *National Hockey League v Pepsi Cola Canada Ltd*.[19] There are bragging companies who actually specialise in ambush marketing and they rhetorically ask why they should even bother investing R300 million to become one of the official sponsors when they can actually get the exposure without paying, by, for example, ambush marketing an event and getting the same or even more exposure than the official sponsor.

Ambush marketing began in the 1994 Soccer World Cup in Los Angeles, USA.[20] Burger King was the official sponsor of the World Cup, but McDonald's ambush marketed the event in the sense that, whenever one bought from McDonald's, they would give him a World Cup souvenir in the form of a football. All of these companies carry out thorough research before and after a big event. So they wanted to find out their 'return on investment' (ROI) and whether they would have actually benefited from sponsoring the World Cup, let's say for US$100 million. After the World Cup, they did this research, including public surveys asking people who the official 1994 World Cup sponsor was and the majority (55%) of the public believed that McDonald's was the official sponsor, solely based on their giving away of World Cup souvenirs to their customers. Unsurprisingly, there was no ROI on the Burger King's investment into the World Cup sponsorship (which was worth millions of dollars) and McDonald's actually benefited. McDonald's got more exposure from the World Cup and were seen as the 'good guys' because they had 'sponsored' the World Cup.[21] In other words, the goodwill and loyalty towards the McDonald's brand increased.

In South Africa however, when the real first major event took place in 1995, there was ambush marketing at the Rugby World Cup Finals at the Ellis Park stadium. Coca-Cola was the official sponsor of the Rugby World Cup in 1995 but at the finals game, Pepsi, just at the start of the game, employed over 400 girls wearing Pepsi clothing to distribute free Pepsi caps as the spectators entered Ellis Park. It goes without saying, therefore, that tens of thousands of spectators wore these Pepsi caps in the stands and, considering that this game was played in the afternoon, the cap then proved a useful accessory,

17 Cornelius (n 4 above) 12.
18 1996 7 TCLR 167.
19 42 C.P.R. (3rd) 390, 1992 C.P.R. Lexis 1773.
20 G Nufer *Ambush Marketing in Sports: Theory and Practice* (2013) 64.
21 B Wilson 'World Cup brands eye winning results' http://www.bbc.com/news/10244711 (accessed 19 October 2016).

especially in the open stands. So Pepsi seemed like they were the official sponsors of the Rugby World Cup and therefore got a lot of exposure. Many also thanked them for sponsoring the World Cup.

This set a dreadful trend for many other ambush marketing incidents in the world and became common in South African sports. All the while, this was allowed to get out of hand over the years because a conducive environment for such ambush marketing existed in the sense that, no penalties were given to pseudo-sponsors who ambush marketed mega sporting events, as there was no legislation to protect the sponsors and give them exclusive sponsorship rights, until 2003.

In 2003, the Cricket World Cup was to be hosted by South Africa and the official sponsor was Pepsi. Remembering its 'past-sins' of ambush marketing a Coca-Cola sponsored 1995 Rugby World Cup final, Pepsi quickly ran to the government to ask for protection in the form of intellectual property legislation on trademarks and copyrights which protect companies from ambush marketing. The legislation was tabled and passed and its enactment saw the ushering in of new legislative protection being granted to sponsors, and them enjoying exclusive association rights to sporting mega-events.[22] Inherently, their commercial rights were protected as well. The two main ways in which the legal protection was rendered was in the form of, namely, intellectual property legislation on trademarks and copyrights or a claim based on passing off which is a form of misrepresentation.[23] The following legislation was passed in order to implement this, namely:

- The Trade Practices Act 76 of 1976 (as amended in 2001) which, in its section 9(d), provides that ambush marketing is now a criminal offence.
- Section 15A of the Merchandise Marks Act 17 of 1941 which was also introduced to prevent ambush marketing and as a move to criminalise it.
- The Consumer Protection Act 68 of 2008.
- The Safety at Sports and Recreational Events Act 2 of 2010. It also made ambush marketing a criminal offence.
- The Advertising Standards Authority (hereafter referred to as 'ASA') also provided a Sponsorship Code.[24] In this Sponsorship Code, an arbitration tribunal was created within the ASA. Therefore, if you have an issue with any ambush marketing, you can go to the ASA arbitration tribunal and resolve anyone of these issues within one — two weeks. It is a speedy process and this is what makes it an attractive option. Instead of approaching the court and bringing an

22 Louw (n 1 above) 418.
23 Klopper & van der Spuy (n 5 above) 109.
24 The Advertising Standards Authority of South Africa 'Sponsorship code' http://www.asasa.org.za/codes/sponsorship-code (accessed 19 October 2016).

> urgent application etc., this ASA tribunal route is a cheaper and faster way of resolving anyone of these disputes.

In this 'dog eat dog' world where, according to Thomas Hobbes, man is a brutish animal who has got to be tamed by the law, one might wonder whether one piece of legislation would not suffice to guard against the unethical and unlawful business practice of ambush marketing in order to protect sponsors and grant them exclusive association rights to sporting mega-events.[25] After all it would seem as though the human animal would have been tamed by that one piece of legislation. In other words, this observer would basically ask why the South African legislature would make much ado about nothing and amend so many Acts to guard against ambush marketing. The answer is simple if one is to not only look at the millions of dollars which the sponsors invest in these sporting mega-events but the ROI which they expect from the investment. This ROI is so well-calculated and virtually has got to be a certain business forecast into the future on which the well-being and continued existence of the sponsor in the business world depends. In light of such an amount of pressure, both on the sponsors and the event organisers, these many Acts and their amendments cover every fathomable legal loophole.

Furthermore, if one is to secure sponsorship, it is important that they match specific products and consumers. Sponsors require a ROI on their sponsorship deals, hence, legislation protects it by granting them exclusive 'association rights' and regulating ambush marketing through legislation.[26] There are no 'freebies' or gratuitous tokens in sport, and sponsors just do not sponsor a game or a particular sport merely because they love it. So for example, if a sporting body is given US$1 million, the sponsor will need to know what his exposure in terms of broadcasting and commercial rights will be, and whether there will be an increase in the sales of the product. Therefore, the sport federation must know the profile of its players namely, their gender, ages, etc. It must also know the profile of its spectators namely, their ages, gender, income bracket, etc. For example, the governing body of table tennis must know the profile of its spectators, namely that their average age is 50 years, the gender ratio and that their income falls within the bracket of R200 000 – R250 000 per annum. The sport federation would then use this information when approaching sponsors. In this same table tennis example, there would be no use in having the table tennis body approach Bentley Motors for sponsorship for instance, because the spectators' income bracket clearly shows that they would never be able to afford a Bentley but,

25 F Viljoen *Beginner's Guide for Law Students* (2014) 1. In this chapter, Viljoen explains this Hobbesian theory of human nature.

26 T Scassa 'Ambush Marketing and the Right of Association: Clamping Down on References to That Big Event with All the Athletes in a Couple of Years' (2011) 25 *Journal of Sport Management* 357-370.

spectators in equestrian sports can afford this Bentley so the sport federation can approach Bentley Motors for sponsorship. Evidently, therefore, it's imperative that the sponsor matches with the specific sport otherwise the sponsorship will never be secured or it will be an epic fail. This is because, the whole idea is that if a sponsor sponsors a specific sport, its spectators should end up becoming consumers of its product(s) and its client.

The best illustration of a ROI is the Carling Black Label campaign.[27] This was brilliant advertising. This campaign sponsored and marketed the great match between the Kaizer Chiefs and the Orlando Pirates, as well as the millions of spectators. Carling Black Label actually registered all the intellectual property rights on this whole campaign. The campaign allowed for spectators to vote for their favourite players and coaches, and create teams which would play against each other in this derby. In order to vote, a spectator first had to buy a beer and at the bottom of the beer cap he would find a code which would enable him to participate by SMSing his preferred coach and player to the specified number.[28] The ROI was astronomically high as Carling Black Label sold over ten million beers in seven weeks! Over 10 000 000 votes were cast in a seven week period. The prize money was huge if one had to just look at the income that was generated on the sales of beers alone. Over ten million beers were sold in seven weeks which implies that more than R10 million was generated as one beer costs more than R1. This was therefore a brilliant campaign and ROI.

The Economist reported that, in order to ensure the influx of this ROI, sponsors take a firm and uncompromised stance of sport federations, keeping their sports clean, well governed and avoiding such things as doping scandals in sporting mega-events such as the Olympics and the World Cup.[29] This is important because it safeguards the sponsors' reputation and this reputation and image are a vital component of the association rights to any event that a sport might have. It is therefore not surprising that the protection of these association rights is escalating because these association rights are invaluable for any sponsors' ROI. It is vital for a sport to remain clean and untainted if it is to secure sponsorship of any sorts. No doping, no match-fixing and no bribery for instance, are all requirements that must be met by a sporting federation before it secures sponsorship. A present day illustration of this 'clean stance' is how some of the main sponsors of FIFA simply terminated their agreements with FIFA,

27 Anonymous 'Orlando Pirates official Carling Black Label squad' http://carlingblacklabelbeer.co.za/bethecoach/cupnews/7-orlando-pirates-official-carling-black-label-squad (accessed 19 October 2016).

28 Anonymous 'Carling Black Label Cup starting XIs' http://www.kickoff.com/news/44933/carling-black-label-cup-starting-xis (accessed 19 October 2016).

29 S Chadwick 'Market-driven morality' http://www.economist.com/blogs/gametheory/2013/04/corruption-sport-0 (accessed 2 April 2016).

because of the bribery in football, as this was all about good governance.

According to Cornelius, laws against ambush marketing evidently prioritise protecting these sponsors and there are very few sports federations or event organisers who realise the importance of the protection of these sponsors because, if the event organisers do not look after their sponsors, they will simply terminate their contracts and sport will eventually die.[30] This is so as to safeguard their economic interests. The sponsors must be protected because they are willing to invest millions into the sport federation or the event and should therefore benefit from it in the form of a high ROI and marketing exposure. The sport federation must therefore assist them to benefit from the specific event in the form of providing protection for them.

On the other hand, Louw argues for a free for all approach towards the sponsorship of mega sport events, which is characterised by a zero regulation of sports mega-events, and is usually in the form of awarding exclusive association rights to sponsors.[31] He treats Cornelius' stance as a mere excuse to monopolise the sporting world.

To a certain extent Louw is right because, for example, if a country hosts an event as big and as lucrative as the FIFA World Cup major events, the locals must also benefit socio-economically from the hosting of such an event. Typically these World Cup events are officially sponsored by huge multi-national companies, such as Budweiser, who get all the exposure and economic benefits, yet local industries and businesses of the host nation do not. During the 2010 FIFA Soccer World Cup Championship, which was held in South Africa, a small restaurant in Pretoria called Eastwoods had the FIFA World Cup logo on its signage.[32] FIFA filed an application for Eastwoods to remove that logo as they were located 500 metres from the Loftus stadium, which was the exclusion zone, and was therefore deemed to be illegal ambush marketing. Eastwoods obviously removed the logo as a lawsuit would have left them bankrupt had FIFA decided to sue them. This application was unreasonable on FIFAs part because Eastwoods is so small and insignificant to FIFAs World Cup campaign that no one would have ever believed that Eastwoods was the official sponsor of the 2010 FIFA World Cup and thus no impression would be created by them that they were the official sponsors of the 2010 FIFA World Cup. This legal protection of sponsors which is in the form of them being awarded exclusive association rights to mega sport events is what Louw is advocating against because, in this case, in its efforts

30 Cornelius (n 4 above) 16.
31 Louw (n 3 above) 716.
32 O Dean 'FIFA wins first 2010 ambush marketing ruling' *Managing Intellectual Property Magazine* 2009 1-2.

as an event organiser to protect Coca-Cola, which was its official 2010 World Cup sponsor, FIFA literally harassed the small, insignificant restaurant, Eastwoods. That harassment was unjust and unfair because, in the end, a paradox was evident in the sense that, whilst FIFA sought to pursue justice for mighty Coca-Cola, it was unjust in its harassment of Eastwoods. Ultimately, Louw believes that a certain extent of ambush marketing is ethical and should be legalised more so if it is as harmless as Eastwoods'.[33]

Ultimately, one sits with the dilemma as to whether or not ambush marketing should be legalised or regulated. Furthermore, one would ask whether or not there should be exclusive rights which are awarded to the official sponsors of these major sports events.

In my opinion, it is to a very limited extent that I agree with Louw that ambush marketing should not be regulated and exclusive rights should not be exclusively granted to sizable official sponsors during major sports events. This is tantamount to him saying that everyone must be allowed to associate with an event. It is to a limited extent that I agree with him because his free for all approach towards the regulation of ambush marketing and the sponsorship of major sport events is impractical and only works in a utopian state where everything is virtually perfect, fair and ethical. Louw is being very myopic in taking such a stance. This is evident in the history of ambush marketing in that before it was even regulated and sponsors for major sports events were protected through the granting of exclusive association rights, these sponsors were prejudiced by the lack of exclusive association rights being granted to them because their competitors would freely intrude on their events and ambush market. Removing these laws that regulate ambush marketing and grant exclusive association rights to sponsors would unnecessarily take us back to the drawing board in order to seek solutions to problems which have already been solved.

One might further argue that the solution to the problem of ambush marketing — which is its regulation through legislation — is in and of itself another problem, in the sense that it has robbed local industries of host nations (of these major sport events) of the opportunity to benefit economically. However, in my view, this is a containable problem and for it I provide the solution below which is based on Cornelius' argument.

I largely agree with Cornelius' aforementioned argument and hold that the investments of these big sponsors of major sporting events should continue being protected by the granting of exclusive association rights. It need not be a monopoly on the whole, but to a

33 Louw (n 3 above) 723. Under the heading 'When prohibiting an "association" with an event', Louw explains this type of a scenario as an exaggeration and unbalanced way of regulating ambush marketing.

limited extent, monopolising the major sporting events would actually be wise. The best solution would be to grant more investors and companies the opportunity of exposure through sponsorship but, at the same time, the event organisers must ensure the ultimate protection of their sponsorship investment by granting them exclusive association rights. Therefore, the granting of exclusive association rights by event organisers must be more open to local industries of the host nations of major sporting events and not be a total ban like what FIFA does. Leniency is imperative.

The other reason I do not agree with Louw's 'free for all' approach towards sponsorship and the granting of association rights to sponsors, is that it is allowing a cancer of unethical business practices, in the form of ambush marketing, to perpetuate. On face value, his free for all approach sounds reformative, fair and legally sound. This is especially true in a South African economy, which is characterised by an uneven distribution of wealth amongst its locals, firstly, because of an apartheid history, which economically marginalised the majority of the population. Secondly, this is also because of modern policies which have been manipulated to maintain the appalling economic status quo, such as the abuse of the tender processes under the new Black Economic Empowerment (BEE) programme which have benefited a very few of the black majority. In the face of such a chequered history, local industries of the host nations of major sporting events, such as South Africa in the 2010 World Cup, would definitely embrace Louw's free for all approach which promotes a zero regulation on ambush marketing and the granting of exclusive association rights to a few multi-national companies, and inherently create free marketing exposure. Be that as it may, the unregulated ambush marketing, which castigated the big multi-national companies or sponsors, will backfire and also haunt the locals, especially if one considers that it is these small local companies which sometimes ambush market the events of these big sponsors. Louw is fails to address the problem of unethical business practices in the form of ambush marketing.

On the other hand, at least, Cornelius attempts to address this problem by suggesting that current legislation, which regulates ambush marketing, should stay in place but he suggests a more open solution to solving the problem of locals also securing association rights and sponsorship deals. He does this by reiterating that the best solution would be to grant more investors and companies the opportunity of exposure through sponsorship but, at the same time, the event organisers must ensure the ultimate protection of their sponsorship investments by granting them with exclusive association rights.

I agree with Cornelius on several matters. Firstly, with Cornelius' stance on advocating for the regulation of ambush marketing and the

granting of exclusive association rights to sponsors of major sporting events because of the logic behind his reasoning, which includes evidence as cited above. Secondly, I agree with Cornelius in this debate solely based on a psychological impression given in the form of the 'security' of his argument, as opposed to Louw's position characterised by a subtle oscillation on his zero regulation on ambush marketing approach. By 'security' of argument, I mean that Cornelius stands by his assertion that ambush marketing has got to be regulated by the law no matter the circumstance. Louw on the other hand starts off by criticising the regulation of ambush marketing but, in his conclusions contained in his book entitled 'Ambush Marketing and the Mega-Event Monopoly: How Laws are Abused to Protect Commercial Rights to Major Sporting Events', evidence abounds that he has subtly accepted the need to regulate ambush marketing and in some ways he is actually providing procedures on how to go about it. Louw's shifting of positions works in Cornelius' favour as even his opponent Louw is now viewing this same matter from Cornelius' perspective. For example, under the heading 'Guard the guardians,' Louw states that checks and balances should be put in place when legislation is enacted by host nations for sporting mega-events because the legislation wields considerable power for these private sponsors which it seeks to protect.[34] One would expect that based on his zero regulation on ambush marketing approach, Louw would provide for this checks and balances mechanism 'if' legislation is enacted by host nations for sporting mega-events and not 'when' legislation is enacted by host nations for sporting mega-events. Clearly Louw has accepted the status quo of ambush marketing regulation and the granting of exclusive association rights and this makes futile his pursuit for a zero regulation on ambush marketing. Furthermore, to this he adds procedural mechanisms which can be employed by the advertising watchdogs.[35] These include, a retired judge or an independent legal expert (such as an intellectual property lawyer) vetting claims of infringement rights by local organisers prior to the threatening of legal action.[36] In the same text Louw continues to argue that such a person could be called upon to consider claims of ambush marketing and to pronounce, on an urgent basis, on the potential lawfulness or otherwise of the relevant conduct, before the issuing of a cease-and-desist letter or summons. Louw has not only accepted the status quo of the regulation of ambush marketing and the granting of exclusive association rights, but he has also provided Cornelius with ideas on how to further enforce the regulation of ambush marketing by giving a procedure on how to go about it.

34 Louw (n 3 above) 727.
35 As above.
36 As above.

If one is to look closely at Louw's checks and balances proposition concerning the legislation which regulates ambush marketing, and the procedural mechanisms thereof, one would realise that he is not making any ground-breaking intellectual discovery of any sort. This is because his retired judge or independent legal expert procedural solution has already been provided for by the aforementioned ASA Sponsorship Code. Clause 9 of the ASA Sponsorship Code provides for a tribunal which determines whether certain claims can be challenged in courts as ambush marketing claims. This is also Louw's purpose of hiring this retired judge or independent legal expert. It is rather academically frustrating that Louw is taking us round and round in circles of theoretical argument only to arrive at the same spot as Cornelius, which is that of the showing the legal feasibility and reasonableness in regulating ambush marketing.

I agree with Louw's argument on the monopolisation of language. He argues that event organisers should not monopolise the language by enacting laws which prohibit the use of certain generic terms which happen to be associated with the sporting mega-events.[37] For example, 'gold', 'games', rings' and 'summer'. He says it is only the dishonest commercial use of such generic terms by sponsors' competitors which should be prohibited. He is right as this protects one's right to freedom of speech and expression.[38]

However, one would wonder in what other way such a prohibition on the monopolisation of language can be made other than enacting laws which prohibit the dishonest commercial language use. Louw brings us back to Cornelius' proposition that the regulation of ambush marketing is vital. Moreover, in his argument against the monopolisation of language by event organisers, Louw states that if the sponsors of sporting mega-events want a prohibition on the use of certain words or symbols associated to a specific sporting mega-event, by non-sponsors, then the sponsors must pitch a sound case of why this should be so by explaining in what way the use of this language by anyone other than the official sponsor might infringe on their association rights to the event.[39] In this argument, law clearly makes provision for the enactment of legislation which protects the association rights of official sponsors of sporting mega-events in the form of language, but he just recommends stricter measures or requirements which have to be met by the sponsors before the legislation is passed. This is an apt illustration of the regulation of ambush marketing which Louw gives and so he eventually ends up seeing this whole matter the way that Cornelius does. However, I would like to commend Louw for being the only authority, amongst

37 Louw (n 3 above) 725.
38 Sec 16 of the Constitution of the Republic of South Africa, 1996 (the Constitution).
39 As above.

Cornelius, Strauss, etc., who has clarified this confusion on the monopolisation of language in accordance with the granting of exclusive association rights.

5 The legal implications of the regulation of ambush marketing in South Africa: Chapter 2 of the Constitution of the Republic of South Africa: Bill of Rights

The Bill of Rights entrenches certain inalienable fundamental rights to which both natural and juristic persons are entitled.[40] I am going to discuss those fundamental rights which are relevant to this discussion.

According to section 16(1) (a) and (c) of the Constitution, 'everyone has the right to freedom of expression, which includes freedom of the press and other media' and the 'freedom of artistic creativity.'[41] Whilst this provision entitles one to advertise his brand, its meaning can be misconstrued as entitling anyone to advertise or market his brand as and when he pleases. This would be unfair on the official sponsors of sports mega-events who would have exclusively been awarded exclusive association rights for the exposure of their products and brand because they would have poured in millions to secure such a business opportunity. This is Cornelius' assertion that, whilst he recommends that event organisers open up the official sponsorship of sporting mega-events to more local investors and companies of host nations, the regulation of ambush marketing cannot, however, be abolished lest companies who ambush market sporting mega-events and unfairly enjoy the exposure of their brand at the expense of the official sponsor, would inappropriately raise the defence of 'freedom of expression'.

In terms of section 18 of the Constitution, 'everyone has the right to freedom of association'.[42] This clearly means that any company can choose to associate its brand with a particular sport and sporting mega-event without any restriction. Louw would agree with this legal provision and its application in context. Be that as it may, the company must thus first seek permission or approval to be associated with the game or sporting mega-event and consequently sponsor it because, opening up the major event to anyone would be unfair on the official sponsors of sports mega-events (who would have been awarded exclusive association rights for the exposure of their products and brand because they would have poured in millions to secure such a business opportunity). This condition is in line with the

40 Ch 2 of the Constitution.
41 *Afri-Forum v Malema* 2011 (6) SA 240 (EqC) para 20.
42 Ch 2 of the Constitution.

new legislation which grants exclusive rights to official sponsors of sports mega-events. This is a justifiable limitation in terms of section 36 of the Constitution which I discuss below.

Section 22 of Constitution is an interesting provision in that it has the special feature of a qualification unlike, for example, section 18 which just bestows a fundamental right on a person. Section 22 provides the qualification that the practice of a trade may be regulated by the law.[43] In other words, whilst one may be entitled to choose their trade freely, this same trade may be regulated by the law. The main aim of getting into business is to make a profit and the only way that this profit can be made is through the exposure which is brought about by marketing.[44] Therefore, when a company assumes its status as a going concern after having chosen its trade, it is obvious that it wants this entitlement of marketing its brand at sporting mega-events for instance, and thus associate itself with the major sport events. Louw and the law are still of one mind up to this point. However, an application of the qualification of section 22 provides that this marketing, in the form of ambush marketing is regulated so as to ensure fair and ethical business practice in business and in sport. This tallies with Cornelius stance on the regulation of ambush marketing and sponsorship.

Section 30 of the South African Constitution provides that everyone has the right to participate in the cultural life of their choice, but no one doing so may do so in a manner inconsistent with any provision of the Bill of Rights.[45] This provision definitely supports Louw's position on allowing ambush marketing to take place because, in terms of this constitutional provision, any company is entitled to partake in any sport or sporting mega-event of its choice as sport is a component of culture. Be that as it may, in terms of the provision's qualification, the company can only do so in a way that is consistent with the Constitution. The Constitution is founded on values of fairness, equality and justice.[46] Therefore, the company has got to associate itself with the sporting mega-event by partaking in marketing in a fair manner and this is definitely not ambush marketing because this would be unfair and unjust on the official sponsors of the sports mega-events — who would have exclusively been awarded exclusive association rights for the exposure of their products and brand because they would have poured in millions to secure such a business opportunity. Cornelius is again supported by the Constitution.

43 *The Law Society of the Northern Provinces v Mahon* [2011] 2 All SA 481 (SCA) para 20.
44 *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL).
45 *Minister of Home Affairs v Fourie* 2006 (1) 524 (CC); *Lesbian and Gay Equality Project v Minister of Home Affairs* [2005] ZACC 19.
46 Sec 1(a) of the Constitution.

According to section 34 of the Constitution, 'everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, where appropriate, another independent and impartial tribunal or forum'.[47] Contrary to Louw's zero regulation on ambush marketing assertions, which criticise the legitimacy and existence of the ASA Code, in terms of this constitutional provision, the ASA Code, which provides for an arbitration tribunal, is evidently a necessary regulation on ambush marketing because it provides a disciplinary forum for all those official sponsors who would have been disadvantaged by the repercussions of ambush marketing such as a low ROI. Furthermore, the *audi alteram partem* principle entitles the claims of ambush marketing to be heard in a tribunal which is similar to that of the ASA Code. This truly makes Louw's position dismissible because, in this application of section 34, his assertion flies in the face of the Constitution and this is legally unpardonable in terms of section 2 of the Constitution. Section 2 entrenches the supremacy of the Constitution by providing that the 'Constitution is the Supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.

In light of these Constitutional arguments one would conclude that Louw is clutching at straws in his free for all approach and zero regulation on ambush marketing position. This is because the Constitution, in all its impartiality, is still found to be agreeing and 'siding' with Cornelius in this ambush marketing regulation debate. Clearly I am not the only one agreeing with Cornelius nor am I being naïve as a mere law student in agreeing with Cornelius.

6 Section 36-Limitations Clause

Section 36 of the Constitution contains a limitation clause. According to this limitation clause, the human rights which are entrenched in the Bill of Rights are not absolute however, they can be limited and encroached upon in a way that is justifiable in an open and democratic society such as South Africa. Section 36 provides:

> 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, 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;

47 *Legal Aid South Africa v Magidiwana* 2015 (6) SA 494 (CC).

(d) The relation between the limitation and its purpose; and

(e) Less restrictive means to achieve this purpose.

Whilst all the aforementioned legal qualifications which promote the regulation of ambush marketing can be highlighted, they are all anchored in the limitation clause of section 36 which also, like them, provides a limitation on these fundamental rights. These fundamental rights which could potentially allow for companies to ambush market at sporting mega-events are limited by laws of general application in the form of all the aforementioned legislation which was passed in order to curb ambush marketing, such as the Merchandise Marks Act[48] and the Olympic Act.[49] This is the legitimate way to limit any fundamental rights in an open and democratic society such as South Africa.

In order to come up with a legitimate limitation of these fundamental rights, the procedure which the courts employ is that of a proportionality test. The court weighs the business interests of the company accused of ambush marketing against the interests of the prejudiced official sponsor of a sporting mega-event, coupled with public policy considerations which focus on the impact of the ambush marketing on the Constitution and society as a violation of the Constitution thereof. As an illustration, in the previously cited ambush marketing incident on the 1995 Rugby World Cup,[50] had Pepsi's ambush marketing of the 1995 Rugby World Cup occurred under the current constitutional dispensation, the court would have considered Pepsi's right to market its brand and exposure thereof versus Coca-Coca's exclusive association rights to the sporting mega-event, which would have come about as a result of the millions of dollars that it would have invested into the event. Moreover, the court would have also considered qualifications such as that of section 22 which allows it to regulate ambush marketing. With this in mind, the court would have then determined whether illegal ambush marketing took place and the type of penalty that would best suit Pepsi's violation of the Constitution. In this case, Pepsi would have probably been found guilty of ambush marketing. This proportionality test was first employed in the precedent setting case of *S v Makhwanyane*.[51] It is in light of these constitutional priorities that the courts will be willing to limit the constitutional values of athletes in terms of the limitations clause.

In light of the regulation of ambush marketing, it is likely that this purpose orientated approach, coupled with the constitutional value orientated approach, will be applied by courts when deciding on how

48 Merchandise Marks Act 17 of 1941.
49 Federal law 12,035 of 2009.
50 See para 4 (pg 5) above.
51 1995 (3) SA 391 (CC) 104.

to address ambush marketing in terms of the limitation clause, in future sport mega-events which are to be held in South Africa. This regulation of ambush marketing is encouraged.

7 Conclusion

In conclusion, this is the middle ground that lies between Louw and Cornelius' arguments in that, the major sponsors must be protected but leniency is being called upon from event organisers and, exclusive association rights should be granted to locals of these nations which host major sport events in order for all to benefit. Nonetheless, Cornelius' endorsement of the regulation of ambush marketing and the granting of exclusive association rights seems more laudable at this point in time, especially if the sporting fraternity would want to survive and not die a natural death due to a lack of oxygen, of which in its case, this oxygen is sponsorship.

UNIVERSAL EDUCATION: 'A DREAM DEFERRED'?

*by Olwethu Mhaga**

1 Introduction

This article is an analysis of the South African higher education system detailing the effects of 'massification' and how progress can be made in ensuring greater participation without impeding on the quality of the institutions. Bearing in mind the recent protests and the mass 'feesmustfall' student movement,[1] higher education has become a prominent feature in the national conversation. Due to the effectiveness of higher education in breaking the poverty cycle and combating the inequalities that remain persistent in our society it is integral that access is widened more effectively especially to the most vulnerable sections of our society.

This article will initially detail the history of higher education in our country displaying how access, whether denied or permitted, draws parallel to the inequalities in our society whether on racial or class lines. This article will then detail the challenge of 'massification' that tertiary institutions have faced around the world focusing on Africa, more specifically South Africa. This will then be linked to the achievements made thus far and the challenges still faced today with specific regard to access to tertiary institutions which has become such a pertinent issue in current discourse.

2 South African higher education in a historical context

In South Africa social inequalities were entrenched and embedded in all spheres of life whether social, academic or professional. These divisions and inequalities can be traced directly to the effects of systemic exclusion of non-white people and women under colonialism and apartheid. Higher education displays this legacy to this day although much progress has been made under the new democratic

* Second year LLB student, University of Pretoria.

1 The 'feesmustfall' movement was a student led protest that begun in mid-October after a three day lockdown of the University of Witwatersrand after an announcement that fees would increase by 10.5% the following year which spread through campuses throughout the country as students protested fees that were increases far higher than the inflation rate of 6% for that year (see S Badat 'Deciphering the meanings, and explaining the South African higher education student protests of 2015-16' (2016) 12).

dispensation. However 'social, political and economic discrimination and inequalities of a class, race, gender, institutional and spatial nature profoundly shaped and continue to shape South African higher education'.[2]

The South African Constitution committed the state and it's institutions to the assertion of the values of 'human dignity, the achievement of equality, and the advancement of non-sexism and non-racialism entrenching the human rights and freedoms that the Bill of Rights proclaims'[3] The Higher Education Act required the creation of 'programmes and institutions to respond better to the human resource, economic and development needs [of South Africa]'[4] redressing 'past discrimination' thus ensuring 'representivity and equal access'[5]. Bearing in mind these two consequential and fundamental statutes with regard to higher education and the essential role that it would play in not only shaping the new South Africa but also play a pivotal role in ensuring greater equality concomitantly alongside the 'vision … of a transformed, democratic, non-racial and non-sexist system';[6] higher education was also called upon to advance specific goals with 'increased and broadened participation', including greater 'access for black, women, disabled and mature students [and] equity of access and fair chances for all [whilst] eradicating all forms of unfair discrimination and advancing redress for past inequalities'.[7]

Inspecting South Africa's history in closer detail it is easily ascertainable the degree to which forced removals from land and educational deprivation provide the foundation of this greater narrative as in the words of the novelist Bessie Head 'created overnight a floating landless proletariat whose labour could be used and manipulated at will.[8] As South Africa at the time was beginning its gradual transition from an agrarian economy to an industrial one the forced removals destroyed the native population's ability to sustain themselves as 'The Native Land Act gave blacks ownership rights to only 7,3% of the land, and only in native reserves. It forbade tenant farming, did away with individual tenure, and forced most black people into migrant labour.'[9] Essentially by depriving the black population from education and land a cheap labour pool was created which would play an essential part, to the growth of South African

2 S Badat 'The challenges of transformation in higher education and training institutions in South Africa' (2010) 6.
3 Preamble to the Higher Education Act 101 of 1997.
4 As above.
5 Sec 1 of Higher Education Act (n 3 above).
6 Sec 4 of Higher Education Act (n 3 above).
7 Preamble to the Higher Education Act (n 3 above).
8 M Gevisser *A dream deferred* (2007) 15.
9 Native Land Act 27 of 1913.

industry especially the mining industry which continues the legacy of migratory labour entrenched by discriminatory legislation to this day.

By the time colonial officials began to encourage immigration by British families into South Africa in 1820 there was already a burgeoning increase in the presence of English education in the country. These were to a larger degree independent religious schools established in the Eastern Cape and Natal which also accepted African children who applied for admission forming the foundation of the educated class to emerge in the African communities who became the teachers, nurses, doctors etc … who would later form a black middle class in those communities this was supplemented by government financed teacher training colleges in the 19th century. Throughout this period and the 20th century many black South African's received education set up by these religious institutions that provided education at the same standard as white students. This progress was essentially eroded by the implementation of the Bantu Education Act of 1953, which created stricter controls of religious schools by the government of the time the National Party by eliminating almost all financial assistance for those organisations.

This legacy was entrenched to a greater degree in Apartheid, which added an inferior education for the black population through Bantu education that the new democratically elected government had to attempt to reverse. In the Apartheid era with the introduction of the 1983 Constitution in the Republic of South Africa a distinction between 'general' and 'own affairs' with regards to governance or self-governance was created. This entrenched even further the divisions in education as various communities obtained greater control such as the Indian and coloured communities whilst the same degree of autonomy was not granted to the black population.[10] One of the consequences was that higher education institutions had to be designated for the exclusive use of the four racial groups: African, coloured, Indian and white creating the situation where 'by 1985 a total of 19 higher education institutions were designated as being 'for the exclusive use of whites', two as being 'for the exclusive use of coloureds',[11] two 'for the exclusive use of Indians' and 'six being for the exclusive use of Africans'[12] although the six did not include the seven institutions in the TBVC countries.

> Higher education in that context was heavily skewed
>
> In order to entrench and maintain the 'power and privilege of the white minority. Higher education institutions established in the early parts of

10 Sec 16 of The Constitution of the Republic of South Africa, 1983.

11 An ethnic label for people of mixed ethnic origin containing ancestry from Europe, Asia alongside various Khoisan and Bantu ethnic groups in Southern Africa.

12 I Bunting 'The higher education landscape under apartheid' in I Bunting (ed) *A legacy of inequality: higher education in South Africa* (1994) 38-42.

> the 20th century were incorporated into a system, which was subsequently shaped, enlarged and fragmented with the view to serving the goals and strategies of successive Apartheid governments.[13]

It is upon this history that we are faced with the challenges that continue to haunt the educational system in South Africa at both basic education (namely primary and secondary schooling) and higher education. Although the tasks remain great especially in basic education in terms of not only ensuring that essential facilities are present, especially for previously disadvantaged communities which remain disadvantaged, when compared to the facilities available to students in former model C and private institutions, but also the standard of the teachers and teaching given to such students remains far below the standard of their more affluent peers. However this paper shall focus on Higher Education and the challenges of access to such institutions that persist in our society. These challenges further entrench inequality, as a knowledge economy is built on the premise that those fortunate enough to receive tertiary education enjoy standards of living far above those who cannot. This leaves poor youths either seeking employment in low paying service jobs to cater to the enfranchised educated class, or seek employment in the languishing mining and manufacturing sector. Ultimately, most young South African's remain unemployed and unemployable as the economy leaves them behind, creating a lost generation.

> Currently the available funding for higher and further education and training does not provide for the estimated 2,8 million (41,6%) young people between the ages 18 and 24 years old who are not in employment, education or training (NEET). Among 23 and 24 year olds the percentage rises to above 50% among youth in the NEET category.[14]

Amongst these youth in the NEET category more than 60% have completed Grades 10,11 or 12 however only 98 000 with university exemption. This perhaps presents one of the greatest challenges to the future of this country and it is clear that serious interventions are required to combat these challenges.

3 Massification

Massification can be defined in many different manners but the two most relevant would be having a 'gross higher education enrolment ratio of a country approaching 50%' or 'characterized by a very rapid

13 Bunting (n 12 above) 52.

14 The Department of Justice and Constitutional development 'Report of Ministerial Committee on the Review of the National Student Financial Aid Scheme' http://www.justice.gov.za/commissions/FeesHET/docs/2009-Report-MinisterialCommittee-ReviewOfNSFAS.pdf (access 20 October 2016).

increase in student enrolment maintained over several years'.[15] The second definition would apply more aptly perhaps for Africa as although enrolment numbers on the continent are at the lowest levels globally there has been a rapid increase in the past decades of enrolments leading to this different and unique massification.

Massification is a global phenomenon, which has occurred due to factors such as 'the democratization of education, the advent of the knowledge economy and globalization'.[16] However the most fundamental factor in the African context is perhaps the improvement of the primary and secondary educational levels in the states this then led to the larger cohort of graduates seeking access to higher education.

The effects of massification have been compounded in the country and on the continent by a lack in accompanying increases in resources provided. Whether financial, human or physical there has been a lack of adequate provision of resources which has had a negative impact on the physical infrastructure, the quality of the teaching and learning, research and the quality of life of the students. This has become a common characteristic of African higher education institutions; whereby there is 'institutional massification but with no adequate planning and with no proportionate accompanying increase in resources to enable them to cope'.[17]

The Economist reported that 'if more and more governments are embracing massification, few of them are willing to draw the appropriate conclusion from their enthusiasm: that they should either provide the requisite funds (as the Scandinavian countries do) or allow universities to charge fees'.[18] This is the greatest problem as stated by Ajayi the 'contraction of resources to the universities, coupled with an increase in demand, constitutes the most critical problem and greatest challenge'[19] it is forcing the institutions to survive on a starvation diet that may not kill one but certainly won't make one healthy.

4 Universal higher education

The debate about free higher education can be viewed on a basis of competing desires and demands pulling institutions and government in all directions. The continued increase in enrolments throughout the country through 'massification' of higher education should be

15 G Mohamedbhai (2008) *The effects of massification on higher education in Africa*.
16 Mohamedbhai (n 15 above) 4.
17 Mohamedbhai (n 15 above) 20.
18 The Economist 'The brains business' http://www.economist.com/node/4339960 (accessed 20 October 2016).
19 JF Ade Ajayi *et al* (1996) *The African experience with higher education* 9.

considered against maintaining the standard of the institution therefore requiring more teaching staff to compensate or building new lecture halls which is coupled alongside the decrease in proportion of government subsidies in real terms to higher institutions. The institutions have put more and more of those rising costs onto the students creating an environment in which, in the past few years, tuition fees have been steadily increasing above the inflation rate. The culmination of the above mentioned issues considering the historical legacy of the structure of our higher educational system displays the degree of difficulty there will be in ensuring the dream of universal higher education comes true.

Before the issues can be addressed it is important to establish the facts that lay out the environment in which we are working. South Africa subscribes to a framework for funding higher education whereby the costs are shared among the beneficiaries in this instance government and the students. Therefore state institutions such as the University of Pretoria, and the University of Witwatersrand rely mainly for their revenue from state grants and tuition fees. Some funding, however, is obtained from what is called third stream income, which consists of donations, consultancy fees and research grants.

These shared costs must be factored with the continued increase in levels of enrolment relative to staff and graduation rates. Below are statistics for 6 major traditional South African universities. The trends remain the same for similar institutions. I have looked at the years 2009 to 2013 to give a snapshot with reliable data however the trends have remained constant.

Total Enrolments

	2009	**2010**	**2011**	**2012**	**2013**
University of Cape Town	23 787	24 772	25 301	25 805	26 118
University of Pretoria	55 734	57 114	58 128	57 408	57 853
Stellenbosch	25 693	27 344	27 266	27 510	27 418
University of Johannesburg	49 315	48 315	50 528	48 769	48 386
Rhodes University	7012	7169	7278	7395	7486
WITS	29 234	29 498	29 094	30 436	31 134

(Centre for Higher Education Trust 2009-2013)[20]

20 Centre for Higher Education Trust 'New higher education performance indicator data 2009 to 2014' http://chet.org.za/data/sahe-open-data (accessed 1 June 2016).

Total staff

	2009	2010	2011	2012	2013
University of Cape Town	3261	3295	3413	3421	3429
University of Pretoria	3562	3662	3189	3212	3260
Stellenbosch University	2668	2830	2928	3050	3166
University of Johannesburg	2569	2628	2720	3138	3171
Rhodes University	1327	1309	1320	1334	1349
WITS	2757	2859	2963	2996	2882

(Centre for Higher Education Trust 2009-2013)[21]

Headcount of enrolments and graduates

	Enrolment	Graduates	% Graduates
2000	578 134	92 819	16,1%
2001	627 277	95 940	15,3%
2002	667 182	101 047	15,1%
2003	705 255	108 263	15,4%
2004	744 478	117 246	15,7%
2005	735 073	120 385	16,4%
2006	741 380	124 626	16,8%
2007	760 889	126 618	16,6%

(Report of Ministerial Committee in the review of the National Student Financial Aid Scheme)[22]

21 As above.
22 The Department of Justice and Constitutional Development (n 14 above) 14.

Ratio of students to staff

	2009	2010	2011	2012	2013
University of Cape Town	15,91	15,32	13,27	12,624	12,055
University of Pretoria	20,035	20,039	20,503	20,56	19,95
Stellenbosch University	18,603	18,474	18,404	18,146	17,48
University of Johannesburg	18,85	20,379	19,431	18,96	29,063
Rhodes University	16,105	15,892	11,223	13,148	13,849
WITS	11,358	11,133	10,28	10,524	10,514

(Centre for Higher Education Trust 2009-2013)[23]

Personnel costs as a percentage of total expenditure

	2009	2010	2011	2012	2013
University of Cape Town	43,7%	51,3%	53,5%	51,7%	51,9%
University of Pretoria	46,8%	46,7%	47,7%	46,5%	48,1%
Stellenbosch University	42,6%	44,1%	45,8%	45%	45,3%
University of Johannesburg	48,5%	48,1%	47,1%	56,7%	56,6%
Rhodes University	55%	54,94%	56,1%	56,4%	54,9%
WITS	47,1%	48,8%	50,9%	51,1%	51,2%

(Centre for Higher Education Trust 2009-2013)[24]

As can be seen from the data above enrolment has been steadily increasing in the 4 years studied with an approximate annual increase of 1% in the institutions. This has placed more pressure on institutions to increase staff to accommodate the higher levels of student enrolment, which has been one of the largest inflationary forces in the costs of education.

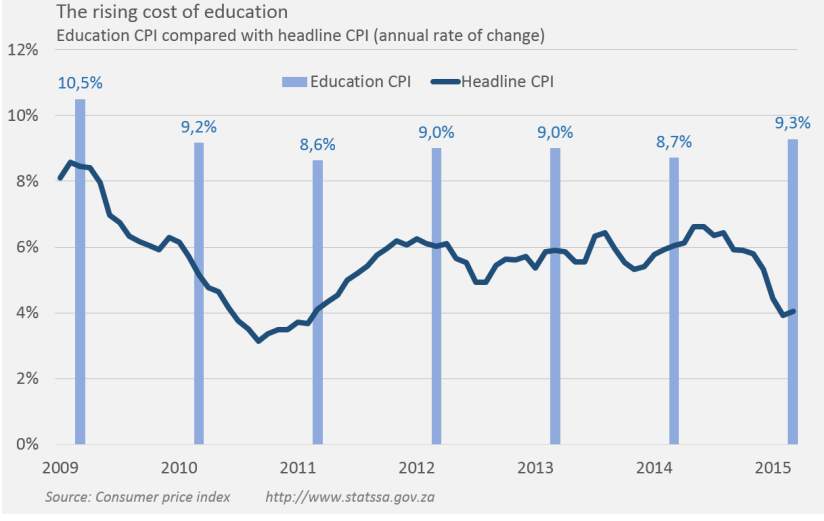
A University World News[25] article stated that total expenditure by South African universities had increased in 2013 by 12% from R41, 4 to R46, 2 billion. The increases in costs were mainly driven by the

23 Centre for Higher Education Trust (n 20 above).
24 As above.
25 M Makoni 'Higher education is not cheap' http://www.universityworldnews.com/article.php?story=20141023131300139 (accessed 20 October 2016).

purchase of 'goods and services' and the compensation of employees. Compensation of employees contributed 55% to higher education spending (R25,5 billion). The article found upon greater scrutiny that administrative and academic salaries were the major cost drivers alongside municipal services such electricity, water, cost of powering labs and other power intensive activities.

It is apparent that the rising costs of the universities are a part of a larger trend beyond the control of the universities. Institutions, in an attempt to ensure a quality education have increased the amount of staff hired, pushing the costs of remuneration of university personnel to either just below or above 50% of costs.

Costs of education have risen by 9,3% from March 2014 to March 2015 rising 5,3% higher than the headline CPI. It is apparent that the abovementioned inflationary forces are essential to understanding these trends.



5 Tuition and student debt

State contributions to university education declined from 49% at the beginning of the century to 40% by 2012, while the burden on students increased from 24% to 31% during the same period. Essentially the state grants allocated to universities have not kept pace with inflation or with the student enrolment[26] growth which has forced the universities to shift those cost somewhere else on their balance sheet. At the same time, student debt rose from R2.6 billion to R3.4 billion

26 As above.

– an increase of 31% over two years[27] it is apparent that this system cannot continue as Stats SA found that 33%[28] of people looking to attend university could not due to lack of affordability. This becomes even more worrying upon realising that dropout rates have increased due to the same issue.

Comparison of Aid provision and student debt

	NSFAS (allocation) R (million)	Total Aid R (million)	Student Debt R (million)
University of Cape Town	105	538	58,7
University of KwaZulu-Natal	269,5	743,1	272,6
Stellenbosch University	N/A	588	73,2
University of Johannesburg	46	280,7	22
Rhodes University	35	168,2	70,2
WITS	321,2	830,4	135

(University annual reports 2014)[29]

*University of Pretoria's data could not be displayed, as its annual reports are not shown online

A review of public universities by *PriceWaterhouseCoopers* measured the risk associated with non-payment of student debt in our system. Averaging at 22% over the period from 2010 to 2012 this remains a manageable but growing concern especially as no plan has been made yet concerning tuition increases in future. This is not as much an issue in traditional universities with 19% being unrecoverable but remains largest in universities of technology where 40% of tuition is expected to be unrecoverable.[30] However with the continued decrease in state funding compounded, the problem of larger groups of students being unable to afford the increases of their costs whilst paying off student debt has led to a significant increase in student debt that the universities have taken on with large portions of it being written off. This has placed an increased pressure on institutions that also bankroll

27 PriceWaterhouseCoopers 'Moving forward: Trends in annual reporting by South African public universities' https://www.pwc.co.za/en/assets/pdf/higher-education-conference-moving-forward.pdf (accessed 20 October 2016).
28 University World News (n 20 above).
29 Anonymous 'How much money students owe South Africa's Universities' http://businesstech.co.za/news/general/101826/how-much-money-students-owe-south-africas-universities/ (accessed 1 June 2016).
30 PriceWaterhouseCoopers (n 27 above) 39-44.

their own financial aid schemes and bursaries in some aspects doubling or tripling the funds available.

Most of these top universities are experiencing increased levels of student debt whilst recoverability has not been efficient. As stated by Rhodes in their annual financial statements, 'the recovery rate of these funds through NSFAS acting as an agency has not been successful'.[31] The university has a student debt load of R70, 2 million with R62 million outstanding NSFAS claims as well as R7, 9 million of it's own student load. At the end of 2014 the University of Stellenbosch handed over R59 million in debt to collectors whilst writing off R6, 8 million leaving it with a balance of R73, 2 million still owed by students.[32] These trends are worrying as they indicate the increased levels of indebtedness of the students who are then unable to pay off these loans leaving the debt on either the books of NSFAS or the universities who have to bear the costs and write them off; this is simply unsustainable.

Another problem that emerges in this crisis is that students who have not completely paid up, have their diplomas or degrees withheld until their debt is settled, this then places students in a tricky catch 22 as they need their diplomas or degrees in order to get an adequate job that could pay off their debt but are unable to get it due to indebtedness. However as Professor Tawana Kupe, the deputy vice chancellor of finance at the University of Witwatersrand stated 'if a student does not voluntarily discuss ways of repayment, the institution contacts the student or the person responsible for the payment to develop a 'repayment schedule'.[33] This does relieve some pressure on the student upon graduation but however does not solve the problem stated above.

One of the progressive steps taken by government that have had a positive impact on the realisation of the Constitutional mandate set out in section 29(1) which states

> Everyone has the right to —
>
> (a) a basic education, including adult basic education; and to further education, which the state, through reasonable measures, must make progressively available and accessible.[34]

Is the creation of the National Student Financial Aid Scheme (NSFAS). The central policy objectives set out by the white paper for the scheme, are to:

31 Anonymous (n 29 above).
32 B Macupe 'Student debt weighs heavy on universities' http://www.iol.co.za/news/south-africa/students-debt-weighs-heavy-on-universities-1479744 (accessed 1 June 2016).
33 As above.
34 The Constitution of the Republic of South Africa, 1996.

- Provide poor and historically disadvantaged students with access to higher education and
- Contribute to the skills pool necessary to drive economic growth and development.[35]

Bearing these objectives in mind it is clear that in terms of the first objective that NSFAS has achieved considerable success having provided in the last decade financial Aid to 659 000 students and distributed more than R12 million in student financial aid.[36] NSFAS provides loans to previously disadvantaged and poor and working class students with 'loans at a lower rate of interest than commercial educational loans, coupled with the income contingent nature of the loans, offers students a potentially affordable loan on favourable repayment terms.'[37] The scheme also attempts to incentivise achievement by allowing students to convert up to 40% of a loan to a bursary based on academic performance.

Although NSFAS has done an exemplary job in providing the opportunity of higher education to students who would most probably have not have had it the current structure of the means test, which determines maximum income level necessary to qualify for the loan, excludes children from families who earn above the R122 000 per annum qualification threshold but who still cannot afford to attend university; these individuals are what has been termed the 'missing middle' which initially emerged as in instigators of the 'feesmustfall' movement. Interestingly, the protests did not begin in the historically black universities, where larger amounts of poor students are prevalent, but rather in the traditional universities displaying a crisis with middle-income families that are unable to afford higher education for their children yet not qualifying for NSFAS funding.

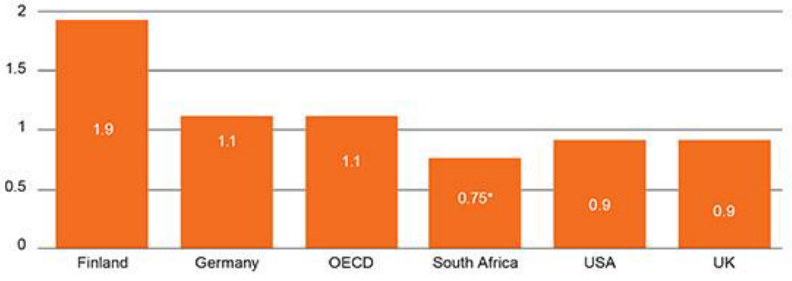
In the end, government grant under-funding of the total university education cost has led to increasing levels of tuition fees at an average rate of 13,7% much higher than the government grant annual increase of 9,7% over the period.[38]

Whilst South Africa spends 0,75% of its GDP on subsidising higher educational institutions advanced countries such as the United States and United Kingdom spend 0,9% of their GDP on higher education and Germany spends 1,1%.[39] It is clear to see on the graph below that the countries that have invested more in higher education have received better outcomes. Therefore, it is essential for government policy to adhere to the ministerial committee's recommendation that Government should increase the level of spending on higher

35 Sec 1 of the National Student Financial Aid Scheme Act 56 of 1999.
36 The Department of Justice and Constitutional Development (n 14 above).
37 As above.
38 Centre for Higher Education Trust (n 20 above).
39 See graph below.

education. Increasing Government's spending from 0,75% of GDP to 2% of GDP will relieve the burden on students to fund their own education.

Expenditure on tertiary educational institutions as a % of GDP (2011)



Source: OECD Indicators: Education at a Glance 2014[4]

*Report of the Ministerial Committee for the review of the funding of universities[3]

6 What can be done?

Upon understanding the scale of the challenges that lay before us, it is easy to feel despair and cynicism about the ability of anyone to truly reverse these inequalities entrenched in our society. However it is always poignant to take stock of the progress that has been made and commit to continuous fervent effort for progressive change in society. This is the task that lies before us of building a system that will ensure that any deserving student will not be excluded from obtaining tertiary education and bettering their life through the power of education.

Due to the differing circumstances and needs of the various aspects of the student bodies in our universities today it has become apparent that a single all-encompassing intervention is not possible. Rather, various interventions for various aspects of the body should be implemented, much like the 3 component financial aid scheme proposed by the Ministerial review committee of NSFAS which proposed the following interventions:

Component 1 — Full scale subsidization of poor students and those from working class backgrounds, to be progressively realized over a specific period.

Component 2 — Income-contingent loan scheme for the children of public sector employees earning salaries up to a maximum of R300 000 per annum

> Component 3 — Income-contingent loan scheme funded by state or other agencies for students from lower middle income families.[40]

These interventions seek to address the varying levels of students that have been excluded from obtaining higher education in the student bodies of our universities. Looking at the first component, which consists of the poorest students, the expansion and reform of NSFAS could achieve this outcome. There however remain serious issues with governance, funds allotment, their means test and other issues, which need to be resolved. However in this apparatus lie the mechanisms to continue widening access to those who are usually excluded.

It is the two other components that require a greater degree of ingenuity. These are the 'missing middle' as has been described when the Review Committee of NSFAS found that 'students who are children of lower income public sector employees, particularly teachers, nurses, police personnel and lower ranked civil servants, are excluded from qualifying for financial aid because their household income is above the R122 000 per annum qualification threshold.[41]

Band	**Curriculum Areas**	**Commonwealth Supported Place (2017)**
Band 1	Education, nursing, humanities, behavioural sciences, social studies, performing arts, nursing, clinical psychology	$0 - $6 349
Band 2	Computing, built environment, health sciences, engineering, surveying, agriculture, mathematics, statistics, science	$0 - $ 9 050
Band 3	Law, dentistry, medicine, pharmacy, veterinary science, accounting, administration, economics, commerce	$0 - $10 596

(Study Assist Australia HELP loan scheme 2016)[42]

The committee proposed an income-contingent loan scheme, meaning that repayment will only be required when the graduate reaches a certain income level, to students who are dependents of public sector employees who belong to the Government Employees

40 The Department of Justice and Constitutional Development (n 14 above) 21-34.
41 The Department of Justice and Constitutional Development (n 14 above) 25.
42 Australian Government: Study Assist 'Student contribution amounts' http://studyassist.gov.au/sites/studyassist/helppayingmyfees/csps/pages/student-contribution-amounts#2016 (accessed 1 June 2016).

Pension Fund enabling the Public Investment Corporation, which invests the funds of the GEPF, to provide the initial funds.

Component 3 consists of households, much like public sector employees, who earn in the range of R150 000 to R300 000 per annum, who are left at the mercy of commercial banks, other high-cost student credit providers or loan sharks to fund higher education.

There is a range of income-contingent loan schemes that could be implemented to ease the burden on these families but this paper will focus only on the example of the Higher Education Loan Programme (HELP) implemented in Australia.[43] In this program all public universities and approved private institutions will offer students either a Commonwealth supported place or a fee-paying place in their institution. In a Commonwealth supported placement the student only makes a contribution towards the cost of education called the student contribution, which varies from course to course, based on the expected future earnings of the student upon graduation. This created a 3-tier fee structure whereby courses that are considered to have the highest likelihood of generating a higher income e.g. Law or medicine were the most expensive and those least likely e.g. Nursing or arts were the least expensive.

Repayment of student debt occurs through the taxation system only once repayment income reaches a specific 'compulsory repayment' threshold, which is adjusted every year. The repayment income is calculated from amounts given on income tax returns for taxable income amongst others. Although there is no interest attached to the debt it is indexed every year to the consumer price index (CPI). The repayment system works by making graduates pay a percentage of their income, once they reach the repayment threshold, with the percentage increasing as income increases.

2016 -17 Repayment Rates

2016 – 17 repayment threshold	**Repayment % rate**
Below $54 869	Nil
$54 869 → $61 119	4%
$61 120 → $67 368	4,5%
$67 369 → $70 909	5%
$70 910 → $76 222	5%
$76 223 → $82 550	6%
$82 551 → $86 894	6,5%
$86 895 → $95 626	7%
$95 627 → $101 899	7,5%

43 Australian Government: Study Assist 'HELP paying my fees' http://studyassist.gov.au/sites/studyassist/helppayingmyfees (accessed 1 June 2016).

$101 900 and above	8%

(Study Assist Australia HELP loan scheme 2016)[44]

7 Conclusion

In order to make higher education available universally to all who deserve and seek it in South Africa requires great political will and sacrifice. It is clear that the current system is both unsustainable and is not ensuring progress in the desirable manner, which the recent protest, action attested to. Although much progress has been made in the face of great challenges it is time to push progress at a greater speed in order to ensure the sort of society envisioned in the constitution where the inherent dignity of all citizens is fully appreciated and each is guaranteed the unalienable right to the 'pursuit of happiness'.

44 As above.

THE AFRICAN TRANSFORMATIVE NOTION OF *UBUNTU* AND THE ENDURANCE OF THE ROMAN QUASI-CONTRACT OF *NEGOTIORUM GESTIO* WITHIN THE SOUTH AFRICAN CONSTITUTIONAL DISPENSATION

*by Mpho Mogadime**

1 Introduction

Certain Roman law principles and rules in the South African legal system have been subject to scrutiny, especially amidst the constitutional mandate to develop the South African common law in conformity with the underlying values of the Constitution.[1] This scrutiny fundamentally stems from the historical imposition of Roman-Dutch law on (South) African customary law during the seventeenth century, the lack of its true reception thereof, and subsequently, the question of its relevance, (dis)use and legitimacy in a post-apartheid constitutional dispensation.[2]

This article serves as a focused discourse on the endurance of the Roman quasi-contract of *negotiorum gestio* in South African law, so as to establish whether or not this particular rule has been abrogated by disuse and whether, in view of the African transformative notion of *ubuntu*, it is upheld by the Constitution. I will firstly provide a brief definition and practical operation of the quasi-contract. Secondly, I will discuss whether *negotiorum gestio* has been abrogated by disuse, with a brief analysis of the doctrine of abrogation. And lastly, I will discuss the constitutional validity of *negotiorum gestio*, in light of the African transformative notion of *ubuntu*, including antithetical views on the validity of the quasi-contract.

* Second year BCom Law student, University of Pretoria.

1 Sec 39(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution).

2 G van Niekerk 'The endurance of the Roman tradition in South African law' http://studia.law.ubbcluj.ro/articol/474 (accessed 20 June 2016).

2 The quasi-contract of *negotiorum gestio* and its operation in South African law

The quasi-contract of *negotiorum gestio* is briefly defined as the voluntary and unauthorised management of the affairs of another person.[3] The description of *negotiorum gestio* as a quasi-contract is derived from the basis that, unlike the establishment of the Roman law contract, which required consensus and a *causa contractus*,[4] *negotiorum gestio* does not require consensus in order for reciprocal rights and duties to exist between parties to the contract.[5] However, certain requirements have to be met for a *negotiorum gestio* to be established. There must exist an intention by the manager (the *gestor*) to manage the affairs of another person (the *dominus*), so as to further the interests of that person. Such an example of this can be found in *Absa Bank Ltd t/a BANKFIN v Stander t/a Caw Paneelkloppers*.[6] Such management must be unauthorised, but useful to the *dominus*.[7] The *gestor* should be able to justify this unauthorised interference or meddling, and rights and duties can only arise after the affairs of the *dominus* have indeed been managed.[8]

The consequences of the fulfillment of the abovementioned requirements are that the *gestor* may only claim compensation for the expenses incurred while managing the affairs of the *dominus*, but neither remuneration nor reward can be claimed,[9] in that such factors are extrinsic to the quasi-contract. The compensation is claimed through the *actio negotiorum gestorum*, which is a legal remedy available for a *gestor* who wishes to claim compensation from the *dominus* for delivering performance.

The practical operation of *negotiorum gestio* would be applicable in instances such as if, for example, M and D are divorced, and K is the biological child of M (the mother) and D (the father). D had been paying maintenance for K throughout the duration of her years as a minor. As K began her studies at a tertiary institution, D disappears and is nowhere to be found. K is in the possession of a study bursary that covers all expenses, excluding basic food items and accommodation. Consequently, M, along with C (K's uncle-in-law), solely contribute to the expenses not covered by the bursary. After a

3 DH van Zyl *Negotiorum gestio in South African law: an historical and comparative analysis* (1985) 3-4.
4 PhJ Thomas *et al Historical foundations of South African private law* (2000) 224. This refers to the reason for the contract.
5 Van Zyl (n 3 above) 4.
6 1998 (1) SA 939 (C) 940. This intention is known as the *animus negotia aliena gerendi*.
7 Van Zyl (n 3 above) 8.
8 Van Zyl (n 3 above) 11.
9 Van Zyl (n 3 above) 14.

few years, C learns of the whereabouts of D. C then decides to institute an action against D, to claim compensation for the maintenance fees paid for K, on the grounds that he had acted as a *gestor* by managing D's affairs, which included D's obligation to maintain K, even though K had passed the age of majority. This was confirmed in *Bursey v Bursey*.[10]

In instances such as the above circumstances, *negotiorum gestio* would be applicable in favour of C, in that all the requirements mentioned above for the existence of the quasi-contract are fulfilled and C would be able to claim compensation for his voluntary, unauthorised management of the affairs of D.

3 Has *negotiorum gestio* been abrogated by disuse?

The doctrine of abrogation is founded on the rule that law may be tacitly repealed (or abrogated) by the prolonged lack of its use, which is mainly determined by the silent consent of an entire community. This was confirmed in the case of *S v Hoho*.[11] Factors used to measure this silent consent are, among other things, the number of prosecutions or convictions involving the particular law,[12] any recent developments or extensions of that law,[13] and existing academic articles and/or books concerning that particular law.[14] In this regard, it is necessary to analyse whether or not *negotiorum gestio* has been abrogated by disuse.

In the case of *Sheriff of Cape Town* v *Mt Argun* (*MT Argun* case),[15] which dealt with maritime law, the court recognised *negotiorum gestio* as a valid basis on which a party can claim contractual performance. The appeal case concerned the legal obligation of a Sheriff to keep custody of an arrested ship.[16] Neither the arresting parties nor the owner of the ship contributed to the preservation costs of the ship held under the Sheriff, who was then acting in the interests and for the benefit of the arresting parties in respect to the payment of the preservation costs (which was not a statutory mandate). Recognising the apparent quasi-contract, Scott JA held that:[17]

10 1999 (3) SA 33 (SCA) 36. Here, Vivier JA provides that the duty of a parent to maintain extends beyond the age of majority.
11 2009 1 SACR 276 (SCA) para 9.
12 *Hoho* (n 11 above) para 11.
13 *Hoho* (n 11 above) para 12-13.
14 *Hoho* (n 11 above) para 14.
15 2001 (3) SA 1230 (SCA).
16 Rule 21(1) of the Admiralty Proceedings Rules.
17 *MT Argun* (n 15 above) para 31.

> It was further argued that in preserving the vessel the Sheriff was acting as a *negotiorum gestor* … the Sheriff was in fact managing the affairs of the arresting parties by preserving their security.

Furthermore, the quasi contract is discussed, considered, and even extended in various academic articles,[18] books,[19] and cases. This ranges from cases dealing with unjustified enrichment,[20] improvements,[21] and even maintenance.[22] The apparent reluctance to completely repeal the *negotiorum gestio*, but rather to extend its action for recovery when dealing with specific facts, while continuing to refer to the prerequisites of the quasi-contract in order to establish whether or not it can be applied in its ordinary sense in such facts, proves that there is a strong preservation of the quasi-contract.

It can, therefore, be deduced that the Roman quasi-contract of *negotiorum gestio* has not been abrogated by disuse, as there exists little evidence of silence from the entire community and the quasi-contract is still applicable in cases where all the requirements needed for the quasi-contract to exist are complied with, so as to further the interests of justice.[23]

4 The constitutional validity of *negotiorum gestio* and *ubuntu*

In the post-apartheid legal context, the question of constitutional validity in South African law is always pertinent; in light of constitutional supremacy.[24] Langa mentions that one of the goals of 'transformative constitutionalism' is achieving a culture of justification,[25] which entails justifying court decisions 'by reference to ideas and values'.[26]

Some of the underlying values that informed the establishment of *negotiorum gestio* are values such as good faith,[27] reliability,

18 LJW Aitken 'Negotiorum gestio and the common law' (1988) 11 *Sydney Law Review* 566; A K Blommaert 'Negotiorum gestio and the life-rescuer' (1981) 2 *Journal of South African Law* 123.
19 Van Zyl (n 3 above); J du Plessis *The South African law of unjustified enrichment* (2012); R Zimmermann *et al Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2004); R Zimmermann *The law of obligations: Roman foundations of the civilian tradition* (1990).
20 *Absa Bank* (n 6 above); *B & H Engineering v First National Bank Of SA Ltd* 1995 (2) SA 279 (A).
21 *Gouws v Jester Pools (Pty) Ltd* 1968 (3) SA 563 (T).
22 *Governing Body, Gene Louw Primary School v Roodtman* 2004 (1) SA 45 (C).
23 Zimmermann *et al* (n 19 above) 373.
24 Sec 2 of the Constitution.
25 P Langa 'Transformative constitutionalism' (2006) 3 *Stellenbosch Law Review* 351. The object of transformative constitutionalism is to transform society through the lens of the Constitution.
26 Langa (n 25 above) 353.
27 Van Zyl (n 3 above) 23.

friendship, respect, kindness, and courteous service; which functioned to create a type of value system in society.[28] These values are synonymous with those key values of the African indigenous concept of *ubuntu*,[29] namely, 'group solidarity, conformity, compassion, respect, human dignity, humanistic orientation and collective unity'.[30]

The interim constitution, from which the current supreme Constitution is derived, states that one of the important objectives of a post-apartheid legal order is the implementation of solutions that address the need for *ubuntu*.[31] This reveals the strong correlation between the current supreme Constitution and the values underlying the concept of *ubuntu*. In her article titled, '*Ubuntu* and the Law in South Africa',[32] Mokgoro argues that the aforementioned values of *ubuntu* are in conformity with the underlying values of the Constitution, especially those in the Bill of Rights, such as human dignity, freedom, and equality. It is also clear in its preamble that the Constitution aims to create a unified society,[33] which is an objective that supports one of the underlying philosophies of *ubuntu*, that 'motho ke motho ka batho ba bangwe / umuntu ngumuntu ngabantu', which means that an individual is only a truly fulfilled person through the help of others (that is, a sense of communality). Moreover, the notion of *ubuntu* is regarded as a backdrop to African customary law,[34] the latter of which is explicitly upheld by the Constitution.[35] The particular quasi-contract in African customary family law is known as *isondlo*, whereby compensation may be claimed for the maintenance of a child or adult (in rare circumstances) who is not a member of the immediate family group.[36]

In view of the agreement between the underlying values that inform the Roman quasi-contract of *negotiorum gestio* and the values of *ubuntu*, it is submitted that *negotiorum gestio* is also in conformity with the Constitution, and therefore supported by it. The quasi-contract can also be seen to give effect to the 'spirit, purport and objects of the Bill of Rights',[37] through the underlying values that inform it.

28 Zimmermann *et al* (n 19 above) 436.
29 Zimmermann *et al* (n 19 above) 372.
30 JY Mokgoro '*Ubuntu* and the law in South Africa' (1998) 1 *Potchefstroom Electronic Law Journal* 17.
31 Provision on 'National unity and reconciliation' in the postscript of the Interim Constitution of the Republic of South Africa, 1993.
32 Mokgoro (n 30 above) 24.
33 Preamble of the Constitution; 'Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations'.
34 D Kleyn & G van Niekerk 'Ulpian's Praecepta Iuris and their role in South African law part 2: Modern-day South African practice' (2014) 20 *Fundamina (Pretoria)* 446 - 447.
35 Secs 39(3) & 211(3) of the Constitution.
36 C Rautenbach & JC Bekker *Introduction to legal pluralism* (2014) 153.
37 Sec 39(2) of the Constitution.

5 Antithetical views on the validity of *negotiorum gestio*

However, there exist antithetical views against the argument established above. One of the dissenting arguments is that firstly, the benefit given by the *gestor* is inseparably entangled with the entitlements of the *dominus* to whatever thing or performance that is involved and this had been done without the consent of the *dominus*. That being argued, the *dominus* can only be liable for non-donative performance.[38] Secondly, English case law, which the Constitution recognises as a persuasive force,[39] states that such an action as *negotiorum gestio* will compel ill-willed individuals to take a *mala fide* advantage of others.[40]

With regards to the first argument, which absolves the *dominus* from liability, Van Zijl JP rather held to the contrary that '… meddling [in the affairs of another] is allowed in circumstances where such meddling is necessary in order to do justice between man and man.'[41]

This is in agreement with the latter position in the *MT Argun* case, and it further reveals that the object of recognising rights and duties arising from unauthorised management is not whether the *dominus* has given consent or not, but rather to administer justice where non-gratuitous 'meddling' is done to the benefit of the *dominus*. And even where there arose circumstances whereby *negotiorum gestio* could not be applied in its ordinary sense, the *gestor* could, *mutatis mutandis*, still claim through the extended *actio negotiorum gestorum*, which would limit the *gestor* to recover the amount by which the *dominus* was unjustifiably enriched at the expense of the *gestor*.[42]

In response to the second argument based on English case law, it is submitted that the firm position of the Constitution with regards to common law (that is, Roman-Dutch law as influenced by English law), is as follows:[43]

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

This section of the constitution corresponds with a well-founded principle in South African law, and that is the *principle of avoidance*. This principle was firmly established by the Constitutional Court in the

38 N Fakude 'Redundant or relevant?' (2015) 551 *De Rebus* 36.
39 Sec 39(1)(c) of the Constitution.
40 Fakude (n 38 above).
41 *Standard Bank Financial Services Ltd* v *Taylam (Pty) Ltd* 1979 (2) SA 383 (C) 392.
42 *Absa Bank* (n 6 above) 944-945.
43 Sec 39(3) of the Constitution.

case of *S v Mhlungu*,[44] where the court held that where it is possible to resolve any dispute without reaching a constitutional issue, that is the course that should be followed. It follows from this that since *negotorium gestio* forms part of common law, which is protected by section 39(3) of the Constitution, it is given effect to and considered as valid law *ab initio*, until such a time where, in light of constitutional scrutiny, it is struck down by a court of law.

On the contrary, the courts have so far upheld quasi-contracts.[45] In the case of *My vote counts NPC v Speaker of the National Assembly and Others* (*My vote counts* case), the Constitutional Court held that:[46]

> Far from avoiding constitutional issues whenever possible, the court has emphasised that virtually all issues — including the interpretation and application of legislation and the development and application of the common law are, ultimately, constitutional. This is because the Constitution's rights and values give shape and colour to all law.

The exception to the abovementioned precedence would of course be where common law is inconsistent with provisions of the constitution. In such an instance, the court would be obliged to develop such common law to bring it in conformity with the constitution.[47] It can clearly be inferred from *My vote counts* that the Constitution does in fact uphold the quasi-contract of *negotiorum gestio* as part of common law, as it is quite apparent from the discussions above that the quasi-contact in itself is in conformity with the Constitution through the values that inform it.

6 Conclusion

Within the current era of constitutionalism, a focus is placed on a substantive approach to the law, which is based on the underlying values of the Constitution. Moseneke reiterates this in his article titled, 'Transformative adjudication',[48] that part of advancing the constitutional goal of transformation is the pursuit of 'substantive justice' through applying the 'foundational values of the Constitution'.[49] These values are evident in the underlying values of the Roman quasi-contract of *negotiorum gestio* and are in agreement with the underlying values that inform the African transformative

44 1995 (3) SA 867 (CC) para 59.
45 As discussed in case law above.
46 2016 (1) SA 132 (CC) paras 51-52.
47 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 40. Further see secs 39(2)-(3) of the Constitution.
48 D Moseneke 'Transformative adjudication' (2002) 18 *South African Journal on Human Rights* 309.
49 Moseneke (n 48 above) 316.

notion of *ubuntu*, which can be said to be at first glance in conformity with the Constitution.

It can, therefore, be concluded that *negotiorum gestio* has not been abrogated by disuse; and moreover, it is supported by the Constitution. The quasi-contract is also a contribution, through the values that inform it, to the greater goal of transformation in South African jurisprudence.

POSITIONING RACE AT THE CENTRE OF LEGAL DISCOURSE IN POST-APARTHEID SOUTH AFRICA: DISSECTING *CLIFF V ELECTRONIC MEDIA (PTY) LTD* AND THE LAND REFORM CRISIS

*by Nonhlelo Nhleko**

1 Introduction

Race axiomatically remains a pervasive force in moulding South African society in the new constitutional dispensation.[1] South Africa's 'metamorphosis' in 1994 from an unequal and deeply segregated society into a society premised upon the centrality of rights to human dignity, equality and freedom for all South Africans gave rise to a deep international reverence.[2] Blindsided by the assurance of a rainbow dream directed towards equal and democratic trajectories, this reverence has engendered jurisprudential complacency within post-apartheid legal discourse through a failure to critique the *status quo* of racial inequality. Thus, law arguably plays an intrinsic role in diffusing racial inequality through the guise of rationality and neutrality and through the universalisation of western ontologies.[3]

In this paper, I critique the manner in which law rationalises Black subordination and white supremacy through its assumption of racial neutrality and ontological equality.[4] I seek to postulate the need for a culture of critique within South African jurisprudence and further challenge hegemonic liberal notions of 'justice' and the existing 'reconciliation' discourse. The calls for a 'race conscious' and general jurisprudence shall be advanced through the epistemological paradigm of Critical Race Theory which offers a politicised account of the law through the acknowledgment of the centrality of race in law and through debunking claims of law's neutrality and objectivity.[5]

* Third year LLB Student, University of Pretoria.

1 J Modiri 'The colour of law, power and knowledge: Introducing critical race theory in (post-)apartheid South Africa' (2011) 28 *South African Journal on Human Rights* 406.

2 Sec 1 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

3 Modiri (n 1 above) 408.

4 Modiri (n 1 above) 406.

5 P Williams 'Alchemical notes: Reconstructing ideals from deconstructed rights' (1987) 22 *Harvard Civil RightsCivil Liberties Law Review* 414.

I argue that South Africa's new democratic constitutional dispensation and the Truth and Reconciliation Commission (TRC) ushered in a new era of liberalism. Such liberalism is best encapsulated by the 'rainbow nation' ideal premised upon the colour-blind approach which is implied in the refusal to adopt a radical account of race in the Constitution.[6] The affirmation of equality fails to take into account historical racial oppression and exploitation of Black South Africans thereby preserving colonial-apartheid racial power imbalances. At present, the restricted gaze adopted in legal discourse fails to take into cognisance the fundamental role law plays in racial stratification through the preservation of white supremacy. To advance this argument and to posit the often neglected Black experience in legal discourse, I will further draw from *ubuntu* in African jurisprudence and Black Consciousness.[7] In keeping with the interdisciplinary approach employed in Critical Race Theory and its insistence on social and historical context, I will reflect on JM Coetzee's *Disgrace* which illustrates the centrality of race in post-apartheid South Africa and which offers an exposition of the reconciliation project embarked upon by the TRC.

The point of departure for this paper is the manner with which the TRC laid the foundation for unfounded liberal optimism. Consequently, in part two, I aver that such liberal optimism gave rise to jurisprudential complacency through the failure to challenge the *status quo* of racial inequality. In part three, I reflect on contemporary jurisprudence and argue that the principle of universal equality and the implied colour-blind approach advanced in the Constitution, through the unfaltering affirmation of equality in the absence of factual racial equality is detrimental to the plights of Black South Africans and has, arguably, failed to provide substantive social and economic justice.[8] To reinforce this argument, I will critically evaluate the manner in which law continues to conceal asymmetrical racial relations through the guise of neutrality by means of an analysis of *Cliff v Electronic Media Network (Pty) Ltd*.[9] The highly contentious *Cliff* judgment poignantly illustrates the role of law in diffusing racial inequality through the guise of rationality and neutrality. I further problematise the failure of the Restitution of Land Rights Act[10] to adequately address the historical dispossession of Black South

6 J Modiri 'Towards a "(post-)Apartheid" jurisprudence: "Divining our racial themes"' (2012) 18 *Potchefstroomse Elektroniese Regsblad* 245.

7 S Biko *I write what I like* (1987) 76. Biko reinforces the notion that Blacks must reify their culture in a manner that thwarts its distortion through the universalisation of western ontologies. Biko stresses that in redefining Black history, Blacks can begin to view themselves with a sense of pride thereby countering racist social discourses regarding people of colour.

8 M Ramose 'Reconciliation and reconfiliation in South Africa' (2012) 5 *Journal on African Philosophy* 29.

9 2016 (2) All SA 102 (GJ).

10 Restitution of Land Rights Act 22 of 1994.

Africans.[11] To shed light on arguments pertaining to the *Cliff* judgment and land reform advanced in this paper, I will discuss ancillary matters aimed at uncovering jurisprudential complacency within legal discourse by means of an analysis of the constitutional project and the TRC. Lastly, in part four, I reflect on what contemporary jurisprudence ought to be and thereafter elaborate on the significance of adopting a race conscious jurisprudence.

2 Justice denied — The Truth and Reconciliation Commission

The TRC, although defective, irrefutably facilitated engagement between the victims and perpetrators of gross human rights violations engendered under the apartheid regime. Albie Sachs' contention that the TRC successfully discharged its statutory mandate is not free from criticism.[12] The use of the Promotion of National Unity and Reconciliation Act[13] to effect reconciliation resulted in the exploitation of Black people through the failure to grant redress for the grand scale dispossession effected by means of colonialism and apartheid.[14]

Both Mogobe Ramose and Mahmood Mamdani contend that the TRC's failure to tackle the issue of land reform was problematic in that it delegitimised the role of the TRC.[15] The views of Sachs, Ramose and Mamdani as to the success of the TRC can be juxtaposed within the historical nexus between race and law. As a judge and as a white man, Sachs' optimism in the role of the TRC and that it successfully facilitated national reconciliation emanates from his confidence in law. For white people, the law has always embodied a historical symbol of empowerment.[16] Blacks, however, view the law

11 M Ramose 'An African perspective on justice and race' (2001) 3 *Polylog: Forum for Intercultural Philosophy* 1.

12 A Sachs *The strange alchemy of life and law* (2009) 71. Further see JM Coetzee *Disgrace* (2000) 47-55. Coetzee gives an allegorical exposition of the TRC as a means of unveiling the shortcomings of the TRC in its effort to facilitate reconciliation in South Africa. Coetzee, through allegory, uncovers the contradictions in TRC proceedings through disciplinary proceedings instituted against the protagonist of the novel, David Lurie. The chairman of the inquiry demands Lurie to express repentance notwithstanding repentance not being a requirement for absolution.

13 Promotion of National Unity and Reconciliation Act 34 of 1995.

14 Ramose (n 8 above) 25. Further see M Mamdani 'The diminished truth' in W James & L van der Vijver (eds) *After the TRC: Reflections on truth and reconciliation in South Africa* (2001) 59 & 60.

15 Ramose (n 8 above) 29. See also Mamdani (n 14 above) 61. It must be emphasised that Ramose and Mamdani's views on 'land reform' differ slightly. Ramose speaks of 'land reform' in the context of returning the sovereign right of title to land to the conquered indigenous people of South Africa whereas Mamdani's notion of 'land reform' extends to all Black South Africans. Both Ramose and Mamdani nevertheless critique the legitimacy of the TRC.

16 Williams (n 5 above) 404-405.

with distrust and scepticism as a result of their lived experience of law as disempowering and as exploitative.[17]

The TRC, premised upon the 'rainbow nation' dream, concretised the precedent that Black South Africans ought to take the moral high ground in the pursuit of justice through the granting of amnesty to perpetrators of heinous hate crimes and through the sacrifice of material justice in exchange for peace and reconciliation. Thus, the TRC purported to effect reconciliation through a complete obliteration of substantive justice.[18] Even in present day South Africa, the precedent set by the TRC's reconciliation project produces an inarticulate premise in the broader white community that Blacks ought to demonstrate peacefully so as to address issues surrounding transformation and historical justice. Where Black people embark on violent protest, as in the case of the student-led Afrikaans Must Fall Movement in South African universities, the manner in which they express their grievances is censured.[19] The TRC, thus gave birth to a tension between Black and white South Africans that has, arguably, stifled true reconciliation.

Evidently, the TRC placed an emphasis on the interests of the perpetrators of gross human rights violations and neglected the interests of Black South Africans through the blatant disregard of the critical issue of substantive justice. In *Disgrace*, Coetzee arguably critiques this fatal flaw in his presentation of an allegorical exposition of the TRC.[20] In *Disgrace*, the protagonist David Lurie, a lecturer at Cape Technical University, is called before a disciplinary hearing for the alleged sexual harassment of his student. During the hearing, the members of the panel go to extraordinary lengths to ensure that Lurie retains his position as a lecturer so as to grant him absolution.[21] Parallels can be drawn between the TRC and *Disgrace*. As a means to engender a state of national catharsis, Black interests pertaining to land reform were neglected in order to safeguard white property ownership. Thus, both the TRC and *Disgrace* illustrate a tendency of privileging beneficiaries of injustice as opposed to focusing on the victims of injustice.

The dubious inclusion of *ubuntu* in the epilogue of the Interim Constitution as a premise for the establishment of the TRC is an additional aspect that warrants critical analysis. *Ubuntu* served as a moral justification to appeal to the Black majority not to strive for

17 As above.
18 Ramose (note 8 above) 21.
19 See S Mqadi 'Violent protests over language policy spark national debate' http://www.capetalk.co.za/articles/11786/violent-protests-over-language-policies-spark-national-debate (accessed 14 May 2016); K Ngoepe 'Students clash over Tuks language policy' http://www.news24.com/SouthAfrica/News/students-clash-over-tuks-language-policy-20160218 (accessed 14 May 2016).
20 Coetzee (n 12 above) 47-55.
21 Coetzee (n 12 above) 58.

vengeance and retribution in the quest for justice.[22] The notion of restorative justice and *ubuntu* in the Interim Constitution and TRC proceedings for such purpose engendered belief that the abandonment of substantive justice was the sole means for the attainment racial cohesion. The misuse of *ubuntu* subtly endorses liberal reconciliation discourses for the alignment of Black reaction regarding the injustices of apartheid with interests of white property ownership. *Ubuntu* therefore serves as a persuasive tool that is utilised as a means of eliminating justice and revenge and inducing Black acceptance of the unjust appropriation of the Black right of the sovereign title to land. This inadvertently demonstrates the utilisation of power as form of governmentality.[23] Arguably, the employment of *ubuntu*, in this regard, is problematic and exposes systemic exploitation and opportunism to the extent that it occasions an annihilation of historical justice for the Black majority.

It is further pertinent to question the choice to utilise *ubuntu* to suppress retribution whereas *ubuntu* could be employed, in a similar fashion, to appeal to white beneficiaries to restore land to its legitimate owners. Ramose raises the African jurisprudential principle '*molato ga o bole*' — reinforcing the notion of justice as reparation in that justice necessitates tangible transformation through redress for past transgressions.[24] Consequently, the improper use of *ubuntu* in legal discourse reveals the law's complicity in the hindrance of the attainment of justice for Blacks.

3 Jurisprudence as it is

3.1 The Constitutional Project

The enactment of the 1996 Constitution was met with much international acclaim. It is patent that 22 years since the advent of democracy, South Africa's liberal constitutional project leaves much room for critique. For the purposes of this paper, I confine this discussion to the liberal tenets of neutrality, equality, and non-racialism endorsed in section 1 of the Constitution.[25]

The premise of a nominally inclusive colour-blind society, as embodied in the Constitution, can be criticised as it suggests oblivion to systemic disadvantage encountered by Blacks in South African society.[26] The colour-blind approach, with its insistence on

22 Ramose (n 8 above) 31.
23 S Veitch 'Law in modernity' in E Christodoulidis *et al* (eds) *Jurisprudence: Themes and concepts* (2012) 268.
24 Ramose (note 8 above) 23.
25 S Friedman 'The ambiguous legacy of liberalism: Less a theory, more a state of mind' in P Vale *et al* (eds) *Intellectual traditions in South Africa: Ideals, individuals and institutions* (2014) 40.

meritocracy, disregards the manner with which law preserves white domination and Black subordination and the manner with which law is normatively orientated towards the protection of white privilege.[27] Colour-blindness portrays racial social dilemmas, such as poverty, as attributable to a lack of ambition. Hence, the centrality of the liberal assumption of colour-blindness endorsed in the South African Constitution engenders a climate that subdues prospects of substantive socio-economic transformation and, by implication, reconciliation.[28]

The claim of the neutrality of law, particularly within the South African context, is untenable and incongruous with the asymmetrical wealth and income divide, manifest racial inequality, poverty, unemployment, lack of access to education and basic amenities for the overwhelming Black majority.[29] Critically assessed, this asymmetry constitutes a function of the operation of law. The average income attributable to Black households remains a sixth of that of white households notwithstanding the liberal assumption that the individual is vested with the unrestrained capacity to effect his own economic advancement and is the master of his own fate.[30] This exposes the myriad of contradictions within the South African liberal tradition.[31] Such liberalism is a 'racial liberalism' which in reality bestows rights and effects justice in accordance with racial categories.[32] Consequently, instead of engendering the much needed transformation it purportedly seeks to engender within society, the South African liberal tradition is complicit in preserving the *status quo* in favour of what Ramose describes as the white 'economic sovereign' who continue to wield vast social and economic power.[33]

3.2 The (un)conscientious judge

In a racialised society, racism remains an issue at the centre of public debate. Central to this debate are the unsurprisingly banal arguments of freedom of speech as opposed to hate speech. In the *Cliff* case, popular *Idols* judge Gareth Cliff was dismissed from his role as a judge and condemned for condoning racist comments which made reference

26 Modiri (n 6 above) 245.
27 Modiri (n 6 above) 233.
28 Modiri (n 6 above) 245.
29 K Crenshaw 'Race, reform, and retrenchment: Transformation and legitimation in antidiscrimination law' in K Crenshaw *et al* (eds) *Critical race theory: The key writings that formed the movement* (1996) 106. See also Modiri (n 6 above) 231.
30 Statistics South Africa 'Census 2011' http://www.statssa.gov.za/?page_id=3839 (accessed 10 May 2016). Further see Friedman (n 25 above) 33.
31 Friedman (n 25 above) 34 & 46.
32 C Mills 'Racial liberalism' (2008) 123 *Publications of the Modern Language Association of America* 1382.
33 See ITV Networks 'Finding me s02 ep22 with Professor MB Ramose' June 2014 https://www.youtube.com/watch?v=hBkRZAGAmp4 (accessed 10 May 2016).

to 'Blacks as monkeys' under the premise that such comments amounted to 'free speech'.[34] Befitting of the South African judiciary's formalistic legal culture, Judge Nicholls dispelled suggestions that the case before the court pertained to race or racism.[35] The court underscored that the matter before the court was purely one of contract.[36] The court further granted Cliff an urgent interdict reinstating him in his position on the basis that the prejudice suffered by Cliff and his brand would be substantial.[37]

The court's disregard for the racial essence of the *Cliff* case was baffling having regard to the manner with which the case was intrinsic to the debate on racism and the project of reconciliation in South Africa. In his seminal paper on *Legal Culture and Transformative Constitutionalism*, Klare calls for the transformation of South African legal culture so as to enliven the text of the Constitution as a means of convening a process of true socio-political and economic transformation.[38] Klare notes that the 'conscientious judge' approaches interpretation in a tactical and prudent manner so as to engender social justice, not through disregard for law texts, but through stretching legal texts to give effect to the democratic underpinnings of the Constitution.[39]

It is commonplace in South African adjudication that judges decline to step into the realm of the political.[40] This election is rooted in positivist assumptions advanced in legal discourse that judges perform an unmalleable interpretive function.[41] Notwithstanding the shift to a democratic constitutional dispensation wherein judges are mandated to adopt a holistic approach towards interpretation, adjudicators, as evident in the *Cliff* case, have often time failed to rise to the occasion.[42]

Klare rightly stresses that the failure to take into cognisance the politics of law is itself political.[43] It could be argued that the mechanical approach utilised in *Cliff* was employed as a means to conceal the 'inarticulate premise' of the denial of white racism that is rampant in legal discourse.[44] In South Africa, race, has constituted

34 *Cliff* (n 9 above) para 9. See also N Shange & P Herman 'Angry Twitter mob hijacked racism debate-Gareth Cliff' http://www.news24.com/SouthAfrica/News/racism-debate-hijacked-by-angry-twitter-mob-gareth-cliff-20160107 (accessed 10 May 2016).
35 *Cliff* (n 9 above) para 3.
36 As above.
37 *Cliff* (n 9 above) paras 25-29.
38 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 149.
39 Klare (n 38 above) 148.
40 J Dugard 'The judicial process, positivism and civil liberty' (1981) 98 *South African Law Journal* 187 & 189.
41 Dugard (n 40 above) 182.
42 Dugard (n 40 above) 181.
43 Klare (n 38 above) 163.
44 Dugard (n 40 above) 189 & 190-191.

the rationale for apartheid and severe racial discrimination and exclusion yet there are often attempts to suppress the pervasiveness with which it defines South African society. Thus, one could problematise the court's apathy in *Cliff* through its failure to address the racial overtones of the case. The court's holding in *Cliff* illustrates the manner with which law operates as ideology and as an instrument of concealment through its indifference towards the methods with which law perpetuates racist ideology and advances the preservation of white hegemony.[45] Judicial disregard of the debate on racism is problematic as it supresses prospects for inter-racial dialogue that could lay a solid foundation for true reconciliation.

3.3 Justice as atonement

Conflicting stances regarding the ideal approach towards land reform in South Africa is possibly the most racially polarising issue.[46] A study on land reform reported that 85 percent of the Black respondents therein viewed the dispossession of land as unlawful, rejecting the stance that whites have a legitimate claim to such land. A mere 8 percent of the white respondents were of the same opinion. In the same study, 66 percent of the Black respondents were of the opinion that land should be restored to its legitimate owners irrespective of the ramifications whereas 9 percent of the white respondents held the same opinion.[47]

It is, thus, marked that the ideal approach towards land redistribution can only be discerned once there is consensus that land dispossession occasioned by virtue of draconian apartheid legislation and colonialism was a grave moral injustice.[48] Consensus regarding the issue of land reform is conceivably a practicable conduit for true reconciliation. For Sachs, reconciliation demands the transmutation of 'knowledge into acknowledgment'.[49] Ramose arguably alludes to the translation of 'knowledge into acknowledgement' where he refers to the 'epiphany of the face' which presupposes an acknowledgement and internalisation of the plights of the other.[50] Consequently, there exists an exigent demand, not merely for ostensible cognisance of the atrocities perpetrated under apartheid, but for an internalisation and cogitation by white South Africans of the dehumanising essence of apartheid ideology.[51] Such internalisation will, in turn, foster meaningful societal transformation. The exclusion of the Black claim to land continues to engender devastating consequences for Black

45 Veitch (n 23 above) 223.
46 EM Letsoalo *Land reform in South Africa: A black perspective* (1987) 1.
47 B Atuahene 'Paying for the past: Redressing the issue of land dispossession in South Africa' (2011) 45 *Law and Society Review* 956.
48 Letsoalo (n 46 above) 1.
49 Sachs (n 12 above) 79.
50 Ramose (n 8 above) 36.

South Africans. The recent Hammanskraal evictions of vulnerable and destitute Blacks reaffirms the intrinsic role played by law in the legitimation of the condition of landlessness of Black people in South Africa and underscores the urgent need for the remediation of land dispossession to safeguard political stability and to restore the inherent dignity of Black people.[52]

The enactment of section 25 of the Constitution and the Restitution of Land Rights Act to facilitate the process of land reform has been unduly heralded as a milestone in the quest of historical justice.[53] Both pieces of legislation purport to empower the state to initiate land redistribution and grant reparation as a means of remediating the legacy of exploitation and oppression occasioned by apartheid.[54] Notwithstanding legislative measures and a 'Black led' government, the ineffectuality of the land redistribution programme has been the cause of much discontent. It is conspicuous that the enactment of ostensibly 'landmark' laws and Black rule, though symbolic, cannot exclusively engender racial equality. The indeterminacy of legal texts connotes that innumerable connotations can be attributed to legal texts.[55] Considering that laws are a mere embodiment of the convictions of the dominant groups in society, law serves to preserve white supremacy and Black subordination. Substantive justice and transformation will, therefore, materialise upon the dismantling of institutions culpable for reproducing white supremacy and systemic advantage and disadvantage for whites and Blacks respectively. The process of deconstruction can, arguably, only be realised through the development of a race conscious jurisprudence that candidly acknowledges the interconnection between race and historical injustices such as land theft.

The enactment of section 25 of the Constitution and the Restitution of Land Rights Act was conceivably motivated by efforts to give effect to the 'negotiated' settlement agreed upon to effect a smooth transition into a new democratic constitutional dispensation.[56] Therefore, I argue that the prospects of the success of the project of land reform have always been marginal in that the land reform project is premised upon the protection of white interests of

51 C Douzinas & A Gearey *Critical jurisprudence: The political philosophy* (2005) 42. Douzinas & Gearey eloquently echo the calls of Sachs of Ramose for emotional encounters with those around us when they make reference to 'a communism of the heart'.

52 G Whittles 'Hammanskraal evictions: "There was war here"' http://mg.co.za/article/2016-05-27-00-hammanskraal-evictions-there-was-war-here/ (accessed 30 May 2016).

53 Atuahene (n 47 above) 986.

54 See sec 25(5) of the Constitution. See also the Restitution of Land Rights Act (n 10 above).

55 W Le Roux & K van Marle 'Critical legal studies' in CJ Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 251. Further see K van Marle 'Reflections on teaching critical race theory at South African universities/ law faculties' (2001) 12 *Stellenbosch Law Review* 89. See also Modiri (n 1 above) 417.

ownership. This is evident in the protracted nature with which the Constitution provides for the protection of ownership.[57] Section 25 goes further to entrench the right to compensation for landowners in the event that the right of ownership cannot be safeguarded by the state.[58] As early as colonialism, Blacks were forcibly removed from their land yet the Restitution of Land Rights Act confines the lodgement of claims to periods not preceding 1913. Thus, both the Constitution and Restitution of Land Rights Act, through periodic restraint and through grant of compensation to white beneficiaries who obtained a 'valid' title to land acquired through dispossession, embody a legitimation of the dehumanising act of land theft.

The land question is South Africa is irrefutably intricate, necessitating regard for economic, social and political considerations.[59] Quintessential to the substantial value placed on liberal tenets of possessive individualism, the approach towards land reform has largely centred on the economic to the detriment of social and political considerations.[60] Crucial to *ubuntu* in African jurisprudence is the centrality of communalism and the notion that being necessitates transcendence beyond the individual.[61] Thus, the imposition of western ontologies of individualism in an African society premised predominantly upon African knowledges and understandings of being is problematic in that it negates the African experience, rendering efforts of land reform futile. *Ubuntu* presupposes symmetry between the needs of the dead, the ancestors and future generations and rejects the emphasis placed on the centrality of the needs and interests of the individual.[62]

Furthermore, the unjust dispossession of territory and land during colonialism and apartheid was premised upon the denial of Black personhood as indigenous people were deemed to be irrational beings, capable of being 'legitimately' conquered.[63] As such, reclaiming the sovereign title to land by Blacks is synonymous with

56 V Gumede 'Land reform in post-apartheid South Africa: Should South Africa follow Zimbabwe's footsteps?' (2014) 9 *International Journal of African Renaissance Studies - Multi- Inter- and Transdisciplinarity* 58.
57 Sec 25 of the Constitution.
58 Secs 25(2) & (3) of the Constitution.
59 A England 'Brilliant analysis: Zimbabwe ruin looms large as SA land reform kicks into gear' http://www.biznews.com/undictated/2015/02/24/brilliant-analysis-zimbabwean-ruin-looms-large-as-sa-land-reform-kicks-into-gear/ (accessed 30 May 2016).
60 Friedman (n 25 above) 33.
61 JY Makgoro '*Ubuntu* and the law in South Africa' (1998) 1 *Potchefstroom Electronic Law Journal* 317. See Douzinas & Gearey (n 51 above) 42. Douzinas & Gearey, although writing from a context divergent from African Jurisprudence, capture the essence of communalism through their conception of 'a communism of the heart'.
62 Ramose (n 11 above) 1.
63 M Ramose 'I conquer, therefore I am the sovereign: Reflections upon sovereignty, constitutionalism, and democracy in Zimbabwe and South Africa' in PH Coetzee & AJP Roux (eds) *The African Philosophy Reader* (2003) 544 & 559-560.

reaffirmation of Black personhood and their innate dignity. Therefore, I argue that there needs to be multilingualism in the manner with which we approach land reform. Multilingualism will, in turn, ensure that the process of land reform does not exclusively safeguard white interest but that it takes Black interests into account thereby stimulating an environment conducive to the attainment of racial cohesion.

4 Jurisprudence as it ought to be – redefining 'black'

> 'I look after the dogs and I work in the garden. Yes.' Petrus gives a broad smile. 'I am the gardener and the dog-man.' He reflects for a moment. 'The dog-man,' he repeats, savouring the phrase.[64]

Historically, race has been utilised as a means of cementing hierarchical social relations along racial lines and as a tool to engender racial fragmentation. In spite of the entrenchment of the right to equality for all before the law, racial inequality oxymoronically remains a reality in the experiences of Black South Africans. The term 'Black' remains inextricably associated with, *inter alia* — poverty, violence and crime. The racist portrayal of Black characters in *Disgrace* is reminiscent of the prejudices often attributed to Blackness. Black characters in *Disgrace* are depicted as violent, immoral and as lacking of a quality of humanness.[65] JM Coetzee's portrayal of Blacks in *Disgrace* sparked lively debate centred on race and racism after the African National Congress lodged submissions to the Human Rights Commission Hearings on Race and Media subsequent to its publication, branding Coetzee's novel as racist.[66] For the purposes of this discussion, I reflect briefly on the character of Petrus. It is strikingly symbolic that the character of Petrus is introduced as the 'dog-man' and remains closely connected with imagery pertaining to dogs throughout the novel. This depiction is problematic in that it feeds into the narrative of the Black man as a *pariah* — subhuman and subservient. This understanding of the term 'Black' remains as rampant in South African legal discourse as in social discourses.

It is, thus, fundamental that we develop critical race perspectives that counter and uncover systemic racism. Steve Biko echoes the calls

64 Coetzee (n 12 above) 64.

65 I refer to the rape of Lucy Lurie, the daughter of David Lurie, by three young Black men and the connivance with which the Black community in *Disgrace* deliberately conceals the identity of Lucy's rapists. This is suggestive of the moral deficiency of Black communities.

66 African National Congress 'ANC submission to the Human Rights Commission Hearings on Racism in the Media' 5 http://www.anc.org.za/show.php?id=2674 (accessed 1 June 2016).

for race consciousness through the ideology of 'Black Consciousness' which centres upon the idea that the mental emancipation of the Black man is essential to the attainment of *de facto* liberation.[67] Biko avers that Blacks must reify their culture in a manner that thwarts its distortion through the imposition of western understandings of the term 'Black'. Biko stresses that in redefining Black history, Blacks can begin to view themselves with a sense of pride.[68] Biko, thus, calls for a grand-scale Black affirmation of Black personhood as well Black self-restoration of the dignity stripped away by dehumanising apartheid rule.

Echoing Biko, I argue for the embracement of a race conscious jurisprudence that will engender a culture that is antagonistic towards institutions that perpetuate racist ideology. In my critique of jurisprudence, I do not advocate for a renunciation of law but, rather, I argue that by 'looking to the bottom' and through the development of a race conscious jurisprudence premised upon critique, legal scholarship can convene a process of deconstruction of law so as to meaningfully transform Black lives.[69] Van Marle poignantly enunciates the power of thought and critique through reference to Hannah Arendt's observation that the 'banality of evil' is underpinned by the absence of introspection.[70] Thus, in this paper, I assert that in post-apartheid jurisprudence, the critique of the nexus between race and law should take centre stage so as to pre-empt a recurrence of South Africa's devastating past.

5 Conclusion

Notwithstanding the shift from a racialised society into a society formally premised upon equality for all before the law, law remains complicit in the preservation of asymmetrical racial relations. In this paper, I have argued for a race conscious jurisprudence that may be conceivable through the uncovering of the role of law in maintaining the *status quo* of racial inequality concretised through colonialism and apartheid. I have further argued that through the adoption of a race conscious jurisprudence, Black and white South Africans can engender a climate that fosters candid reconciliation.

67 Biko (n 7 above) 29.
68 Biko (n 7 above) 76.
69 See M Matsuda 'Looking to the bottom: Critical legal studies and reparations' (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 324-326 & 330. Matsuda impressively asserts the importance and effectiveness of listening to the voices of people of colour (the voices of the 'other') in order to engage in the meaningful critique of law.
70 K van Marle 'Transformative constitutionalism as/ and critique' (2009) 2 *Stellenbosch Law Review* 287.

INTOLERABLE ACTS: AN ANALYSIS OF THE LAW RELATING TO ONLINE CHILD PORNOGRAPHY IN UGANDA

*by Rukundo Solomon**

1 Introduction

In recent years, Uganda has experienced considerable growth in the ICT sector. As of June 2015, the estimated number of Internet subscribers was 6 179 698 and internet users were 12 986 216.[1] By 2014 the RCDF had financed the setup of 76 Internet Points of Presence, 106 internet cafes and 78 Multi-Purpose Community Tele-centres, 78 District web portals, 708 School ICT laboratories, and provided internet connectivity to over 300 projects across the country.[2] In Uganda computers are beginning to form an integral part of the social and economic life of the people. Computer based social media such as Facebook, WhatsApp and Twitter are increasingly getting more subscribers in Uganda, many of them being children.[3] Internet penetration and legitimate usage has grown in tandem with internet abuses such as online child pornography. The risk of child sexual abuse in Uganda is considerably high with 77.7% of the primary school children and 82% of the secondary school students having experienced sexual abuse at school. 51% of victims were aged between 10 and 13 years, and 40.6% between 14 and 17.[4] In 2013 alone 399 children were reported to have been trafficked internally while 230 children were trafficked across borders.[5] It is in this already

* LLB (Hons) University of Dar es Salaam, Postgraduate Diploma in Legal Practice from the Law Development Centre in Uganda.

1 Ugandan Communications Commission, Annual Report 2014/2015.

2 The Rural Communications Development Fund (RCDF) run by the Uganda Communications Commission aims to ensure that quality communications services are accessed at affordable prices in rural and under-served areas: CIPESA 'State of Internet Freedoms in Uganda 2014: An Investigation into the Policies and Practices Defining Internet Freedom in Uganda' (2014).

3 R Kanyoro 'How social media has evolved in Uganda' http://www.monitor.co.ug/artsculture/Reviews/How-social-media-has-evolved-in-Uganda/-/691232/2771872/-/15q1foh/-/index.html (accessed 5 February 2016).

4 The study was conducted by Winsor Consult LTD between 2011 and 2012. The sample was 40 primary schools and 10 secondary schools in 8 districts across 4 regions of Uganda: Government of Uganda, Ministry of Education and Sports 'Assessing child protection, safety & security issues for children in Ugandan primary and secondary schools' (July 2013).

5 Government of Uganda, Ministry of Internal Affairs 'Annual Report on the Trend of Trafficking in Persons in Uganda: 2013' (2014).

volatile environment that the internet appears as a catalyst for child abuse.

The availability and distribution of child pornography through the internet has been a social concern since the mid-1990s, when paedophiles started using this medium to share sexually explicit content to such an extent that one member of the Ugandan Parliament called it 'the most powerful instrument for the paedophiles.'[6] The making, viewing and distribution of child pornography takes place within a subculture[7] that operates outside any particular state or legal jurisdiction and represents a new pattern of globalised crime and deviance.[8] The increasingly cheaper accessibility of the internet has made pornography in general more readily available in Uganda, making computer-based pornography a significant crime.[9] In the past, it was generally only family members or trusted friends, or perhaps clergy or teachers, who had private access to children. Now, the internet enables virtually anyone to communicate privately with children in their homes. Ironically, parents concerned about threats from 'strangers' may erroneously believe that their children are safer inside the home and on the computer.[10] While a search on 'child pornography' on a web search engine, such as Google, would normally only produce sites campaigning against the availability of child pornography on the internet, child pornography thrives in channels devoted to it within the internet Relay Chat, ICQ environment and on peer to peer (P2P) file sharing systems[11] and can sometimes be found in 'spam' e-mails.[12]

6 Comments of Mr Awori in the Committee Stage of the Computer Misuse Bill reported in the Uganda Parliament Hansard on Tuesday, 29 June 2010. A 1986 Report of the US Senate Permanent Subcommittee on Investigations on Child Pornography and Paedophilia stated, 'no single characteristic of paedophilia is more pervasive than the obsession with child pornography' cited in J Clough *Principles of cybercrime* (2010) 5.

7 M Taylor & E Quayle *Child pornography: An internet crime* (2003) 126.

8 P Jenkins *Beyond tolerance: Child pornography on the internet* (2001) 5.

9 G Kamali 'Pornography exported to Uganda' http://www.newvision.co.ug/new_vision/news/1060278/-eur-pornography-exported-uganda-eur (accessed 31 January 2016); Uganda Law Reform Commission, 'A Study Report on Electronic Transactions Law' (2004) para 5.8(g).

10 Clough (n 6 above) 332; Increasingly children in Uganda are getting onto Social Networking sites such as Facebook, Twitter etc. which leave them vulnerable; Internet Society Uganda Chapter 'Child online protection: An insight into legislation and practices in Uganda' http://internetsociety.ug/uganda-igf/reports/# (accessed 20 October 2016).

11 Y Akdeniz *Internet child pornography and the law: National and international responses* (2008) 7.

12 All Party Internet Group '"Spam": Report of an inquiry by the All Party Internet' para 21 https://www.cl.cam.ac.uk/~rnc1/APIG-report-spam.pdf (20 October 2016).

1.1 The foundations of the laws dealing with online child pornography in Uganda

In Uganda, the protection of children from pornography by parents, all citizens and the state, is mandated by the Constitution. Citizens have a duty to protect children from any form of abuse, harassment or ill treatment.[13] It is the duty of parents to care for and bring up their children in a safe environment.[14] Furthermore, under the Constitution, local laws and regional treaties, children are protected from social or economic exploitation and in particular activities that are harmful to their spiritual, moral or social development.[15] International law imposes the duty on the State to take all appropriate national, bilateral and multilateral measures to prevent the exploitative use of children in pornographic performances and materials.[16] The United Nations optional protocol on child pornography,[17] to which Uganda is party, requires states to take all necessary steps to strengthen international co-operation in the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving child pornography.[18] The African Charter on the Rights of the Child further requires Uganda to protect the child from all forms of sexual exploitation and sexual abuse, and in particular to take measures to prevent the use of children in pornographic activities, performances and materials.[19] The State's obligation to protect children from online sexual predators was noted by the European Court of Human Rights in *K.U. v Finland*,[20] where the Finnish government's failure to provide adequate legislative measures to facilitate investigations into child pornography was condemned by the court. In the South African case of *De Reuck v Director of Public Prosecutions*,[21] it was stated that child pornography is seen as an evil in all democratic societies and that its criminalisation was a legitimate object.

Section 23 of the Computer Misuse Act 2011 (CMA) prohibits child pornography imposing a fine of 7, 200 000 Uganda shillings (roughly

13 Art 17(1)(c) of the Constitution of the Republic of Uganda 1995 (the Constitution).
14 Art 31(4) of the Constitution.
15 Art 34(4) of the Constitution; sec 8 of the Children Act ch 59; art 15 of the African Charter on The Rights and Welfare of The Child OAU Doc. CAB/LEG/24.9/49 (1990).
16 Art 34 of The United Nations Convention on The Rights of The Child.
17 Uganda acceded to the United Nations' Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2002 on 30 November 2001: Akdeniz (n 11 above) 219; http://indicators.ohchr.org/ (accessed 06 January 2016).
18 Art 10(1) of the United Nations Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2002.
19 Art 27 of the African Charter on The Rights and Welfare of The Child OAU Doc. CAB/LEG/24.9/49 (1990).
20 (Application no. 2872/02) EctHR.
21 2004 (1) SA 406 (CC).

2000 US dollars) and or imprisonment for 15 years. The provision was restricted to *child* pornography so as to provide a special protection to children which would continue even if laws against adult pornography were ever relaxed.[22] This provision in the CMA compliments a number of other obscenity laws in the country. Section 3 of the Press and Journalist Act[23] prohibits the publication of pornographic matters and obscene publications insofar as they tend to offend or corrupt public morals. Section 3 of the Prevention of Trafficking in Persons Act[24] provides that anyone who recruits a person through force or coercion for the purpose of engaging that person in pornography commits an offence.[25] Section 14 of the Anti-Pornography Act 2014, passed after the CMA, criminalises the production, trafficking, publishing, broadcasting, procuring, importing, exporting or in any way abetting pornography depicting the images of children and imposes an even stiffer fine of fifteen million shillings (about 4500 US dollars).[26] Regulation 5 of The Employment (Employment of Children) Regulations[27] prohibits children from being employed in the worst forms of child labour and regulation 2 defines the worst forms of child labour to include production of pornography or pornographic performances and the use of the internet to spread child pornography.[28]

1.2 Definition of child pornography

It has been said that pornography is notoriously difficult to define, and child pornography no less so,[29] nonetheless the Parliament of Uganda has made at least two attempts at this.[30] Section 23(3) of the Computer Misuse Act defines child pornography as including pornographic material that depicts a child, a person appearing to be a child, and realistic images representing children, engaged in sexually suggestive or explicit conduct. This definition is a fairly broad

22 Parliament Hansard Tuesday, 29 June 2010. At the time the Act was passed, adult pornography was and still is illegal in Uganda.
23 Ch 105.
24 Prevention of Trafficking in Persons Act 7 of 2009.
25 Sec 3(4) of the Prevention of Trafficking in Persons Act provides that the consent of the victim of trafficking or if a child, the consent of his or her parents or guardians to the exploitation shall not be relevant.
26 Sec 14 of the Anti-Pornography Act.
27 SI 17 of 2012 (under secs 32, and 97 of the Employment Act 6 of 2006).
28 These are derived from the Convention concerning the International Labour Organisation Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour No.182 (1999): Government of Uganda, Ministry of Gender, Labour and Social Development, *National Child Labour Policy*, November 2006, para 1.1.3.
29 2004 (1) SA 406 (CC).
30 Computer Misuse Act 2 of 2011 and the Anti-Pornography Act 1 of 2014.

one capturing virtually any version of child pornography,[31] and is similar to the one contained in the Council of Europe Convention on Cybercrime.[32] The Anti Pornography Act, borrowing from the UN Convention,[33] defines child pornography as any representation through publication, exhibition, cinematography, indecent show, information technology or by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual enjoyment.[34] The definition in the Anti-Pornography Act was meant to be more comprehensive,[35] therefore the phrase 'any representation' could also cover textual material including cartoons, and drawings.[36] A child under Ugandan law is defined as any person below the age of 18.[37] This is in keeping with regional and international instruments.[38] In a recent ULRC study, the lowering of the age at which one ceases to be a child was vehemently rejected.[39] The Penal Code prohibits any sexual activity with a child; therefore consent of the child to the prohibited acts is irrelevant.[40]

31 In the initial Bill the phrase read '*visually* depicts' similar to that contained in the Convention on Cybercrime. However this was removed at Committee stage so as to make the provision wider capturing even audio depictions: Parliament Hansard Tuesday, 29 June 2010; United Nations Office On Drugs and Crime, Comprehensive Study on Cyber Security (2013) 101.

32 Art 10 of the Council of Europe Convention on Cybercrime European Treaty Series - No. 185 Budapest, 23.XI.2001 (Cybercrime Convention).

33 The United Nations' Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography which came into force on 18 January 2002 defines child pornography in art 2(c) as 'any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes'.

34 Sec 14(2) and sec 2 of the Anti-Pornography Act 2014.

35 During the passing of the Anti-Pornography Bill, the Chairperson, Committee on Legal and Parliament Affairs (Mr Stephen Tashobya) observed that there were some aspects of pornography control already covered in the legal regime prior to the Act but none of them comprehensively dealt with the vice. He cited as an example, the Computer Misuse Act 2 of 2011, catering for child pornography albeit not comprehensively: Parliament Hansard Tuesday, 19 December 2013.

36 *McEwen v Simmons* [2008] NSWSC 1292: Cartoon figures modelled on the children in an animated television series, 'The Simpsons', were engaged in sexual acts and this amounted to pornography.

37 Sec 2 of the Computer Misuse Act 2 of 2011; sec 2 of the Anti Pornography Act 1 of 2014.

38 Art 2 of the African Charter on The Rights and Welfare of The Child OAU Doc. CAB/LEG/24.9/49 (1990); Art 1 of the United Nations Convention on the Rights of the Child.

39 In a study conducted by the Uganda Law Reform Commission, the lowering of age of consent to below 18 years was opposed by medical practitioners with 60% of them advocating increasing it to 20 years. It was argued that below 18 years, a girl's pelvic bones are not fully developed. Early pregnancies can lead to rupture of the uterus, damage of the urinary tract and Vesico Vagina Fistula (VVF). In addition, a girl is likely to be psychologically immature and incapable of sustaining marital pressure: Uganda Law Reform Commission, 'Study Report on Marriage and Divorce in Uganda' (2000) 56 & 59.

40 Sec 129 of the Penal Code Act Cap 120; in *Uganda v Kusemererwa* (Criminal case no: HCT-01-CR-SC-0015-2014) (2015) UGHCCRD 12 (25 November 2015) it was stated that a child is incapable of giving consent to sex.

It should be noted that all these definitions cover both real depictions as well as realistic and simulated representations. Computer Generated Images (CGI), as well as images of real persons above the age of 18 who appear to be a child under the age of 18, would therefore fall under these definitions. The inclusion of real images i.e. images of real children in the definition of child pornography, is directly aimed at protecting children from sexual abuse and exploitation. The children involved in the making of the pornography may suffer physical and mental injuries, and violations of their rights to dignity and privacy, therefore the prohibition of the making of such material is legitimate.[41] There is an argument for criminalising the 'distribution' of CGI rather than their making, creation and possession as there is no evident direct harm perpetrated upon any children at the point of making of such pseudo-photographs.[42] However, the justification for the inclusion of simulated representations is the concern that they may be used by paedophiles to groom and lure children for sexual activity, or encourage children to participate in sexual activity.[43] This is in contrast to the US position where it has been held by the Supreme Court that CGIs of child pornography are protected by the Constitution's free speech provisions.[44] Chief Justice Rehnquist's dissenting opinion in that Supreme Court case is of note as he argued that rapidly advancing technology would soon make it very difficult, if not impossible, to distinguish between pornography made with actual children and pornography made with simulated images of children.[45] Therefore the prohibition of simulated images is the most suitable way to deal with the vice.

2 Child pornography offences

2.1 Production

Section 23(1) (a) of the CMA criminalises the production of child pornography for the purposes of its distribution through a computer. To produce child pornography, someone has to assault a child, or pose

41 *R v Land* (1999) QB 65, 'The object is to protect children from exploitation and degradation. Potential damage to the child occurs when he or she is posed or pictured indecently, and whenever such an event occurs the child is exploited.'
42 Clough (n 6 above) 263.
43 S Sternberg 'The Child Pornography Prevention Act of 1996 and the First Amendment: Virtual Antitheses' (2001) 69 *Fordham Law Review* 2783 (also see http://ir.lawnet.fordham.edu/flr/vol69/iss6/14); Cybercrime Convention, Explanatory Report, para 93.
44 *Ashcroft v Free Speech Coalition* 535 U.S. 234 (2002).
45 As above.

a child in a sexualised way, and then make a photographic record of it.[46] In the South African case of *Kleinhans v S,*[47] a 74-year-old businessman befriended the complainants' families over a period of five years by assisting with various expenses such as school fees, groceries, clothing expenses, tuition and by supplying them with gifts; in one case even going so far as to purchase a motor vehicle for one of the complainants when she was older. He fitted out an unoccupied house which he owned with gymnasium equipment, ostensibly for use by himself and the complainants in the evenings. In truth this was just a cover for his activities and to assist him in procuring the complainants to pose for the pornographic pictures. The house was also fitted out with photographic equipment. A neighbour became suspicious of his regular arrival in a motor vehicle at the house in the afternoons and evenings, accompanied by one or more young girls sometimes dressed in school uniforms, and notified the police. He was found in the house with one of the complainants (aged between 13 and 14) who eventually told a policewoman that there were pictures of her on a memory stick which was found hidden on his person. In the pictures she was either naked or only partially clothed in a variety of poses, many of them highly suggestive, exposing at different times her breasts, vagina, buttocks and also at times the inner portions of her vagina and anus. In certain photographs, vibrators were placed on or in her vagina. A total of 86 such photographs were found on a memory stick hidden on his person. He was convicted of producing child pornography. Similarly in *S v Stevens,*[48] the appellant removed the undergarments of the two young girls aged five years at the time while they were sleeping and took photographs with more active participation on their part, and in certain instances placing his finger on the vagina of the two young girls. Some 71 photographs of the children were taken. The photographs were not distributed and were used by the appellant only for his own sexual gratification. He was convicted and sentenced to 6 years imprisonment. Pornography can be produced even without the knowledge of the child as was the case in *M v S,*[49] where the 14-year-old complainant discovered that the appellant had installed a hidden video camera that could record images of her when using the bathroom and shower. Research has found that whether it is for private use or commercial distribution, a parent, guardian, or family friend is often responsible for the production of child pornography.[50]

46 Taylor & Quayle (n 7 above) 21.
47 *Kleinhans v S* 2014 (2) SACR 575 (WCC).
48 *S v Stevens* (CA&R54/07) [2007] ZAECHC 53 (22 June 2007).
49 2013 (2) SACR 111 (SCA).
50 Taylor & Quayle (n 7 above) 22.

Controversially, in the United Kingdom, it has been held that the mere downloading of child pornography can amount to 'making' it. In *R v Bowden*[51] Jonathan Bowden, a schoolteacher, downloaded photographs containing indecent images of young boys from the internet and printed out and stored them on computer discs for his personal use. He was charged with making an indecent photograph. The prosecution argued that a person who either downloaded images on to disc or who printed them was making them as the law was not only concerned with the original creation of the images, but also their proliferation. Therefore downloading or printing the images was to create new material. The Court of Appeal accepted this argument holding that the words 'to make' had to be given their natural and ordinary meaning which in this context, relying on the Oxford Dictionary, meant 'to cause to exist; to produce by action, to bring about.' This applied not only to original photographs but also to negatives, copies of photographs and data stored on a computer disc.[52] This interpretation was accepted by the same court in *R v Graham Westgarth Smith and Mike Jayson*[53] where the court stated that 'the act of voluntarily downloading an indecent image from a web page on to a computer screen is an act of making a photograph or pseudo-photograph.' If this interpretation is adopted in Uganda, then the mere downloading of child pornography would amount to producing it contrary to this sub section. This interpretation would be suitable bearing in mind that 'even the young inexperienced amateur who downloads one image for his or her personal gratification does a significant criminal act which adds to the scale of human misery because, if there was no market for these images children would not be degraded producing them.'[54]

2.2 Offers or Makes Available

Section 23(1) (b) of the CMA prohibits the offering or making available of child pornography through a computer. 'Offering' is intended to cover soliciting others to obtain child pornography, and implies that the person offering the material can actually provide it. 'Making available' includes publishing, showing and advertising.[55] 'Making available' is intended to cover the placing of child pornography on websites, and the use of hyperlinks to facilitate access to child

51 *R v Bowden* (2000) 2 All ER 418.
52 However, it appears that where the defendant is unaware that the download is taking place as is the case when files are automatically saved in the cache, there is no making involved: *Atkins & Goodland v Director of Public Prosecutions* (2000) 2 All ER 425.
53 *R v Graham Westgarth Smith and Mike Jayson* [2002] EWCA Crim 683.
54 *R v Toomer and others* [2001] 2 Cr App R(S) 30, Lexis UK CS 1705, para 6.
55 Clough (n 6 above) 287.

pornography.[56] This therefore covers websites and chat rooms where child pornography is made available. In *US v Rowe,*[57] the defendant posted in an internet chat room, known as 'preteen00,' showing the software program he used, the password needed to access the file server and that he had pictures of pre-teen boys and girls and that a person wishing to access the images would have to read the rules of use and upload an equivalent number of images to his computer. A search warrant was subsequently executed and 12,000 child pornographic images and videos were found on the defendant's computer. The court rejected the defendant's argument that the posting did not constitute an advertisement as it did not specifically refer to pornography, but rather only referred to pictures of prepubescent boys and girls. It was held that there was no doubt that the defendant's posting knowingly offered or sought images depicting minors engaged in sexually explicit conduct. Even a password protected website would still amount to making available. In *R v Fellows and Arnold*[58] it was held that placing material on the internet for downloading, even if it is subject to a password, was to 'publish' within the terms of the Obscene Publications Act 1959 (UK).

2.3 Distribution

Distribution or transmission of child pornography through a computer is prohibited by section 23(1) (c) of the CMA. 'Distribution' which involves the active dissemination of child pornography[59] is inapplicable to the process of downloading images where the recipient is the end-user.[60] It is, however, clearly applicable to the process of sending images over computer networks by e-mail or in chat rooms, and to the uploading of files onto bulletin boards.[61] A person is to be regarded as distributing child pornography if he parts with possession of it to, or exposes or offers it for acquisition by, another person. Thus sending pornography as an attachment to an e-mail message, or posting to a newsgroup, or publishing on a website, or making it available for sharing or download through a P2P (peer to peer) network would qualify as distribution.[62] Transmission ordinarily

56 Cybercrime Convention, Explanatory Report Para 95; *Universal City Studios v Reimerdes*, 111 F Supp 2d 294, 325 (SD NY 2000); *Universal Music Australia Pty Ltd v Cooper* (2005) 150 FCR 1 (Australia); A supporter of the hacker group Anonymous published DDoS (Distributed Denial of Service) cyber-attack links to UK Home Office and Home Secretary Theresa May websites on Twitter and was convicted; Stoke & Staffordshire 'Mark Johnson guilty of 'crippling' Home Office cyber-attack' http://www.bbc.com/news/uk-england-stoke-staffordshire-29958425 (accessed on 12 February 2016).

57 *US v Rowe* 414 F 3d 271 (2nd Cir 2005) (USA).

58 *R v Fellows and Arnold* (1997) 2 All ER 548 at 558–9.

59 Cybercrime Convention, Explanatory Report para 96.

60 Clough (n 6 above) 293.

61 As above.

62 Akdeniz (n 11 above) 7.

means to cause (a thing) to pass, go, or be conveyed to another person, place, or thing. The offence is therefore well suited to the sending of child pornography via a computer system, whether by uploading, e-mail, peer-to-peer or any other form of electronic communication.[63] In *R v Hyett*[64] the defendant admitted that she encouraged and instructed her daughter of 13 years of age to accede to the requests of a man to see her breasts through a chat room conversation despite her protests. The defendant and her partner were convicted of distributing an indecent photograph of a child.

2.4 Procuring

Section 23(1) (d) of the CMA criminalises the procuring of child pornography through a computer. The term 'procuring for oneself or for another' means actively obtaining child pornography, e.g. by downloading it.[65] Procuring includes: accessing, causing to transmit, receiving and requesting for child pornography.[66] This offence serves to compliment the possession offence in section 21(1)(e) as the traditional legal notions of possession may prove problematic in cyberspace due to concepts of physical custody and control which evolved in the context of tangible items.[67] An example of the possession offence's limitation is viewing a video online without deliberately storing it on the computer. In such circumstances actual possession may be difficult to prove though it is clearly established that the defendant did in fact view child pornography. Internet records, both on the defendant's computer and in the records of ISPs, may provide evidence that the defendant in fact accessed child pornography, irrespective of whether it was viewed, saved to disk or otherwise dealt with. Such conduct falls under 'procuring,' which is intended to deal with a person who actively obtains child pornography; for example, by downloading it, whether for himself or another.[68]

2.5 Possession

Section 23(1)(e) of the CMA states that a person who unlawfully possesses child pornography on a computer, commits an offence. The word 'unlawful' was added to cater for the possibility of legitimate possession such as law enforcement, research and genuine scientific purposes.[69] A defendant may be in possession of an item in one of two

63 Clough (n 6 above) 294.
64 *R v Hyett* (2001) EWCA CRIM 669.
65 Cybercrime Convention (n 59 above) para 97.
66 Clough (no 6 above) 296.
67 As above.
68 As above.
69 Parliament Hansard Tuesday, 29 June 2010.

ways. The first is the obvious one where the item is in the physical custody or control of the defendant. The second, also called '*de facto* custody,' is where the item is in a place where he may go, without physical bar, in order to obtain such manual possession.[70] An example of the first is in the US case of *US v Tucker*[71] where by means of forensic examination 27,000 images, an estimated 90–95 percent of which were child pornography, were recovered from the 'Internet Explorer' cache file and the temporary internet files in the computer hard drive's 'recycle bin.' Images had been viewed but the storage had been automatic and not necessarily deliberate. The defendant therefore denied being in possession of the images on the basis that he could not be found to be in possession of something which he didn't 'download, copy or intentionally store.' This argument was rejected as the defendant clearly exercised control over the images in a number of ways. He could enlarge or otherwise manipulate them, he could print and he could copy them. In particular, his control over the images automatically stored in the cache was illustrated by his practice of deleting them. However, in *Atkins & Goodland v DPP*[72] the offending images were contained in the cache memory of the defendant's machine but expert evidence was submitted which indicated that most computer users are unaware of the operation of the cache memory feature on their machines. It was held that the offence of possession was not committed unless the defendant knew that he had, or had once had, the photographs in his possession. Accordingly, an accused could not be convicted where, as in this case, he could not be shown to have been aware of the existence of a cache of photographs in the first place. De facto custody applies in situations where the defendant has hidden the pornography effectively so that he can take it into his physical custody when he wishes and where others are unlikely to discover it except by accident.[73] It would apply to remote storage of digital files such as where the accused uploads material to a local server or ISP. Where the defendant is able to copy, delete or otherwise manipulate such files remotely, then he or she may be said to be in possession of those files, for example where the images are found on a website maintained by the defendant.[74]

Where the defendant has deleted an image, and believes it to have been removed from the computer, the fact that the defendant is mistaken, or that other people may be aware that such images may

70 Clough (no 6 above) 302.
71 *US v Tucker* 150 F Supp 2d 1263 (D Utah 2001).
72 *Atkins & Goodland v DPP* [2000] 2 All ER 425.
73 Clough (no 6 above) 310.
74 As above.

be recovered through technical means, is irrelevant to the subjective knowledge of the defendant.[75] In *R v Porter*[76] the defendant had been charged with possession in respect of some 3000 still images and 40 movie files. However, for the period in respect of which the charge related, it was conceded that the images and files had been deleted and were viewable only in thumbnail format, or were only present in the computer cache. The court held that if a person cannot retrieve or gain access to an image he no longer has custody or control of it and therefore can not be said to be in possession. However, a defendant could be found to remain in control of deleted files, where, due to his level of technical skill and possession of the necessary software, he can easily retrieve the files.

2.6 Unsolicited photographs

Where a photograph or pseudo-photograph is sent to the defendant without any prior request by him or on his behalf, this does not amount to production, procuring, or possession provided the defendant does not keep it for an unreasonable time.[77] The issue of reasonableness in a matter is decided on the facts of any individual case.[78] There are at least three new ways in which individuals might become unintentional recipients of child pornography in computer-based transactions: through unsolicited 'spam' e-mails, pop-up advertisements during legal internet searches,[79] and viruses.[80] Further, with a shared computer or e-mail account, images and files may be placed on a computer or e-mail account without the knowledge or consent of one of the users. Although the CMA does not have knowledge of the images as a *mens rea* requirement, courts have held that a *mens rea* requirement will be read into criminal statutes[81] and therefore a requirement that the defendant know that the images relate to child pornography can be presumed.[82] In *R v Graham Westgarth Smith & Mike Jayson*[83] it was held that a person is not

75 As above.
76 *R v Porter* [2006] EWCA Crim. 560.
77 Akdeniz (n 11 above) 37.
78 As above.
79 Akdeniz (n 11 above) 37; 'Within the context of the Internet, presumably, the courts would treat pop-up websites as unsolicited, and if certain websites trigger pop-up advertisements involving indecent images of children then this could be treated as unsolicited if there was no further intention to store the advertisement images by the suspect.'
80 In *United States v Miller* 527 F.3d 54 (3d Cir. 2008) the court relied on expert testimony to conclude that 'a person may come to knowingly possess a computer file without ever knowingly receiving it.' Cited in DM Rice 'Note: Child pornography, the internet, and the challenge of updating statutory terms' (2009) *122 Harvard Law Review* 2215-2216.
81 *Sweet v Parsley* [1970] AC 132; *Uganda v Dr. Richard Ndyomugyenyi & 2 others* (CR.SC 003 OF 2010) ((CR.SC 003 of 2010)) (2010) UGHC 49 (31 August 2010).
82 Rice (no 80 above) 2217.
83 *R v Graham Westgarth Smith & Mike Jayson* (2002) EWCA Crim. 683.

guilty of an offence of 'making' or 'being in possession' of an indecent photograph contained in an email attachment if, before he opens the attachment, he is unaware that it contains or is likely to contain an indecent image. Once he realises what the contents are, the defendant would have to delete the illicit files within a reasonable time. In *R. v Collier (Edward John)*[84] the defendant had in his possession tapes and CD-ROMs containing indecent images but maintained that he never suspected that the material would include indecent images of children. The court stated that it would seem wrong to penalise a person for having images which he proves that he has not seen when he also proves that he did not know or have reason to suspect that they were indecent images of a child. If the defendant proves that he had not seen the photograph and did not know and had no cause to suspect that it was an indecent photograph of a child, he must be acquitted of the possession offence.

2.7 Showing pornography to children

Section 23(2) of the CMA states that a person who makes available pornographic materials to a child commits an offence. This criminalises the showing of any kind of pornographic material to a child whether it involves adults or children.[85] This, as seen above, is in keeping with the Constitution that guarantees the protection of children from social exploitation that is harmful to their mental, spiritual, moral or social development.[86] It protects children from a form of online grooming[87] whereby they are shown pornography involving children to encourage them to participate in sexual behaviour at a young age. For example in the Canadian case of *R v VH*[88] the defendant used child pornography downloaded from the internet in an attempt to persuade his twelve-year-old daughter that incest was normal. In the South African case of *Botha v S*[89] the court noted that child pornography 'is potentially harmful because of the attitude to child sex that it fosters and the use to which it can be put in grooming children to engage in sexual conduct.' In *M v S*[90] the defendant showed pornography to the 14-year-old complainant prior to engaging in sexual acts with her. Finally in *Print Media South Africa and Another v Minister of Home Affairs and Another*[91] the

84 *R v Collier (Edward John)* (2004) EWCA Crim. 1411.
85 Parliament Hansard Tuesday, 29 June 2010.
86 Art 34(4) of the Constitution of the Republic of Uganda 1995.
87 This is the intentional proposal, through information and communication technologies, by an adult to meet a child for the purpose of committing an offence: United Nations Office On Drugs and Crime, Comprehensive Study on Cyber Security (n 31 above) 103.
88 *R v VH* (2001) 10 VR 234.
89 (A163/2014) (2015) ZAFSHC 34 (26 February 2015).
90 (657/12) (2013) ZASCA 43 (28 March 2013).
91 2012 (12) BCLR 1345 (CC).

Constitutional Court of South Africa held that protection of children from exposure to inappropriate materials was a legitimate object to be pursued by the state through her laws.

The provision, however, does not adequately cater for the initial stages of online child grooming which are less explicit. At its initial stage, grooming will involve socialisation through which an offender seeks to interact with a child, possibly sharing their hobbies and interests in an attempt to gain trust in order to prepare them for sexual abuse.[92] Social networking sites in particular may facilitate this process and children easily share information thereon.[93] The internet allows for an almost instant sense of intimacy between people who have never met. Some people will quickly tell a stranger very intimate thoughts as the fact that they are not physically near the person and cannot see him or her lowers inhibitions. Over time children or adolescents can come to believe that the person they have been communicating with actually cares about them.[94] Groomers often target vulnerable children lacking in confidence, with low self-esteem or who are emotionally deprived. The fact that some victims of child pornography may be willing participants does not make them any less of victims.[95] It is worth noting that a number of countries have created legislation that deals specifically with this practice.[96] An illustration of this practice in an offline environment is in the South African case of *Ravi v Chetty*[97] where a teacher graphically described certain sexual acts to a 13-year-old pupil then proceeded to sexually assault her.

2.8 Abetment

Section 21(1) of the CMA provides that one who abets another in committing an offence under the Act is treated as having committed that offence and is therefore liable on conviction to the punishment prescribed for the offence. This reiterates the provisions of section 19 the Penal Code Act[98] which provides that every person who aids or abets in the commission of an offence commits that offence.[99]

92 J Davidson 'Legislation and policy: Protecting young people, sentencing and managing, internet sex offenders' in J Davidson & G Peter (eds) *Internet child abuse: Current research and policy* (2011) 9.
93 T Jon 'Policing social networking sites and online grooming' in J Davidson & G Peter (eds) *Internet child abuse: Current research and policy* (2011) 127.
94 MM Ferraro *et al Investigating child exploitation and pornography: The internet, the law and forensic science* (2005) 55.
95 S Ost *Child pornography and sexual grooming: Legal and societal responses* (2009) 9.
96 The Sexual Offences Act (2003) in England and Wales, and Northern Ireland, the Protection of Children and Prevention of Sexual Offences Act (2005) in Scotland the Crimes Amendment Act (2005) in New Zealand include offences dealing with this. See Davidson (n 92 above) 3.
97 *Ravi v Chetty* Case No AR 377/2014 (South Africa).
98 Ch 120.

Abetment is where some assistance or encouragement is voluntarily done with the knowledge of the circumstances constituting the crime and it is irrelevant that the assistance was not given with the motive of encouraging the crime.[100] One can be convicted of abetting in the commission of an offence provided he had the necessary *mens rea* i.e. that he participated in the commission of the offence in the full knowledge that it was an offence.[101] In *The State v SV & FH* [102]one of the accused, the mother to the victim was convicted of assistance in the creation and production of child pornography. She recorded and participated in the sexual abuse of her daughter with her partner. However, where the offence was complete before the abetment, the abettor cannot be made liable under this section.[103] Therefore anyone who assists in the commission of any of the child pornography offences commits the same offence.

2.9 Attempts

Section 21(2) of the CMA provides that any person who attempts to commit any offence under the Act commits that offence and is liable on conviction to the punishment prescribed for the offence. An attempt is defined as when a person, intending to commit an offence, begins to put his or her intention into execution by means adapted to its fulfilment, and manifests his or her intention by some overt act, but does not fulfil his or her intention to such an extent as to commit the offence, he or she is deemed to attempt to commit the offence.[104] The circumstances preventing the commission of the offence are immaterial except for purposes of sentencing;[105] therefore a thwarted attempt; a failed attempt and an impossible attempt all fall foul of this section.[106] The definition of attempt in the CMA mirrors precisely that contained in the Penal Code Act.[107] In the law of attempts, the mental element is crucial: it is the intention of the actor that the substantive offence be committed which makes his conduct potentially dangerous and justifies the intervention of the criminal law before any concrete harm has been done. However, it is very important to remember that there is no liability for merely planning alone, to commit an offence. There must be an overt act for an accusation of attempt to succeed.[108] In other words, merely having

99 *Uganda v Kankiruho James & Another* (1996) I KALR 70 (HCCC) & *Kalange Steven v Uganda* (1996) VI KALR 107 (HCCR).
100 *Uganda v Mugenyi Godfrey & Another* (1994) II KALR 76 (HCCR).
101 *Ali Islam v Republic* [1967] 1 EA 246 (High Court of Tanzania at Dar-es-Salaam).
102 *The State v SV & FH* Case No. CC82/2014 (South Africa).
103 *Njoroge v Republic* [1969] 1 EA 17 (High Court of Kenya at Nairobi).
104 Sec 22(1) of the CMA.
105 Sec 22(2) of the CMA.
106 J Herring *Criminal law* (2011) 346.
107 Sec 386(1) of the Penal Code Act Ch 120.
108 Sec 22(1).

a desire to procure child pornography is not an offence. The accused must have gone a step further in his efforts to fulfil his wicked designs such as requesting for or attempting to download child pornography. The CMA only departs from the Penal Code by providing that one who attempts to commit an offence under the Act is liable on conviction to the punishment prescribed for the offence.[109] In effect, one who merely attempts to engage in a child pornography offence is treated as the same as one who in fact succeeds in doing the act. The severity of the punishment in relation to a mere attempt can be justified by the need for deterrence of computer related crimes.[110] Though not decided on the law of attempts, the Canadian case of *R v Daniels*[111] is instructive. In this case, the accused was downloading child pornography but terminated the download before it was complete. On the evidence, there was no doubt that the defendant was aware that he was ordering child pornography as he had to read a graphic description before proceeding to download. It was, however, impossible to establish how much of the image appeared on the defendant's screen, and none of the requested images were found on the defendant's computer. It was held that once the downloading had begun, absent some computer malfunction, Daniels had complete control in deciding how much of the image would be displayed on the computer screen. To be in possession of child pornography, it is not necessary for the individual to have viewed the material.

3 Liability of internet service providers

The main function of internet Service Providers (ISPs) is the commercial provision of internet access services such as dialup and broadband to the online users. It is not possible (especially for home users) to access the internet without the services of an ISP, and therefore the role of an ISP is crucial.[112] ISPs may be content providers themselves, offering content to customers ranging from small scale such as the provision of a web page with information relevant to their customers to creating and providing content for their customers such as news, sports and entertainment.[113]

Under the Electronic Transactions Act 2011 of Uganda, an ISP is not subject to civil or criminal liability in respect of third-party material to which it merely provides access.[114] The Act further states that an ISP is not liable for damage incurred by the user if the ISP does

109 Sec 21(2).
110 United Kingdom, Law Commission, Computer Misuse, Working Paper No. 110 (1988) para 2.15.
111 *R v Daniels (*2004) NLSCTD 27 (Supreme Court of Newfoundland and Labrador).
112 Akdeniz (n 11 above) 227.
113 As above.
114 Sec 29 of the Electronic Transactions Act 4 of 2011.

not have actual knowledge of the infringing material or circumstances from which the infringing activity is apparent and does not receive a financial benefit directly attributable to the infringing activity.[115] These provisions on their own would in effect immunise ISPs with respect to 'third-party content' that travels through their servers but not any material the ISPs develop or create entirely by themselves. However, although an ISP is not obliged to monitor the data which it transmits or stores,[116] it is obliged to remove or disable access to the reference or link to the data message or activity within a reasonable time after being alerted to it otherwise it loses its immunity.[117] The declared rationale for such an approach is that if ISPs were to be held liable for all content to which they provide access, then they would be less likely to offer such services, which would be to the detriment of the development of e-Commerce.[118] This is similar to the approach used in the US as seen in the case of *Doe v America Online, Inc*.[119] where America Online (AOL) faced criminal prosecution following allegations by the mother of an 11-year-old that AOL had created 'a home shopping network for paedophiles.' According to the lawsuit brought by the mother, one AOL subscriber, Ron Russell, allegedly used the service to sell images of sexual acts involving himself, her 11-year-old son and two other boys he had befriended. In its defence, AOL argued that all Doe's claims were barred by laws which stated that they were not liable for their content. It was held that AOL was not liable as making it liable would treat it as the publisher or of those communications. Second, it would subject AOL to principles of liability that govern traditional publishers (such as newspapers and magazines) but that do not govern entities (such as telephone companies) that provide a service over which numerous third parties may communicate with one another. Third, it would impose on AOL, as a matter of law, a standard of care that would require AOL to monitor, screen and censor the great volumes of information transmitted over its system by third parties which might not be practicable.

Section 29(2) of the CMA limits the immunity of the ISP stipulating that the ISP has an obligation which is imposed by law or a court to remove, block or deny access to any material. One such law is section 17 of the Anti Pornography Act which states that ISPs which do not use

115 Sec 30 of the Electronic Transactions Act.
116 Sec 32 of the Electronic Transactions Act.
117 Sec 30(d) of the Electronic Transactions Act.
118 Draft East African Framework for Cyber Laws (2008), para 2.1.5.
119 *Doe v America Online*, Inc. 25 Media L. Rep. (BNA) 2112; 1997 WL 374223 (Fla. Cir. Ct. 26 June 1997); Case No. 97-2587 (Fourth District Court of Appeal, Fla., 14 October 1998).

the procedures set by the Pornography Control Committee,[120] a body created under that Act, and thereby permit any pornographic content through the service are liable to a fine of ten million shillings or five years imprisonment. Therefore ISPs have the obligation of following the procedures established by the committee so as not to fall foul of this section.

4 Conclusion

As seen from the above analysis, the legal regime to combat online child pornography is, with a few shortfalls, largely adequate and efficient. However, there are some issues it does not address satisfactorily. For example, as discussed above, the provisions do not adequately cater for the initial stages of online child grooming. Further, the provisions clearly do not anticipate a scenario where children themselves voluntarily send images of themselves to each other, a practice popularly known as 'sexting'. This is a growing habit in some jurisdictions and ought to be addressed by the law.[121] As it stands now children engaging in sexting would be charged with the offence of child pornography.[122] Further, the blanket immunity given to the ISPs is questionable. Though significant inroads are made against the immunity by the CMA and the Anti Pornography Act, these still leave the exact extent and nature of ISP liability subject to some debate. Internet service providers control the gateway through which child pornography and other internet pests enter and re-enter the public computer system. They should therefore bear some responsibility for stopping these pests before they spread and for helping to identify individuals who originate them in the first place.[123]

Nonetheless, great effort has been made in ensuring the enforceability of the provisions of the CMA. The Electronic

120 The members of the Pornography Control Committee were appointed in April 2016 however they claim that they are unable to fulfill their duties due to limited funding: Anonymous 'Pornography control committee named' http://www.newvision.co.ug/new_vision/news/1422110/anti-pornographic-committee-named (accessed 09 June 2016); B Musinguzi 'Uganda: Anti-Pornography Committee Redundant' http://www.monitor.co.ug/News/National/Anti-pornography-committee-redundant/688334-3304124-l07jex/index.html (accessed 9 August 2016).

121 T Crofts & M Lee '"Sexting", children and child pornography' (2013) 35 *Sydney Law Review* 85.

122 In jurisdictions where this practice is common among young people there have been many reports of teenagers being prosecuted for child pornography offences (Crofts & Lee, 2014). Sec 88 of the Children Act Ch 59 provides that the minimum age of criminal responsibility shall be twelve years. Therefore children of age twelve and above who engage in the practice are liable to prosecution.

123 DG Lichtman & E Posner 'Holding internet service providers accountable' http://ssrn.com/abstract=573502 or http://dx.doi.org/10.2139/ssrn.573502 (accessed 16 July 2016).

Transactions Act and the Regulations thereunder provide a procedure through which infringing material can be reported to ISPs.[124] As part of the efforts to combat child pornography, the Government of Uganda and internet Watch Foundation (IWF) have launched a Portal for Ugandan citizens to report child sexual abuse images and videos.[125] There is also a provision for reporting child abuse online on the Internet Society-Uganda Chapter Website[126] and on the website of Ministry of Gender, Labour and Social Development.[127] NITA collaborated with the internet Society Uganda to develop the Online Safety Educational Toolkit to educate students on how to recognise potential internet risks and empower children to help prevent themselves from being exploited online, or to report possible victimisation to a trusted adult.[128] A multi-sectoral working group on Child Online Protection has been put in place centred at the Ministry of Internal Affairs with the main purpose of educating all categories of internet users including children on responsible use as well as creating awareness among key stakeholders and duty bearers.[129]

124 Sec 31 of the Electronic Transactions Act and reg 19 of the Electronic Transactions Regulations SI 42 of 2013.

125 NITA 'Uganda launches Portal with IWF' http://www.nita.go.ug/media/uganda-launches-portal-iwf (accessed 03 February 2016). The portal used to report is https://report.iwf.org.uk/ug/.

126 Internet Society-Uganda Chapter website is http://Internetsociety.ug/.

127 Ministry of Gender, Labour and Social Development website is http://www.mglsd.go.ug/blog/report-online-child-sexual-abuse.html.

128 Internet Society Uganda Chapter 'Online Safety Education Toolkit for Young People in Uganda' www.nita.go.ug/sites/default/files/publications/COP-Toolkit-ISOC-UG.PDF (accessed on 3 February 2016).

129 L Mbonimpa 'Why you should care for a better internet' http://www.newvision.co.ug/new_vision/news/1416673/care-internet (accessed 18 February 2016).

IMPLEMENTABLE POLICY CONSIDERATIONS IN THE ADVANCEMENT OF OFFICIAL INDIGENOUS AFRICAN LANGUAGES AS MEDIUMS OF INSTRUCTION AT INSTITUTIONS OF HIGHER EDUCATION

*by Marko Svicevic**

1 Introduction

In late 2015, the #FeesMustFall campaign swept across South Africa, leaving no public institution of higher education untouched. The campaign, a student-led protest movement which began in mid-October, initially stemmed from student frustrations relating to increases in university tuition fees. Beginning at the University of the Witwatersrand and moving to the University of Cape Town and Rhodes University, rapidly escalating to a nationwide student crusade, it later developed into a movement tackling issues of transformation, university language policies, tuition fee increases and university practices of outsourcing workers. At its peak, the #FeesMustFall movement saw an estimated 15 000 students march to South Africa's iconic Union Buildings, resulting in government announcing a zero percent fee increase for universities in 2016.[1]

This article attempts to analyse a single aspect of the #FeesMustFall movement, namely, university language policies. The research problem is defined as an unjustifiable underdevelopment of indigenous African languages as mediums of instruction at institutions of higher education. The research problem is situated with defective university language policies. Firstly, most current language policies detract from a national framework on the advancement of indigenous African languages.[2] Secondly, most current university language policies have no clear implementation plan and the advancement of their specified African indigenous language(s) remains unrealised.

* Fourth year BA (Law) LLB student, University of Pretoria.

1 B Bateman '#FeesHaveFallen: Zuma scraps fee hikes for 2016' http://ewn.co.za/2015/10/23/FeesHaveFallen-Zuma-scraps-fee-hikes-for-2016 (accessed 21 August 2016).

2 For purposes of this article the term 'Indigenous African languages' refers to the nine official indigenous languages as mentioned in section 6(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution) which are: isiXhosa, isiZulu, Sesotho, Sepedi (Sesotho sa Leboa), isiNdebele, Tshivenda, Xitsonga, Setswana and siSwati. This for the argument is directly related to the fact that official indigenous languages are afforded equal status, as opposed to other indigenous languages which do not share the same constitutional character.

This underdevelopment of indigenous African languages can also be attributed to the 'Anglicisation' of the higher education sphere.[3] Finally, this paper utilises and builds on the Language Policy for Higher Education[4] and a 2005 Ministerial Committee Report[5] on the development of indigenous African languages in universities, ultimately proposing implementable policy considerations in (re)addressing the underdevelopment of indigenous African languages as mediums of instruction across all public institutions of higher education.[6]

The focus of this article falls on the following premise: The Constitution of South Africa[7] recognises and mandates the protection and development of all 11 official languages, which is also alluded to by numerous legislative texts and policy documents.[8] The Anglicisation of South African universities has detracted from realising the provisions of section 6 of the 1996 Constitution, to the detriment of indigenous African languages.

The adoption of indigenous African languages as mediums of instruction at all public universities with a national framework on the advancement of such languages as envisaged in the Ministerial Committee Report on 'the development of indigenous African languages as mediums of instruction in higher education'.[9]

This article begins by outlining the basic constitutional and legislative principles which protect and enshrine all official South African languages. The argument that Anglicisation of universities detracts from the development of indigenous South African languages is then discussed with particular reference to the University of Cape Town and the University of the Free Sate.[10] An analysis and comparison of current university language policies then assists in identifying shortfalls within university language policies. Specific attention is focused on the particular indigenous languages chosen by universities for advancement. Finally, several implementable policy

3 See para 3.1.1 and 3.1.2 below.
4 Ministry of Education 'Language Policy for Higher Education, November 2002' http://www.dhet.gov.za/HED%20Policies/Language%20Policy%20for%20Higher%20Education.pdf (accessed 13 October 2016).
5 'The Development of Indigenous African Languages as Mediums of Instruction in Higher Education Report' by the Ministerial Committee appointed by the Ministry of Education in September 2003 (the Ministerial Committee Report).
6 For purposes of this research paper, the term 'universities' and 'higher education institutions' are used synonymously in referring to the 26 public universities in operation in South Africa today.
7 The Constitution of the Republic of South Africa, 1996 (the Constitution).
8 See sec 27(2) of the Higher Education Act 101 of 1997; South Africa (1997) Ministry of Education, Education White Paper 3; Government Gazette 1196, July 24 para 2.77 - 2.81, South Africa (2002) Ministry of Education; Transformation and restructuring: A new institutional landscape for higher education; Government Gazette 855, June, 21, 30, 34 - 35, 48.
9 Ministerial Committee Report (n 5 above) para 48.8.
10 Ministerial Committee Report (n 5 above).

considerations are proposed in addressing the current 'language crisis' universities are experiencing.

2 Constitutional provisions enshrining languages and multilinguism

Section 6 of chapter one, the founding provisions of the 1996 Constitution, recognises 11 official languages in South Africa.[11] These are Sepedi (Sesotho sa Leboa), Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu. Although the Constitution of 1996 and the interim Constitution of 1993[12] differ somewhat in their provisions, they do not materially deviate, in particular, on the explicit referral to the equitable use of all official languages.

The interim Constitution phrases the equitable use of all official languages as follows:[13] Afrikaans, English, isiNdebele, Sesotho sa Leboa, Sesotho, siSwati, Xitsonga, Setswana, Tshivenda, isiXhosa and isiZulu shall be the official South African languages at national level, and conditions shall be created for their development and for the promotion of their equal use and enjoyment.

The 1996 Constitution further states:[14]

> The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.

In terms of section 6, a Pan South African Language Board established by national legislation is to 'promote, and create conditions for, the development and use of' among others, 'all official languages.'[15]

The 1996 Constitution further places a positive duty on the state to advance the use of indigenous South African languages:[16]

> Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.

Finally, national and provincial legislatures may pass any laws relating to functional areas listed in Schedule 4 of the 1996 Constitution,

11 Sec 6(1) of the Constitution.
12 Sec 3 of the Interim Constitution of the Republic of South Africa, 1993 (the Interim Constitution).
13 Sec 3(1) of the Interim Constitution.
14 Sec 6(4) of the Constitution.
15 Sec 6(5) of the Constitution.
16 Sec 6(2) of the Constitution. See n 8 above and n 3 above, para 3.1.2.

which include laws on language policy and the regulation of official languages.[17]

It is clear from these provisions that the drafters of the respective Constitutions intended for all official languages to enjoy equal status and operation post-1994. Indigenous African languages also enjoy an enhanced level of constitutional protection and attention. This article places the rights in section 6(2) in context with section 29(2) — the right to receive education in an official language or language of choice.[18] Most universities currently only provide education in either English or Afrikaans. Ultimately it is argued that the adoption of indigenous languages to mediums of instruction would give effect to both section 6(2) and section 29(2). However, this is not being realised in South African universities today. It is therefore argued that in order to give effect to section 6(2) and 29(2), higher education institutions should adopt and develop indigenous African languages to mediums of instruction, thereby increasing their use and enabling teaching in these languages. In this manner, the provision in both section 6(2) and section 29(2) will be given effect to, in particular, the recognition of equal status of all official languages.

The debate on adherence to the 1996 Constitutional provisions on official languages, and in alignment with the Use of Official Languages Act,[19] is an extensive and complex one. This article detracts from the complex issues raised in the administrative use of languages by government and organs of state and instead focuses on the use (and lack thereof) of official indigenous African languages in institutions of higher education.

3 Current university language policies: analysis and criticism

Without detracting from the arguments made above, almost every university language policy in South Africa recognises the importance of multilingualism and development of indigenous South African languages.[20] While these language policies textually embody section 6 of the 1996 Constitution, as well as numerous other legislative provisions on multilingualism in South Africa,[21] they detract from a materially substantive national framework on the implementation of multilingualism in the higher education sector.

17 Schedule 4 of the Constitution.

18 Sec 29(2) of the Constitution states that 'everyone has the right to receive education in the official language or languages of their choice in public educational institutions but is qualified in such instances where it is reasonably practicable'.

19 Use of Official Languages Act 12 of 2012.

3.1 Current university language policies[22]

All South African public institutions of higher education are classified according to three categories: traditional universities, comprehensive universities and universities of technology.[23] Below follows a comprehensive analysis and criticism of several university language policies. The analysis is based on two aspects: Firstly, it discusses current university language policies in light of their predominant language(s) used as mediums of instruction, language(s) of communication and choice of indigenous African language identified for advancement. Statistics on student demographics at each respective institution are then analysed in the backdrop of the language discussion.[24] This analysis then forms the backbone for cross analysis with provincial census statistics from the geographical location of universities in proposing implementable policy consideration for the advancement of indigenous African languages

20 See Stellenbosch University 'Language Plan of Stellenbosch University' 1-2, 5 http://www.sun.ac.za/english/Documents/Language/english_language/Language%20Plan%202014%20Final%2012%20Dec%202014-1.pdf (accessed 21 March 2016); University of Kwazulu-Natal 'Language Policy of the University of KwaZulu-Natal' paras 1.4-1.5, 5.1-5.6 http://registrar.ukzn.ac.za/Libraries/policies/Language_Policy_-_CO02010906.sflb.ashx (accessed 21 March 2016); University of the Witwatersrand 'University of the Witwatersrand, Johannesburg Language Policy' 1-3 https://www.wits.ac.za/media/migration/files/Language%20Policy. pdf (accessed 21 March 2016); North-West University 'Institutional Language Policy of the North-West University' paras 1, 2, 3.2, 4.1 - 4.2, 5.1 - 5.2, 9.1.1.1, 9.2.1.1 - 9.2.1.2 http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/i-gover nance-management/policy/2P-2.5_Language_e.pdf (accessed 21 March 2016); University of Johannesburg 'University of Johannesburg Language Policy' paras 1, 2.4, 5.1.1 - 5.1.3, 6.1, 6.3.4 http://www.uj.ac.za/about/Documents/policies/Language%20Policy%20-%20Council%20approved%20-%203%20April%202014.pdf (accessed 21 March 2016).

21 n 8 above.

22 Accurate at the time of writing.

23 In 2004, the higher education sector saw substantial implementation of reforms across all South African universities. Among these were the renaming of higher institutions of education to 'universities' and merging smaller universities into larger ones. Considerable mergers included but are not limited to the University of the Cape of Good Hope renamed to University of South Africa, Cape Technicon now part of Cape Peninsula University of Technology, University of Bophuthatswana and Potchefstroom University for Christian Higher Education now part of North-West University, Border Technicon, Eastern Cape Technicon, University of Transkei now part of Walter Sisulu University for Technology and Science, Technicon University merging with Rand Afrikaans University and Vista University (Soweto and East Rand Campus) to form the University of Johannesburg, Port Elizabeth Technicon and the University of Port Elizabeth now part of Nelson Mandela Metropolitan University. Notably, the Ministerial Committee Report in their guidelines for languages to be developed by the respective universities, only included traditional universities. This was subsequently changed to include universities of technology and comprehensive universities.

24 All statistics in this section were obtained from the Statistics on Post-School Education and Training in South Africa 2013 report http://www.dhet.gov.za/DHET%20Statistics%20Publication/Statistics%20on%20Post-School%20Education%20and%20training%20in%20South%20Africa%202013.pdf (accessed 13 October 2016), as well as Statistics South Africa 2011 Census. See table 1, 2, 3, 4 & 5 below.

nationally. For purposes of the analysis below, only contact students are included in the statistics and it is assumed that the predominant speakers of indigenous African languages are African or black students. Tables 1 and 2 below collectively illustrate the demographics for university students and staff respectively.[25]

3.1.1 University of Cape Town (UCT)[26]

UCTs official language policy declares the medium of instruction and administration to be English. The policy states that English is an international language of communication in science and business, although it is not the primary language for many of its students and staff.[27] A major objective of the language policy plan is to ensure students acquire effective literacy in English.[28] The policy's only mention of multilinguism refers to its awareness and proficiency with the aid of language and literature departments 'to explore and implement ways in which these aims may be achieved through the Undergraduate and Postgraduate Programme structures'.[29] Finally, students intending to study at the institution must have a certain level of proficiency in English and are required to submit evidence (Matric or Senior Certificate) of this as part of their application to study, whether on an undergraduate or postgraduate level.[30]

Seemingly, UCT has no official stance on the incorporation of an official indigenous African language within its functioning. The Ministerial Committee Report outlined isiXhosa and Sesotho as possible indigenous languages to be taken up by UCT for advancement. UCTs student demographics show that black students constitute 33% of the total student population. Black[31] academic staff account for only 29% of the total permanent number of academic staff.

3.1.2 University of the Free State (UFS)[32]

Until March 2016, UFSs main languages of instruction and communication were English and Afrikaans. Recent developments at

25 See Tables 1 & 2 on pages 11 & 12 below.
26 University of Cape Town 'University of Cape Town Language Policy', https://www.uct.ac.za/downloads/uct.ac.za/.../policies/languagepolicy.doc (accessed 21 March 2016).
27 University of Cape Town (n 26 above) 1.
28 As above.
29 As above.
30 University of Cape Town (n 26 above) 1 - 2.
31 'Black' academics, in terms of the Statistics on Post-School Education and Training in South Africa report (n 24 above) includes all African, Coloured, Indian and Asian academics employed on a permanent contract.
32 University of the Free State 2003 'Language Policy of the University of the Free State', approved by Council: 6 June 2003. Adopted but currently under revision.

the institution have seen the university amend its language policy, removing Afrikaans as a medium of instruction.[33] UFSs language policy illustrates the removal of Afrikaans as an argument for 'inclusivity' at universities. Instead of adopting an indigenous South African language, UFS revised its language policy in 2016 making English its only medium of instruction at the institution from 2017 onward. This shows an increasingly exclusive English policy being implemented in higher education institutions, even in the case of a former historically Afrikaans university (HAU).[34] In addition, English is also becoming the main language of research, community service, management and administration.[35] The 'Anglicisation' of institutions of higher education has, at the same time, meant that indigenous African languages are not meaningfully developed as mediums of instruction or communication.[36] UFSs lack of planning for the advancement of an indigenous African language means that the 62% majority of its black students studying at the institution have no other option but to study in English. Black academic staff at UFS make up for only 23% of all permanent academic staff.

3.1.3 University of KwaZulu-Natal (UKZN)[37]

UKZN, in its language policy, recognises the need to develop and promote the proficiency of official languages, in particular English and isiZulu. The policy clearly indicates its objective to develop awareness of multilinguism through the acknowledgement of the predominant languages spoken within the province, namely, isiZulu, English and Afrikaans.[38] The policy states that English is its primary academic language but that it would activate the development and use of isiZulu as an additional medium of instruction.[39] It further adds that its implementation of the policy 'forms part of a wider interconnected strategy at the national level to promote multilinguism and, at the provincial level, to advance isiZulu'.[40] In developing isiZulu as an indigenous language, UKZN undertakes to pay

33 S Jamal 'Vrystaat goes English' http://www.timeslive.co.za/thetimes/2016/03/15/Vrystaat-goes-English (accessed 17 March 2016).
34 The former HAUs, Rand Afrikaans University, University of the Free State, University of Pretoria, University of Potchefstroom and Stellenbosch University, were previously predominantly Afrikaans universities.
35 V Webb (2006) *English in Higher Education in South Africa: inclusion or exclusion* MIDP Symposium, Bloemfontein, 24 - 27 April 2006 1.
36 As above.
37 Language Policy of the University of KwaZulu-Natal (n 20 above).
38 UKZNs choice in these languages is not fully justified, particularly its mention of Afrikaans as a predominant language within the province. Census data from Statistics South Africa shows that isiZulu is the predominant language spoken as a first language by 77.8% of the province's population, followed by English and isiXhosa. Afrikaans first language speakers only account for 1.6% of the province's population.
39 Language Policy of the University of KwaZulu-Natal (n 20 above) 1.
40 Language Policy of the University of KwaZulu-Natal (n 20 above) 2.

particular attention to curriculum development in isiZulu, work alongside the University of Zululand to create a regional platform for the development and study of isiZulu, and encourage research at UKZN to be conducted in isiZulu.[41]

Although the language policy remains somewhat silent on the implementation process of isiZulu at the university, its language policy is seemingly one of the stronger ones in existence today. Identifying isiZulu as an indigenous language to be adopted also follows the Ministerial Committee Report on its suggestion for adoption of isiZulu.[42] The adoption of isiZulu was also suggested for the University of Johannesburg, North-West University, University of South Africa, University of the Witwatersrand and the University of Zululand.[43]

At UKZN, 64% of the student population is black and 55% of its total academic staff are also black. However, even in a seemingly well transformed university such as UKZN, more effort is needed in terms of indigenous language education.[44]

3.1.4 Central University of Technology, Free State (CUT)[45]

All teaching and learning facilitation, as well as correspondence, general communication and institutional transactions at CUT are conducted in English.[46] CUTs language policy states that it does not prescribe the language of communication between the instructional employee (academic staff) and student but rather assumes the choice of language is determined by mutual agreement.[47] It adds where a student's competence in English would constitute a serious communication barrier that could be resolved by using the student's home language, use of such home language is recommended. The policy however states that this is not a legal obligation in the event that CUT cannot provide assistance to students in their home languages.[48] The only specific mention of the advancement of indigenous African languages regards the multilingual lexicons of concepts and terminology. Within feasibility limitations, student

41 Language Policy of the University of KwaZulu-Natal (n 20 above) 3.
42 Ministerial Committee Report (n 5 above) para 48.6.
43 As above.
44 DE Mutasa 'Language Policy Implementation in South African Universities vis-à-vis the Speakers of Indigenous African Languages' Perception' (2015) 31 *Per Linguam* 50.
45 Language Policy of the Central University of Technology, Free State, implemented on 1 January 2010 (CUT Policy).
46 Language Policy of the Central University of Technology (n 45 above) para 13.1.4.1.
47 Language Policy of the Central University of Technology (n 45 above) para 13.1.4.1.4.
48 Language Policy of the Central University of Technology (n 45 above) para 13.1.4.1.5.

support will be extended to Sesotho first language speakers in this form of support.[49] CUTs language policy seemingly has no explicit implementation plan for the adoption of Sesotho as an indigenous language. The Ministerial Committee Report identified Sesotho as a possible language of development at CUT and UFS. At 87%, the CUT student population has the largest number of black students in any institution. 46% of CUTs permanent academic staff are black. There is clear indication that an indigenous language at CUT is in demand and a comprehensive plan for the adoption of Sesotho is recommended.[50]

3.1.5 University of Johannesburg (UJ)[51]

Informed by its geographical context, Sepedi, English, isiZulu and Afrikaans are designated primary languages used at UJ.[52] However, English is the predominant language of instruction and only where it is possible and practical, will the other three primary languages be used.[53] isiZulu and Sepedi were both identified as possible languages to be advanced by UJ in the Ministerial Committee Report.[54] 87% of UJ's student population is black and 43% of permanent academic staff are black.

3.1.6 Nelson Mandela Metropolitan University (NMMU)[55]

NMMU uses English as its predominant language of tuition and assessment. Its language policy states that at the same time, it embraces the imperative to advance isiXhosa at the institution, and ensure the retention and strengthening of Afrikaans as an established academic language. The choice of isiXhosa adheres to the Ministerial Committee Report. 59% of the student population is black yet there is no definitive plan for the adoption of isiXhosa as a medium of instruction.

3.1.7 North-West University (NWU)[56]

NWUs language policy states English, Afrikaans and Setswana to be official languages, with Sesotho having 'working-language status' use at its Vaal Triangle Campus.[57] Presently, only English and Afrikaans

49 Language Policy of the Central University of Technology (n 45 above) para 13.1.4.1.6.
50 Language Policy of the Central University of Technology (n 45 above)
51 University of Johannesburg Language Policy (n 20 above).
52 University of Johannesburg Language Policy (n 20 above) para 5.
53 Language Policy of the Central University of Technology (n 45 above) para 6.2.1.
54 Ministerial Committee Report (n 5 above) para 48.7.
55 Nelson Mandela Metropolitan University Language and Multilingual Development Support.
56 Institutional Language Policy of the North-West University (n 20 above).

are used as mediums of instruction, while efforts to implement Setswana and Sesotho are being made.[58] The Ministerial Committee Report suggested Setswana and isiZulu as ideal indigenous languages the university should adopt. Instead, NWUs language policy refers to Setswana and Sesotho as its choice of adoption and integration of indigenous languages. Half of the student population at NWU is black, with only 27% of the total permanent academic staff being black. The university's comparatively large (45%) white population may strengthen it in retaining Afrikaans as a medium of instruction, however, its lack in implementation of Setswana is not justifiable in terms of student demographics.

3.1.8 University of Pretoria (UP)[59]

UP uses English and Afrikaans as its official languages of instruction.[60] The university has identified Sepedi as an indigenous language to be promoted, in particular, and is used as a third language of communication.[61] The Ministerial Report identified Sepedi, Setswana and IsiNdebele as possible indigenous African language for advancement at UP. UP, alongside UCT and SU, are the only three universities in the country which still maintain a higher white than black student population. Student demographics show that 42% of the student population is black and 51% are white. Further to this, only 22% of the permanent academic staff are black. UP also lacks an implementable plan on the adoption of Sepedi at the institution. By implication, education through an official indigenous language at UP is seemingly not a priority at the institution.[62] Instead, the university focuses on academic excellence and achievement through already established academic languages, namely English and Afrikaans.[63] This too means that indigenous languages will, for the meantime, remain on the side-lines at UP.[64] On 22 June 2016, UPs Council adopted a new language policy in which English would be the primary language of instruction.[65] The new language policy further aims to develop Sepedi

57 Institutional Language Policy of the North-West University (n 20 above) para 3.2.
58 Institutional Language Policy of the North-West University (n 20 above) para 9.1.2.1.
59 University of Pretoria 'University of Pretoria Language Policy' http://www.up.ac.za/media/shared/Legacy/sitefiles/file/1/elzanie/r1610languagepolicy.pdf (accessed 21 March 2016).
60 University of Pretoria Language Policy (n 59 above) para 1.
61 University of Pretoria Language Policy (n 59 above) para 3.1.
62 Mutasa (n 44 above) 49.
63 As above. Further University of Johannesburg Language Policy (n 20 above) para 3.3.
64 As above.
65 X Janse van Rensburg & M Svicevic 'UP to become English only from 2017' http://perdeby.co.za/sections/news/tuks-news/4992-up-to-become-english-only-from-2017 (accessed 21 August 2016).

to a higher language of discourse, although it is not certain whether the new policy includes any implementation plans.

3.1.9 Rhodes University (RU)[66]

The university's langue of teaching and learning is English. All official university business is also conducted in English.[67] RUs policy states that RU will create conditions for the use of isiXhosa as a language of learning and eventually also teaching.[68] RUs language policy states that selected signage will be in English, Afrikaans and isiXhosa. The language policy goals further state that the language of wider communication at RU is English but translation and interpretation into isiXhosa and Afrikaans is provided for students and staff where necessary and feasible.[69] The policy adds that RU seeks to develop isiXhosa as a language to support the language of teaching and learning.[70] In line with the Ministerial Committee Report, RU was identified as an institution of higher education for the advancement of isiXhosa, alongside seven other institutions. The RU student population consists of 54% black students. The language policy is plausible, but lacks an implementation plan regarding the advancement of IsiXhosa.[71]

3.1.10 University of South Africa (Unisa) [72]

Unisa, in the context of this paper, differs in that its academic plan is offered to distance students and not contact students. Unisa's language of instruction is based on functional multilinguism which it defines as the choice of a particular language being used depends on the particular situation and context it is to be used in. English is however offered across the board as an academic language. Unisa was identified as the optimal university for the advancement of all official languages by the Ministerial Committee Report. As per the 2016 amendment of the language policy, an implementation plan will ensure annual evaluation and reporting to Senate, with a re-evaluation of the policy set to take place in 2020.

66 Rhodes University 'Rhodes University Language Policy' https://www.ru.ac.za/media/rhodesuniversity/content/institutionalplanning/documents/Language%20Policy.pdf (accessed 21 March 2016)
67 Rhodes University Language Policy (n 66 above) para 2.1.
68 As above.
69 Rhodes University Language Policy (n 66 above) para 2.2.
70 Rhodes University Language Policy (n 66 above) para 3C.
71 Mutasa (n 44 above) 50.
72 Unisa Language Policy, approved by Council on 22 September 2006, revised on 19 November 2010 and 28 April 2016.

3.1.11 Stellenbosch University (SU)[73]

SU uses Afrikaans as its predominant language of instruction. The university offers several variations to languages used as mediums of instruction. Parallel-mediums teaching, teaching in Afrikaans with interpretation into English and teaching in English with interpretation into Afrikaans are currently options present at SU. SUs language policy further states that isiXhosa is used as an institutional language, depending on circumstances.[74] In its planned advancement of isiXhosa, SU states that it presents modules in programmes and short courses as well as developing trilingual terminologies in various disciplines.[75] SU also states that in environments which communicate regularly to the public and students, SU ensures that there are enough staff members who can communicate with ease in English and isiXhosa.[76] Student demographics show that only 23% of the student population is black. The predominant race group consists of white students. This may be due justification for Stellenbosch retaining Afrikaans as a language of instruction, with the possible adoption of isiXhosa as an indigenous language.

3.1.12 University of the Western Cape (UWC)[77]

The languages used when writing tasks, assignments, tests and examinations is English. According to UWCs language policy, English and isiXhosa should be used in setting up of tasks, assignments, tests and examinations and wherever it is practicable.[78] All students and staff are encouraged to develop proficiency in Afrikaans, English and isiXhosa. UWCs predominant language of tuition is English, while lecturers who are competent in other languages are encouraged to use those languages in addition to the main language of teaching.[79] UWCs student population comprises of 42% black students while 62% of all permanent academic staff are black.

73 Language Plan for Stellenbosch University approved 22 November 2014, amended in 2016.
74 Language Plan for Stellenbosch University (n 73 above) para 6.1.b.
75 Language Plan for Stellenbosch University (n 73 above) para 5.
76 Language Plan for Stellenbosch University (n 73 above) para 6.1.g.
77 University of Western Cape 'University of Western Cape (UWC) Language Policy' https://www.uwc.ac.za/Documents/Language_Policy_C2003-3.pdf (accessed 21 March 2016).
78 University of Western Cape (UWC) Language Policy (n 77 above) para 4.
79 University of Western Cape (UWC) Language Policy (n 77 above) para 3.

3.1.13 University of Witwatersrand (Wits)[80]

Wits' language policy recognises the importance of multilinguism particularly in accordance with its geographical location. It states that its location means that 76 home languages are spoken by its students and staff. Sesotho and isiZulu are the most widely understood African language spoken in the immediate vicinity of the university.[81] The language policy however states that it believes institutions in KZN are more suited to develop isiZulu and that in should predominantly focus on the advancement of Sesotho.[82] Although English remains the only medium of instruction at the institution, Wits' language policy outlines a detailed four phase plan for the implementation of Sesotho and its eventual use as a medium of instruction.[83] The language policy further includes rationale for its choice of Sesotho, as well as a more unified and congruent claim for its development, with consideration for other languages being developed at other institutions.[84] This rationale adheres well with the Ministerial Committee Report. Wits' language policy is arguably the most progressive and well informed language policy amongst higher education institutions, taking into account student demographics, provincial census, development of indigenous languages holistically and institutional co-operation in its choice of languages for advancement. 58% of the Wits student population is black, yet only 38% of total permanent academic staff are black.

3.2 Overview of student demographic populations across universities in South Africa

Table 1 below is a brief overview of student demographic populations across universities in South Africa. It serves to show the large number of black students attending universities, indicating a possible demand for receiving education in indigenous languages.

80 University of the Witwatersrand, Johannesburg Language Policy (n 20 above).
81 University of the Witwatersrand, Johannesburg Language Policy (n 20 above) 1.
82 As above.
83 University of the Witwatersrand, Johannesburg Language Policy (n 20 above) 1 - 2. Further see para 3.2. below.
84 University of the Witwatersrand, Johannesburg Language Policy (n 20 above) 3 - 6.

Table 1: Number of students enrolled in higher education institutions, by population group and institution, in 2013[85]

Institution	Demographics for Contact Students			
	African	Coloured	White	Total
Cape Peninsula University of Technology	19 235	9367	4372	33370
University of Cape Town	6979	3628	8589	26109
Central University of Technology, Free State	11411	434	1163	13050
Durban University of Technology	21053	415	827	26059
University of Fort Hare	11714	229	327	12315
University of the Free State	15 860	1 344	8 100	25 611
University of Johannesburg	38 648	1 500	6 043	48 386
University of KwaZulu-Natal	26 055	906	2 796	40 576
University of Limpopo	22 478	26	278	22 914
Mangosuthu University of Technology	11 340	16	5	11 375
Nelson Mandela Metropolitan University	14 941	3 634	6 407	25 301
North-West University	18 176	1 143	16 434	36 195
University of Pretoria	20 038	1 069	24 089	47 468
Rhodes University	4 046	280	2 856	7 485
University of South Africa	0	0	0	0
Stellenbosch University	4 231	4 421	18 130	27 418
Tshwane University of Technology	49 290	304	3 057	52 864
University of Venda	11 797	3	7	11 818
Vaal University of Technology	19 647	268	508	20 495
Walter Sisulu University	23 970	37	43	24 122
University of Western Cape	8 653	9 431	1 021	20 382
University of Witwatersrand	18 210	1 157	7 669	31 134
University of Zululand	16 466	26	44	16 591
Total	**394 238**	**39 638**	**112 765**	**581 038**
Percentage	**68**	**7**	**19**	**100**

Table 1: Adapted from the 4th issue of the Statistics on Post-School Education and Training in South Africa.[86]

85 2013 HEMIS Database, extracted in October 2014 (available at http://www.dhet.gov.za/DHET%20Statistics%20Publication/Statistics%20on%20Post-School%20Education%20and%20Training%20in%20South%20Africa%202013.pdf).

86 Interpretation notes: Table 1 only accounts for contact students who are defined as those students who are registered mainly for courses offered in contact mode. Data from the University of Mpumalanga and Sol Plaatjie University are not included as these universities were founded after 2013. Figures for Unisa have been omitted as it only conducts its business through distance learning.

Table 2: Adapted from the 4th issue of the Statistics on Post-School Education and Training in South Africa.[87] Number and percentage of permanent staff in higher education institutions, by population group and institution, in 2013.[88]

Table 2 below is a brief overview of staff demographics across universities in South Africa. It serves to show the limited number of black academic staff working at universities. This is detrimental in that such staff would be more competent in indigenous African languages. With such low numbers this translates negatively to universities having staff competent in such languages.

Institution	Total permanent staff		Percentage of black staff in total	
	Instruction and research staff	Admin Staff	Instruction and research staff	Admin Staff
Cape Peninsula University of Technology	768	973	60	84
University of Cape Town	1 093	2 233	29	71
Central University of Technology, Free State	291	342	46	64
Durban University of Technology	579	767	73	91
University of Fort Hare	327	520	72	89
University of the Free State	962	1 165	23	35
University of Johannesburg	1 024	1 894	43	68
University of KwaZulu-Natal	1 376	2 104	55	85
University of Limpopo	884	725	85	84
Mangosuthu University of Technology	195	263	90	96
Nelson Mandela Metropolitan University	606	993	27	58
North West University	1 288	1 809	27	32
University of Pretoria	1 300	1 598	22	48
Rhodes University	351	547	25	56
University of South Africa	1 631	3 137	50	72

87 Interpretation notes: Institutional and research staff (academic staff) are those staff that spend more than 50% of their official time on duty on instruction and research activities. Administrative staff includes all executive, professional, technical and office staff that spends less than 50% of their official time on duty on instruction and research activities. The 'percentage of black staff in total' includes all African, Coloured, Indian and Asian (non-white) staff employed on a permanent contract.

88 2013 HEMIS database, extracted in October 2014.

Stellenbosch University	1 006	1 909	21	48
Tshwane University of Technology	917	1 468	56	74
University of Venda	337	319	93	99
Vaal University of Technology	361	444	61	75
Walter Sisulu University	576	671	87	96
University of Western Cape	574	928	62	94
University of Witwatersrand	1 093	1 479	38	74
University of Zululand	299	379	81	92
Total	**17 838**	**26 667**	**47**	**68**

From tables 1 and 2, and upon analysis of the abovementioned university language policies, two aspects are evident. Firstly, university language policies may seem substantively comprehensive and well drafted, but they are difficult to implement. This, as Van Huyssteen[89] and Nkuna[90] critically note, shows a gap between university language policies and the implementation thereof.[91] Secondly, upon the completion and presentation of the Ministerial Committee Report on the development of indigenous African languages, all institutions of higher education were compelled to choose and promote indigenous African languages in such institutions.[92]

> All higher education institutions are required to develop their own language policy subject to the above policy framework, which should be submitted to the Minister by 31 March 2003. The Ministry will continue to monitor the impact of language policy in higher education.

Evidently, no effective binding national framework for the advancement of African indigenous official languages among institutions of higher education was concluded. This resulted in several blunders for the advancement of indigenous South African languages at universities. Universities have either dismally failed at promoting and advancing an indigenous South African language due to ineffective or inefficient implementation of language policies. Some were left to decide for their own which indigenous South African

89 L Van Huyssteen 'A practical approach to the standardization and elaboration of Zulu as a technical language' unpublished thesis, University of South Africa, 2003 22.

90 PH Nkuna 'The fit between government language policies and institutional language policies: the case of indigenous languages in the South African higher education system' unpublished thesis, University of South Africa, 2010 250.

91 Implementation in this regard means the effective use of languages as a medium of instruction and of communication.

92 Ministerial Committee Report (n 5 above) para 48.8. Further see South Africa (1997) Ministry of Education 'Education White Paper 3' Government Gazette 1196 para 2.80 - 2.81.

languages to choose which, resulted in several universities choosing the same indigenous languages, leaving other languages completely excluded. Several universities in their language policy documents may even boast of having more than one indigenous official language as a medium of instruction or language of communication. This individual linguistic autonomy has, for the greater part, detracted from successful implementation of indigenous languages in these institutions. A country's language policy is a set of principles conceptualised in an overreaching framework and requires congruency for effective implementation.[93] Although the guideline for the advancement of indigenous languages in universities was drawn up in the Ministerial Committee Report, it was not binding on universities and in focusing on regional adoption of indigenous languages by universities, it detracted from congruency and national advancement of such languages.[94]

4 Implementable policy considerations

4.1 Building on the 2005 Ministerial Committee Report[95]

With the above-mentioned in mind, and bearing particular attention to a strategic national framework for the advancement of indigenous South African languages, several implementable policy considerations are discussed. Prior to the discussion on implementable policy considerations, the following must too be noted:

> Firstly, although the majority of historically white, Afrikaans universities are gradually moving to the adoption of single-medium (English) languages of instruction, language continues to be a barrier to some in accessing these institutions.[96] Secondly, the change in the demographics of student populations at universities does not necessarily translate to these institutions being more representative.[97] Thirdly, there is still a broad difference in the number of black and white graduation rates, suggesting that white student graduation rates are double that of those for black students.[98] Fourthly, the growth in black student numbers has been accompanied by a decline in white student enrolment numbers.[99]

93 Van Huyssteen (n 89 above) para 18. See TG Reagan *Language Matters: Reflections on Educational Linguistics* (2009) 134.
94 Unpublished: RA Judith 'The Implementation of the Language Policy at Tshwane University of Technology: The Case of Indigenous Languages' unpublished MA (African Languages) dissertation, University of South Africa, 2014 12 http://hdl.handle.net/10500/18665 (accessed 16 February 2016).
95 Language Policy for Higher Education report (n 4 above) para 5.
96 'Transformation and Restructuring: A new institutional landscape for higher education' Government Notice 885 (2002) 34. Further see National Plan for Higher Education, Ministry of Education (2001) 37.
97 'National Plan for Higher Education' Ministry of Education (2001) 38.
98 As above.
99 As above.

Fifthly, pragmatically speaking, it is impossible to incorporate all 11 official languages as mediums of instruction at every university in the country. Sixthly, every public university should be legislatively required to adopt at least one indigenous South African language, with a mind-set of:[100]

(a) a multi-phased implementation plan;

(b) which includes a set period for its implementation;

(c) with a final outcome of advancing such indigenous language to be used as a medium of instruction at the institution.

4.2 The geographical location of universities and the choice in adoption of indigenous African languages

University languages of instruction are usually the official or majority languages.[101] The need for education in mother-tongue instruction (indigenous African languages) is an exhaustive argument on its own.[102] Studies have shown the effectiveness mother-tongue education plays in particular, being beneficial to language competence in the first language as well as achievement in other subject areas and training in a second language.[103] According to the Ministerial Committee Report and based on the United Nations Educational, Scientific and Cultural Organisation's Education Position Paper,[104] mother-tongue, or in this case, education in an indigenous language is effective if four requirements are met. Firstly, appropriate terminology for education purposes must exist, secondly, sufficient resource material is available, thirdly, appropriately trained teachers are available, and fourthly, there is willingness from learners, teachers and parents for education in indigenous languages.[105]

The need for the development of indigenous African languages can be explained by Foley as follows: at the moment, English, and to a lesser extent, Afrikaans, are the only languages capable of functioning fully as languages of learning and teaching at higher education institutions, yet most current and potential higher education students are not sufficiently fluent in English and or Afrikaans to be able to study effectively through these languages.[106]

100 Ministerial Committee Report (n 5 above) para 48.1 - 48.8.
101 Ministerial Committee Report (n 5 above) para 20.
102 This paper detracts from this such discussion as the advancement of indigenous languages is based on its constitutional upholding.
103 UNESCO 'Education in a multilingual world' 15-16. Education Position Paper, Paris, France. http://unesdoc.unesco.org/images/0012/001297/129728e.pdf (accessed 26 March 2016).
104 As above. Further see Ministerial Committee Report (n 5 above) para 22.
105 As above.
106 A Foley 'Language policy for higher education in South Africa: implications and complications' (2004) 18 (1) *South African Journal of Higher Education* 57. Further see Language Policy for Higher Education report (n 4 above).

Where advancement of indigenous languages in institutions of higher education regards, the Ministerial Committee Report stated 'each higher education institution should be required to identify an indigenous African language of its choice for initial development as a medium of instruction.'[107]

In identifying an African indigenous language, universities were given a criterion of seven priorities to include in consideration. These are: regional and locality-specific criteria, concentration of speakers and students, availability of expertise, availability of infrastructure, affordability, possible linkages and partnerships with English and Afrikaans, economic, social and political significance of courses.[108] Table 3 below illustrates the Ministerial Committee Report recommendations on recommended languages each respective institution should consider in adopting for advancement and eventually using such languages as a medium of instruction.

Table 3: The 2005 Ministerial Committee Report guidelines for choice of indigenous languages to be adopted by institutions of higher education.[109]

Indigenous Languages	University
isiNdebele	UP, UNISA
isiZulu	UJ, UKZN, UNW, UNISA, WITS, UZ
isiXhosa	UCT, UFH, UFS, NMMU, RU, SU, UNISA, UWC
Sepedi (SeSotho sa Lebowa)	UL, UJ, UP, UNISA, UV
SeSotho	UCT, UFS, SU, UNISA, WITS
SeTswana	UWN, UP, UNISA
siSwati	UNISA, UZ
TshiVenda	UL, UNISA, UV
XiTsonga	UL, UNISA, UV

Table 3: Adapted from the Ministerial Committee Report.

Although the recommendations are necessary, they are not fool proof. In this regard, the following are additional considerations which must be borne in mind:

(a) current student population and demographics at each institution, particularly focused on the number of black students as speakers of indigenous languages;

107 Ministerial Committee Report (n 5 above) para 48.5.
108 Education White Paper 3 (n 92 above); Ministerial Committee Report (n 5 above) para 48.3.
109 Although initially not specified, Table 3 includes traditional universities alongside universities of technology and comprehensive universities.

(b) geographical location of each institution with regard to its feed area;

(c) predominant languages spoken in the vicinity or province of the institution;

(d) current staff population and demographics, particularly of black staff competent in indigenous languages;

(e) availability of infrastructure;

(f) affordability;

(g) holistic envisagement as not to detract from a national framework for the

advancement of indigenous languages.

For purposes of this article, only points a, b, c and d are discussed and applied to individual universities when considering the most appropriate indigenous African language which should be adopted. The statement plan can be summarised as follows: a university should adopt an indigenous African language, while cognisant of all the consideration mentioned here, with the outlook of using such language as a medium of instruction, while ensuring national congruency in advancing all nine official indigenous languages. Table 4 below lists the nine provinces alongside universities located in each province and the predominant languages spoken as first languages in each province.

Table 4: List of provinces with universities within each province and most prominent first languages spoken in that province[110]

Province	Universities in province	Percentage of population per province by first language speakers
Gauteng (GP)	UJ, UP, UNISA, TUT, WITS, VUT	IsiZulu (19.8%) English (13.3%) Afrikaans (12.4%) Sesotho (11.6%) Sepedi (10.6%) Setswana (9.1%)
Limpopo (LP)	UV, UL	Sepedi (52.9%) Xitsonga (17.0%) Tshivenda (16.7%)
Mpumalanga (MP)	University of Mpumalanga	SiSwati (27.7%) isiZulu (24.1%) Xitsonga (10.4%) isiNdebele (10.1%)

110 Table 4 interpretation notes: All statistics obtained from Statistics South Africa census 2011. A full list of abbreviations can be found at the end of this article.

North West (NW)	NWU	Setswana (63.4%) Afrikaans (9.0%) Sesotho (5.8%) isiXhosa (5.5%) Xitsonga (3.7%) English (3.5%)
KwaZulu-Natal (KZN)	DUT, MUT, UZ, UKZN,	IsiZulu (77.8%) English (13.2%) isiXhosa (3.4%) Afrikaans (1.6%)
Northern Cape (NC)	Sol Plaatjie	Afrikaans (53.8%) Setswana (33.1%) isiXhosa (5.3%) English (3.4%)
Western Cape (WC)	CPUT, UCT, SU, UWC	Afrikaans (49.7%) isiXhosa (24.7%) English (20.2%) Sesotho (1.1%)
Eastern Cape (EC)	NMMU, UFH, RU, WSU	IsiXhosa (78.8%) Afrikaans (10.6%) English (5.6%) Sesotho (2.5%)
Free State (FS)	UFS, CUT	Sesotho (64.2%) Afrikaans (12.7%) isiXhosa (7.5%) Setswana (5.2%) isiZulu (4.4%) English (2.9%)

It is evidently clear that some provinces are home to more universities than others. It is suggested that where a province has several universities, the language with the most speakers in that province should be assigned to larger universities with a greater functional capacity. These universities should be required to choose the most predominant languages as these universities can accommodate the larger number of speakers of the language who are assumed to be prospective and current students of such universities.

Table 5: The nine official indigenous languages with the suggested universities to adopt each language for advancement as a medium of instruction, based on provincial demographics[111]

Language	Ministerial Committee institution suggestion	Institution suggestions based on provincial demographics	Rationale
isiZulu	UJ, UKZN, UNW, UNISA, WITS, UZ	UKZN*, DUT*, UZ*, UJ, WITS, VUT, TUT	KZN (77.8%), GP (19.8%)
isiXhosa	UCT, UFH, UFS, NMMU, RU, SU, UNISA, UWC	UFH*, NMMU*, RU*, WSU, CPUT, UCT, UWC, SU	EC (78.8%), WC (24.7%)
isiNdebele	UP, UNISA	University of Mpumalanga	MP (10.1%)
Sepedi	UL, UJ, UP, UNISA, UV	UV, UL, UP	LP (52.9%)
Xitsonga	UL, UNISA, UV	University of Mpumalanga, UV*, UL*	MP (10.4%), LP (17.0%)
Setswana	UWN, UP, UNISA	NWU, Sol Plaaitjie, UP	EC (63.4%), NC (33.1%)
Sesotho	UCT, UFS, SU, UNISA, Wits	UFS*, CUT, UJ	FS (64.2%)
Tshivenda	UL, UNISA, UV	UV, UL	LP (16.7%)
siSwati	UNISA, UZ	University of Mpumalanga	MP (27.7%)

Table 5: List of indigenous African languages with universities suggested to adopt such languages by the Ministerial Committee Report, alongside suggested universities to adopt such languages according to provincial demographics.

From Tables 4 and 5, and within the necessary considerations mentioned above, the following recommendations are made:

> In Gauteng, the predominant language is isiZulu, followed by Sesotho, Sepedi and Setswana. It is recommended that UJ and TUT adopt isiZulu as it is the predominant language in the province, and because these universities are predominantly black, they cater for the largest black student populations in Gauteng. UP could adopt Sepedi or Setswana as these languages are not the predominant languages in the province nor is the black student population a majority at UP. In this regard, UPs choice in Sepedi as a third language of communication is supported. Wits could adopt Sesotho, given the university's size, black student population and that Sesotho is the second most predominant indigenous language in Gauteng. Wits' choice in adoption of Sesotho is also supported. Finally, it is recommended that VUT adopt Setswana,

111 Table 5 interpretation notes: * indicates the university should get preference for the language due to the language's predominance as a first language in the province the university is situated in. See table 4 above for further reference.

specifically because of its smaller size and the less predominant position the language holds within Gauteng.

Setswana is the predominant language in the North West. It is therefore highly recommended that NWU adopts Setswana. In light of NWUs student demographics, it is suggested that NWU keep Afrikaans and English as mediums of instruction, as there is seemingly a demand for those languages.

For the Free State, it is recommended that UFS adopt Sesotho, coupling the predominant language in the province with the largest university therein. CUT has identified Sesotho as its language for development. It is however recommended that Sesotho may be adopted alongside isiXhosa as it is the second most wide spoken language in the province.

IsiXhosa is the predominant language spoken in the Eastern Cape. With 78.8% of first language speakers in the province, NMMU and RUs decision to adopt isiXhosa for advancement is supported. It is further recommended that, alongside NMMU and RU, UFH and WSU also adopt isiXhosa as a language for advancement. Alternatively, one of these universities may adopt Sesotho as it is the second most spoken indigenous language in the province.

IsiXhosa is also the predominant language of the Western Cape. CPUT, UCT, SU and UWC are all identified as universities which could adopt isiXhosa as a language for advancement. SU and UCTs predominantly white student population may, for the greater part, mean less willingness from students to adopt the language.

The Northern Cape only has one university, namely Sol Plaatje. In line with provincial demographics, it is suggested that the university adopts Setswana as its indigenous language for advancement. It must also be noted that Sol Plaatje, which was only founded in 2014, is a very young and small university and may, therefore, not have the necessary capacity to provide education in more than on language. In such a manner, the recommendation for NWUs adoption of Setswana would ensure that the language is advanced regardless.

The predominant language spoken in KwaZulu-Natal is isiZulu with 77.8% of the population speaking it as a first language. DUT, MUT, UKZN and UZ are all universities which could adopt isiZulu for advancement.

Limpopo and Mpumalanga present the greatest challenge in national congruency in choices for adopting indigenous languages. In Limpopo (which has two universities, UV and UL) Sepedi, Tshivenda and Xitsonga are the predominant languages of the province. In Mpumalanga, with only one university, the main languages of the province are siSwati, isiZulu, Xitsonga and isiNdebele. In order to

include all nine indigenous languages in the national framework, the following is recommended.

The University of Mpumalanga could adopt siSwati as it is the predominant language of Mpumalanga. Although isiZulu is the second most prominent language in the province, universities in KwaZulu-Natal as well as Gauteng would be better suited to advance isiZulu. It is therefore further recommended that, where possible, Xitsonga or isiNdebele be adopted alongside siSwati.

Sepedi is the predominant language in Limpopo and as far as Limpopo is concerned, since more than half the province speaks Sepedi as a first language, notwithstanding that institutions in other provinces may choose to advance Sepedi, it should be adopted in at least one of the universities in the province. It is recommended that UL adopt Sepedi due to the large number of speakers in the province. UL is also able to accommodate a much larger number of students. UV could adopt Xitsonga or Tshivenda for advancement.

With the above recommendations in mind, it is possible that either Tshivenda, Xitsonga or isiNdebele is excluded from an institution in Limpopo or Mpumalanga. Upon such an occurrence, possible agreements could be reached between universities in neighbouring provinces, particularly those in Gauteng, in adopting any of the excluded languages for advancement in another institution. Adding to this, Unisa is yet another option in adopting such an excluded language and, furthermore, Unisa could be responsible for adopting several indigenous languages due its nature in providing distance education.

Table 6: Comparison of universities and choice of indigenous African language with recommended choice in indigenous African language

University	Province	% of black students	% of non-white academic staff	Current indigenous language identified for advancement	1st choice in indigenous language to be adopted	2nd choice in indigenous language to be adopted
UFH	EC	95%	72%	-	isiXhosa	-
NMMU	EC	59%	27%	isiXhosa	isiXhosa	-
RU	EC	54%	25%	isiXhosa	isiXhosa	-
WSU	EC	99.3%	87%	-	isiXhosa	-
CUT	FS	46%	46%	Sesotho	Sesotho	-
UFS	FS	62%	23%	None	Sesotho	-
UJ	GP	87%	43%	Sesotho sa Leboa, isiZulu	isiZulu	-
UP	GP	42%	22%	Sepedi	isiZulu	-
Unisa	GP	-	-	-	-	-

TUT	GP	93%	56%	-	isiZulu	-
VUT	GP	96%	61%	-	isiZulu	-
Wits	GP	58%	38%	Sesotho	isiZulu	-
DUT	KZN	81%	73%	-	isiZulu	-
UKZN	KZN	64%	55%	isiZulu	isiZulu	-
MUT	KZN	99.6%	90%	-	isiZulu	-
UZ	KZN	99.2%	81%	-	isiZulu	-
UL	LP	98%	85%	-	Sepedi	Tshivenda
UV	LP	99.8%	93%	-	Xitsonga	Tshivenda
NWU	NW	50%	27%	Sesotho, Setswana	Setswana	-
CPUT	WC	58%	60%	-	isiXhosa	-
UCT	WC	33%	29%	-	isiXhosa	-
SU	WC	23%	21%	isiXhosa	isiXhosa	-
UWC	WC	42%	62%	isiXhosa	isiXhosa	-
University of Mpumalanga	MP	-	-	-	siSwati	isiNdebele
Sol Plaatjie University	NC	-	-	-	Setswana	-

4.3 The Wits language policy plan: a multi-phased, holistic approach to implementation

For purposes of this article, Wits' language policy plan is discussed as one of the optimal and most practical language policy plans among higher education institutions. As Nkuna points out, implementation of university language policies, particularly in terms of incorporating indigenous languages, remains a challenge.[112] Wits' choice in Sesotho is arguably a good one. A survey at the institution showed that 28.7% of respondents supported the choice in Sesotho, 11.3% of the students speak it as a first language and it is one of the predominant languages in the Iscamtho Township (within the vicinity of Wits).[113] The university's strategy of focusing on only one language, developing it holistically, seems practically viable.[114]

The university has a detailed four phase plan for the process of incorporation and eventual use of Sesotho as a medium of instruction.[115] This multi-phased approach to the development of Sesotho should be encouraged and recommended at all higher education institutions. Phase one focuses on the development of materials and resources needed for the teaching of Sesotho as a subject at all levels. During this phase, staff who wish to learn Sesotho

112 Nkuna (n 90 above) 250 - 256.
113 Foley (n 106 above) 65 - 66.
114 As above.
115 University of the Witwatersrand, Johannesburg Language Policy (n 20 above) 1 - 2.

will be encouraged to do so by the university and will be provided with courses approved in terms of the skills development levy.[116] Phase two will focus on the linguistic abilities of staff and students at the university. Those who do not speak an indigenous African language will be required to become communicatively competent in Sesotho. Courses for those who speak an African language will be provided to extend their competence in English. Phase three indicates that the university will play a role in the development of the Sesotho language.[117] Phase four will commence once Sesotho has been developed for use as a language of instruction. In phase four, students and staff will be prepared for the introduction of English and Sesotho as mediums of instruction.[118]

The phased plans are also subject to time periods, with phase one being completed in 2010 and phase two having begun in 2011.

4.4 Criticism of the policy considerations

Although the development of indigenous languages at universities is challenging, the Ministerial Committee Report is arguably the most viably practical option. Notwithstanding this, its implementation and geographic basis does however open it up to some criticism. Its implementation faces several inherent characteristics and its criticism is briefly discussed here. The Ministerial Committee's recommendations on the language policy for higher education institutions , as Judith critically notes, has similarity to the apartheid homeland system of regional and local language use.[119]

The Ministerial Committee report did not totally move away from an apartheid-like use of indigenous languages based on regional and local use, and also according to the language that the tribe speaks.[120] Consequently, sharing similar characteristics, this article would face the same criticism.

Another aspect which the Ministerial Committee Report also acknowledged was the conflicting nature of teaching in an indigenous language at tertiary level, while such languages are not used in primary or secondary schooling education. The Ministerial Committee acknowledged the importance of primary and secondary schooling provided in indigenous South African languages as a pivotal point in realising education in indigenous languages at higher education institutions.[121]

116 As above.
117 University of the Witwatersrand, Johannesburg Language Policy (n 20 above) 2.
118 As above.
119 Judith (n 94 above) 11.
120 As above.
121 Ministerial Committee Report (n 5 above) para 48.11.

5 Concluding remarks

Given the current turmoil universities are experiencing, particularly with regard to their language policies, it is clear that an action plan on the matter is needed. University language policies may embody the provisions of the 1996 Constitution, however, these language policies lack substantive and material action plans in order to advance indigenous languages and their implementation remains unrealised. University institutional language policies continue to fail at advancing the use and status of African indigenous languages.[122] A national framework, one aligned with the provisions of the Language Policy for Higher Education of 2002 and the Ministerial Committee Report, is a strong and stable point of departure. If effect is to be given to section 6(2) and section 29(2) of the 1996 Constitution, then the advancement of indigenous languages must be made a priority at all institutions of higher education. The enhanced level of use, which English and Afrikaans currently enjoy, as well as the disregard for the development of indigenous African languages, means all official languages do not enjoy equal status in South Africa today. Each higher education institution should choose a language for advancement with national congruency in mind. Subsequent to this decision, a multi-phased implementation plan should assist with both short and long term goals in the advancement of such languages.

Although this article analyses and criticises most current university language policies, the process of incorporating an indigenous language as a medium of instruction entails much more than a well thought of plan of action. University funding, availability of resources and willingness from university management structures are all massive hurdles which will need to be overcome before any indigenous African language will be utilised for teaching at higher education institutions. Given especially the enormous financial constraints government and universities are currently experiencing, the incorporation of indigenous African languages will definitely not happen in the short term, and perhaps not even in the medium to long term.[123]

122 Nkuna (n 90 above) 257.
123 Foley (n 106 above) 58.

IN LIGHT OF 'NKANDLA', WHAT IS THE ROLE OF THE PUBLIC PROTECTOR IN UPHOLDING THE RULE OF LAW IN SOUTH AFRICA?

*by Aadelah Shaik Yakoob**

1 Introduction

In March of 2014, the Public Protector of South Africa, Thuli Madonsela released a report entitled *Secure in Comfort* (the report).[1] The report was compiled in response to several complaints received by the Public Protector regarding security upgrades that were made to the private residence of President Jacob Zuma in Nkandla, during the period 2009 to 2013, at the expense of the State (the Nkandla project).[2] Prior to the investigation by the Public Protector and the release of the report, the story had received widespread attention in the media, causing concern among South Africans that the project was a product of maladministration, corruption and the misuse of public funds.[3]

The report later confirmed these and other allegations surrounding the project.[4] The findings by the Public Protector revealed, among other things, that while the authority to facilitate security upgrades at the home of the President does exist, this authority was exercised improperly and beyond its scope by officials in the Nkandla project.[5] She found further, that the Nkandla project was unjustifiably funded by public funds, which were meant to be spent on other significant public projects and that the conduct of all organs of state involved in managing the Nkandla project was unlawful and amounted to improper conduct and maladministration.[6] Most importantly, she revealed that President Zuma and members of his family unduly benefited from the excessive and opulent upgrades

* LLB graduate, University of Pretoria.

1 'Secure in comfort', Report of the Public Protector, 2014.

2 Secure in comfort (n 1 above) 5.

3 See M Letsoalo & C Molele '*Bunker, bunker time: Zuma's lavish Nkandla upgrade*' http://mg.co.za/article/2011-11-11-bunker-time-for-zuma (accessed on 5 August 2015), alleging the occurrence of maladministration surrounding the project. On 30 September 2012 the City Press Newspaper published an article on the Nkandla scandal, alleging that in excess of R203 million had been spent on the project (website unavailable).

4 Secure in comfort (n 1 above) 6.

5 Secure in comfort (n 1 above) 53.

6 Secure in comfort (n 1 above) 55 and 62, 'funds were reallocated from the Inner City Regeneration and the Dolomite Risk Management Programmes of the Department of Public Works'.

to his private residence at the expense of the state.[7] Accordingly, the Public Protector ordered remedial action by a recommendation that the President take steps to assess the costs of the upgrades that did not relate to security measures, and then pay back a reasonable portion of these costs.[8]

Fourteen days after the release of the report, the Presidency responded to the report and the recommendations made by alleging that the Public Protector's findings and recommendations were unfounded based on the fact that her actions and the report constituted a 'violation of the separation of powers.'[9] This allegation had no basis in law, as the Public Protector does not belong to any of the organs of state which are subject to the doctrine of separation of powers.[10] The doctrine of separation of powers divides the state into the judicial, legislative and executive spheres of government,[11] whereas the Public Protector is a Chapter 9 institution which enjoys independence from any of the above spheres of government.[12] The Presidency further alleged that recommendations made by the Public Protector are not binding on any persons and thus chose to ignore any recommendations made in the report. The President had thereafter been evasive on the matter both in Parliament and in the media, despite the efforts of members of Parliament to hold the President accountable on the basis of the report.[13] This matter has caused strife among South Africans, created international embarrassment for the country and disrupted many a parliamentary session, including the State of the Nation Address in February 2015.[14]

In a follow up to the report the Minister of Police, Mr Nathi Nhleko, issued a secondary 'Nkandla Report' in March of 2015 at the request

7 Secure in comfort (n 1 above) 57.
8 Secure in comfort (n 1 above) 68.
9 K Magubane 'Ministers want High Court Judicial Review of Nkandla' http://www.bdlive.co.za/national/2014/05/15/ministers-want-high-court-judicial-review-of-nkandla-report (accessed 5 August 2015).
10 Sec 8(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and Schedule 4 of the Interim Constitution of the Republic of South Africa, 1993 provide for the separation of powers between the judicial, legislative and executive organs of state.
11 Sec 8(1) of the Constitution (n 10 above).
12 Sec 181(2) of the Constitution — 'these institutions are independent, and subject only to the Constitution and the law … and perform their functions without fear, favour or prejudice.'
13 E News Channel Africa 'EFF — Pay back the money' https://www.enca.com/eff-we-want-money (accessed 6 August 2015); E Fereira *et al* 'Nkandla report passes after riotous debate' http://www.news24.com/SouthAfrica/Politics/Nkandla-report-passes-after-riotous-debate-20141113 (accessed 6 August 2015); E Mabuza 'EFF: Zuma and Parliament violated Constitution on Nkandla' http://www.sundayworld.co.za/news/2015/08/14/eff-zuma-and-parliament-violated-constitution-on-nkandla (accessed 16 August 2015); M Merten 'Nkandla: now DA takes Zuma to court' http://www.iol.co.za/news/politics/nkandla-now-da-takes-zuma-to-court-1.1902074#.VeSZ0CWqqko (accessed 20 August 2015).
14 R Calland 'An eyewitness account of SONA 2015' http://mg.co.za/article/2015-02-13-an-eyewitness-account-of-sona-2015 (accessed 16 August 2015).

of the President.[15] In this report, the Minister absolved the President of any responsibility regarding the maladministration surrounding the Nkandla project and exonerated the President of any duty to pay back any funds in respect of the project.[16] This parallel investigation by the Minister seemed to have no purpose other than to undermine and override the initial report by the Public Protector.

The 'Nkandla scandal', as many call it, sparked my attention as both a student of administrative and constitutional law and as a concerned and interested citizen. The abovementioned events, as well as the fact that corruption within the executive sphere of government has become a recurrent problem in South Africa,[17] prompted my interest in investigating what the role of the Public Protector is in South Africa. The significance of such a role may play a crucial role in upholding the rule of law and curbing the incidence of corruption in South Africa.

The focus of this article will, therefore, be to ascertain what role, if any, the Public Protector plays in achieving and upholding the rule of law as envisaged in section 1(c) of the Constitution. In doing so, I will assess the powers of the Public Protector as envisaged by the Constitution and supporting legislation and analyse the effect of recommendations made by the Public Protector. I will then offer a discussion on certain shortfalls within the legislation that have become a hindrance to the Public Protector achieving her mandate in practice. I will, further, highlight the importance of the powers of the Public Protector as an avenue to achieving the rule of law, and, offer an analysis of the judgments in *South African Broadcasting Commission v Democratic Alliance*[18] and *Economic Freedom Fighters v Speaker of the National Assembly*.[19] I will, finally, conclude by

15 Report by the Minister of Police to Parliament on security upgrades at the Nkandla private residence of the President, March 2015 http://www.gov.za/sites/www.gov.za/files/speech_docs/REPORT%20BY%20THE%20MINISTER%20OF%20POLICE%20TO%20PARLIAMENT%20ON%20SECURITY%20UPGRADES%20AT%20THE%20NKANDLA%20PRIVATE%20RESIDENCE%20OF%20THE%20PRESIDENT.pdf. (accessed 16 August 2016) para 1.1 (The Minster's Report).

16 *The Minister's Report* (n 15 above) para 9.

17 In addition to the Nkandla scandal, recent corruption scandals include, among others, the involvement of former Police Chief Mr Bheki Cele in unlawful and improper property deals see (J Maromo 'Cele an active participant in leasing scandal' http://mg.co.za/article/2012-04-02-cele-an-active-participant-in-leasing-scandal (accessed 20 August 2015)); former national Police Commissioner, Mr Jackie Selebi, being convicted on corruption charges in 2010 (S Evans 'Selebi guilty of corruption' http://www.timeslive.co.za/local/2010/07/02/selebi-guilty-of-corruption1)), and various government officials being found to have forged their qualifications (see South African Broadcasting Commission 'High profile cases of fake qualifications in 2014' http://www.sabc.co.za/news/f1/f02fb30046ae5c38984df838250c0ce1/High-profile-cases-of-fake-qualifications-in-2014-20141224) (accessed 20 August 2015).

18 2015 ZASCA 156 (SCA) (unreported case found at http://www.saflii.org/za/cases/ZASCA/2015/156.html).

19 2016 (3) SA 580 (CC).

discussing possible solutions to the challenges faced by the Public Protector in practice and offer a summary of my views.

2 The Constitutional and statutory powers of the Public Protector

2.1 The Constitution and supporting legislation

The institution of the Public Protector finds its roots in section 181 and 182 of the Constitution. It is the first of several 'Chapter 9' institutions tasked with supporting constitutional democracy.[20] Section 181 of the Constitution provides some general governing principles which apply to all Chapter 9 institutions. These principles create the first point of departure in establishing the role and powers of the Public Protector.

Section 181 instructs firstly that all Chapter 9 institutions are independent from any other organ of state; they are subject only to the law and the Constitution and must exercise their mandate impartially and without fear, favour or prejudice.[21] Section 181(3), in particular, dictates further that other organs of state, through legislation or other measures, must assist and protect all Chapter 9 institutions, ensuring the impartiality, independence, dignity and effectiveness of these institutions.[22] Section 181(4) prescribes further, that, no person or organ of state shall interfere with the functioning of a Chapter 9 institution,[23] and, that these institutions should report to the National Assembly regarding their activities at least once a year.[24]

Section 182 of the Constitution then deals specifically with the functions of the Public Protector. It empowers the Public Protector to investigate any conduct of the State or the public administration in any sphere of government that is suspected to be improper, prejudicial or that may result in any impropriety.[25] The Public Protector is then empowered to report on that conduct and take appropriate remedial action.[26] The fact that section 182(1)(c) of the Constitution expressly empowers the Public Protector to 'take appropriate remedial action' clearly indicates that recommendations made by the Public Protector are binding and enforceable in nature.

20 Chap 9 of the Constitution creates several 'State Institutions Supporting Constitutional Democracy', these include: the Public Protector, the Human Rights Commission and the Electoral Commission.
21 Sec 181(2) of the Constitution.
22 Sec 181(3) of the Constitution.
23 Sec 181(4) of the Constitution.
24 Sec 181(5) of the Constitution.
25 Sec 182(1)(a) of the Constitution.
26 Sec 182(1)(b) and (c) of the Constitution.

As will be discussed later, this has in fact been confirmed by the Constitutional Court.

The Public Protector Act[27] sets out the additional powers and functions of the Public Protector as contemplated by section 182(2) of the Constitution. The Act sets out various procedural and administrative guidelines regarding, inter alia, the appointment,[28] remuneration[29] and investigative procedures[30] concerning the institution of the Public Protector in sections 1A, 2 and 7, respectively. The additional powers of the Public Protector are set out in section 6, in terms of which the Public Protector may at his/her own discretion, or, in response to a complaint received, investigate, among other things, any maladministration within government at any level.[31] He/she also has the power to investigate the abuse or unjustifiable exercise of power by a person performing a public function,[32] and, any unlawful enrichment or the receipt of an improper advantage by a person as a result of an act/omission in the public administration or at any level at government.[33] Importantly, section 6(4)(c)(ii) empowers the Public Protector to make an appropriate recommendation to redress the prejudice resulting from the matter being investigated by him/her or make any other recommendation he/she deems fit to the affected public body or authority.[34] Section 6(4)(b) and 6(4)(d) also grant the Public Protector the power to resolve a dispute or rectify any omission by means of, mediation/conciliation, advising a complainant regarding appropriate remedies or any other means he/she deems necessary in the circumstances.[35]

2.2 Interpreting the powers of the Public Protector and shortfalls within the legislation

Upon analysis of the Public Protector Act, it becomes clear that the legislature failed to properly define important concepts relating to the powers of the Public Protector. The definitions and interpretations of the terms 'recommendation' and 'appropriate remedy' do not feature in section 1 of the Act. The Act also does not give any indication as to the effect of recommendations made by the Public Protector and whether these recommendations are binding on public bodies and authorities. Furthermore, while the Constitution

27 Public Protector Act 22 of 2003.
28 Sec 1A of the Public Protector Act.
29 Sec 2 of the Public Protector Act.
30 Sec 7 of the Public Protector Act.
31 Sec 6(4)(a)(i) of the Public Protector Act.
32 Sec 6(4)(a)(ii) of the Public Protector Act.
33 Sec 6(4)(a)(iv) of the Public Protector Act.
34 Sec 6(4)(c)(ii) of the Public Protector Act.
35 Secs 6(4)(b) and 6(4)(d) of the Public Protector Act.

explicitly empowers the Public Protector to 'take appropriate remedial action,'[36], the Public Protector Act mentions only that the Public Protector may 'advise a complainant regarding appropriate remedies'[37] but does not contain any provision dealing specifically with the concept of remedial action and what it may or may not entail. This discrepancy has led to confusion and uncertainty regarding the scope and effect of recommendations made by the Public Protector, as seen in the Nkandla scandal.

Rautenbach and Malherbe[38] offer a discussion on the requirements for the exercise of Presidential and other executive powers in certain instances where the President or another member of the executive is required to act 'on the recommendation of'[39] another functionary or institution. They argue that this term cannot be interpreted within legislation in the same manner as the words 'after consultation with.'[40] The latter does not have a binding effect, while the former does.[41] If this method of interpretation is followed, the President or other members of the executive are, in theory, bound to act according to such recommendations received.[42] However, we have seen that members of the executive instead choose to interpret the term 'recommendation' far too narrowly in practice.

What we observe in practice is that certain provisions of the Public Protector Act are vague, and, the Act lacks important terminology found in section 182 of the Constitution. This has resulted in the Act being ambiguous, open ended and susceptible to manipulative interpretations by those wishing to escape or evade responsibility in cases of maladministration and impropriety that have been investigated and reported upon by the Public Protector. This often results in these cases going without proper redress, and the rule of law being trampled upon without any consequence.

3 The role of the Public Protector in upholding the rule of law

Having discussed the powers conferred upon the Public Protector by the law and the ambiguity and shortfalls of certain aspects of the legislation governing her powers, I will now analyse the role of the Public Protector in upholding the rule of law and highlight how the above legislative shortfalls hinder or threaten the theoretical power

36 Sec 181(1)(c) of the Constitution.
37 Secs 6(4)(b)(ii) and 6(4)(d)(ii) of the Public Protector Act.
38 Rautenbach & Malherbe *Constitutional Law* (2012).
39 Rautenbach & Malherbe (n 38 above) 144-145.
40 As above.
41 As above.
42 As above.

that the Public Protector possesses to be a direct enforcer of the rule of law in South Africa.

The principle of 'the rule of law' is rooted in section 1 of the Constitution which sets out the values upon which the sovereignty and democracy of South Africa are founded. One of these values is the 'supremacy of the Constitution' and the 'rule of law' as found in section 1(c). In an ordinary context, the rule of law translates to the principle that no person/entity or their actions are ever above or immune to the law. For the purposes of jurisprudence and governance however, the meaning and interpretation of the rule of law is far more detailed and far reaching. The rule of law is a widely accepted legal ideal which finds its roots in English law.[43] An English constitutional lawyer, AV Dicey, was influential in defining the rule of law as we understand it today.[44] He summarises the rule into three core principles: the fact that every person is subject to and equal before the law; that every person is subject to appearing before the ordinary courts of a land and that there are to be no special courts for certain people and, finally, that the rule of law stems from and is a symbol of the legal victories of ordinary people and is not an aspect of the law that is imposed by any authority above the people.[45]

Hoexter notes that in a pre-constitutional South Africa, the rule of law was seen by many liberals as a possible way to compensate for the unrepresentative government and lack of a Bill of Rights at the time.[46] While it may seem that in a post constitutional era, where just administrative action and the control of public power are specifically provided for,[47] the generality of the rule of law is obsolete, the opposite is in fact true.[48] While the Promotion of Administrative Justice Act has codified aspects of administrative law in South Africa,[49] certain conduct by public bodies may not meet the definition of 'administrative action,'[50] while other conduct is specifically excluded from the definition.[51] Standards against which the exercise

43 G Quinot *et al Administrative Justice in South African Introduction* (2015) 5.
44 As above.
45 As above.
46 C Hoexter 'The principle of legality in South African administrative law' (2004) 4 *Macquarie Law Journal* 165-185.
47 In terms of sec 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000.
48 Hoexter (n 46 above).
49 As above.
50 Sec 1 (a)-(b) of Promotion of Administrative Justice Act defines 'administrative action' as any decision/failure to take a decision by an organ of state when exercising a power in terms of the Constitution or provincial constitution; or exercising a public power or performing a public function in terms of any legislation; or where a natural/juristic person other than an organ of state exercises a public power or performs a public function in terms of an empowering provision.
51 Sec 1(b)(aa)-(ii) of Promotion of Administrative Justice Act. Some examples of these exclusions are, inter alia, the executive powers and functions of the National Executive and the legislative functions of Parliament.

of public power in the form non-administrative action could be reviewed were therefore needed, in order to ensure the lawfulness and rationality of those actions. The rule of law (and the principle of legality which flows from it)[52] was a perfect avenue through which such standards could be achieved.[53] The rule of law and the principle of legality thus provide a minimum threshold or safety net that governs the exercise of all public power.[54]

Chapter 9 institutions, including that of the Public Protector, are perhaps in theory institutions which are tasked with ensuring that the standards imposed by the rule of law are upheld in practice. As previously discussed, section 181 of the Constitution creates the various Chapter 9 institutions and designates that these institutions 'strengthen constitutional democracy.'[55] Since one of the values upon which that democracy stands is in fact the rule of law,[56] it follows that strengthening our democracy would entail also strengthening and upholding the rule of law.

The drafters of our Constitution created Chapter 9 institutions with a deliberate intent to raise the standards of integrity and accountability that our government should be held to.[57] They created these institutions as safeguards that go above and beyond the standards already imposed by our Constitution that ensure good governance and accountability.[58] The purpose of these institutions, including that of the Public Protector, is to strengthen democracy by limiting the exercise of public power where necessary and creating additional pathways for ordinary citizens to hold the government, which they have entrusted with power, accountable for the use of that power.[59] The purpose of these institutions therefore ties directly into the purpose of the concept of the rule of law being an ideal meant to hold all persons equally accountable before the law, even those in power.

52 Legality as an aspect of the rule of law has evolved to include standards that require an exercise of public power to be in good faith (*President of the Republic of South Africa v SARFU* 2000 (1) SA 1 (CC)), be rational and not arbitrary (*Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC)), be carried out in a procedurally fair manner (*Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC)), be subject to the requirement that reasons be given for the exercise of such power (*Wessels v Minister of Justice and Constitutional Development* 2010 (1) SA 128 (GNP)) and that all relevant factors are considered in the decision making process while such a power is being exercised (*Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC)).

53 Hoexter (n 46 above).

54 As above. Further see: A Price 'The content and justification of rationality review' (2010) 2 *South African Public Law* 346-348.

55 Sec 181 of the Constitution.

56 Sec 1(c) of the Constitution.

57 T Madonsela 'The role of the Public Protector in protecting human rights and deepening democracy' (2012) *Stellenbosch Law Review* 6.

58 As above.

59 As above.

Chapter 9 institutions are furthermore an embodiment of an active democracy and act as an intermediary between the ordinary citizen and those who hold office in government. They serve as one of the most direct and effective ways, outside court action, that any citizen can participate in governance and have their concerns heard and acknowledged.[60] Unlike court action, however, access to these institutions is of absolutely no cost to a citizen. In my view, these institutions represent another 'branch of government' on their own, a branch tasked with representing and protecting the interests of the ordinary citizen against the abuse of public power. In this way, Chapter 9 institutions, including the institution of the Public Protector, are symbols of the people and the purpose and mandate of these institutions often stems directly from the people themselves in the form of complaints or requests made to these institutions. This is in line with the third principle identified by Dicey, that, the rule of law stems from and is imposed by the people themselves,[61] and as such these institutions serve as an embodiment of the rule of law in practice.

Considering the provisions of the Constitution and the Public Protector Act, the Public Protector is competent to investigate the following: maladministration at any level of government; the abuse or unjustified exercise of power; an improper or dishonest act or omission; an improper or unlawful enrichment of a person within the public administration or any other act or omission by a person within government or a person performing a public function that results in the unlawful or improper prejudice of another person.[62] Each and every one of the above scenarios amounts to the violation of the rule of law and the principle of legality, as discussed above, in some or other manner. I would go as far as to say that section 6(4)(c) of the Public Protector Act can be summed up, in layman's terms, in a single phrase, 'the Public Protector is competent to investigate any violation of the rule of law within any sphere of government.' Theoretically, these provisions create an implicit duty on the Public Protector to directly uphold the rule of law through her mandate, by investigating, reporting on and redressing violations of the rule of law.

If a rigid and somewhat positivist approach is followed in interpreting the Constitution as well as the Public Protector Act, it would seem that the Public Protector has a sufficient degree of power to directly enforce the rule of law through her investigations and subsequent recommendations. In an ideal case, the Public Protector would directly uphold the rule of law as follows: the Public Protector

60 C Murray 'The Human Rights Commission et al: What is the role of South Africa's Chapter 9 Institutions?' (2006) *Potchefstroom Electronic Law Journal* 7; see also S Woolman & M Bishop *Constitutional Law of South Africa* (2014) 24A.2.

61 Quinot (n 43 above) 5.

62 Sec 6(4)(a)(i)-(v) of the Public Protector Act.

would elect to investigate, of her own accord or as a response to a complaint from the public, a violation of the rule of law that occurs in one of the ways mentioned in section 6(4)(a) of the Public Protector Act. She would then carry out such an investigation on the alleged violation in terms of section 7 of the above mentioned Act. The Public Protector would then report on her findings, after the investigation, that a violation of the rule of law has (or has not) occurred in one of the ways listed in section 6(4)(a). She would then make recommendations to or instruct the relevant official or public body that specific remedial action be taken to redress the violation and any prejudice that resulted from it. Finally, the relevant official or public body would respect the findings of the Public Protector, implement her recommendations and accordingly redress the violation of the rule of law that occurred.

If the above model, as intended by legislation, was followed, the Public Protector would in fact play an integral role as a direct enforcer of the rule of law in South Africa. The unfortunate truth is that in practice the above procedure, as envisaged by the Constitution and supporting legislation, is not followed by government officials. The Public Protector must often rely on the assistance of the courts to properly exercise her mandate and uphold the rule of law, rendering the theoretical independence of the institution superfluous in practice.[63]

4 An analysis of *South African Broadcasting Commission Limited v Democratic Alliance*[64] *and Economic Freedom Fighters v Speaker of the National Assembly*[65]

In *Democratic Alliance v South African Broadcasting Corporation Limited and Others*,[66] the effect of recommendations made by the Public Protector and the correct interpretation of her powers was raised, giving the High Court an opportunity to clarify and shed light on the confusion. The case dealt with an application brought by the Democratic Alliance (DA) seeking to have Chief Operations Officer (COO) of the SABC, Hlaudi Motsoeneng, suspended from his position as COO pending disciplinary action against him.[67] Motsoeneng faced this pending disciplinary action as a result of findings and recommendations made by the Public Protector that he was guilty of

63 Woolman & Bishop (n 60 above) 24A.2.
64 *SABC v DA* (n 18 above).
65 *EFF v Speaker of the National Assembly (*n 19 above*)*.
66 *Democratic Alliance v South African Broadcasting Corporation Limited* 2015 (1) SA 551 (WCC).
67 *DA v SABC* (n 66 above) para 1.

maladministration and fraudulently misrepresented his qualifications to the SABC.[68] The DA based their claims upon these findings by the Public Protector, which arose out of an investigation conducted by her into various allegations of maladministration at the SABC that were referred to her by senior officials at the SABC themselves.[69] Following the report and findings however, the board of directors at the SABC refused to institute disciplinary proceedings against Motsoeneng and instead permanently appointed him as COO, effectively blatantly ignoring the Public Protector's report and her recommendations.[70]

The blatant disregard for the Public Protector's report and her findings in this matter prompted her to join the matter with the intention of asking the High Court to determine if her report was valid and legally binding.[71] This led to the Court assessing the scope and powers of the Public Protector. The opinion of the Court in this regard was slightly contradictory and did not clarify the matter sufficiently. Early in the judgment the Court makes a note that remedial action required by the Public Protector in terms of section 182(1) of the Constitution is not a mere recommendation, and is therefore binding until set aside by a Court.[72] In a later portion of the judgment that dealt specifically with the powers of the Public Protector however, the Court held that neither the Public Protector Act nor the Constitution contain any provision that the findings or remedial action required by the Public Protector are binding and enforceable and that the legislator would have explicitly stated this if it was so intended.[73] However, the Court reiterated that these are still not 'mere recommendations', that an organ of state has the choice to accept or reject.[74] The Court reasoned this firstly on the basis that an organ of state may not merely ignore recommendations made by the Public Protector as this would directly conflict with the duty imposed upon such an organ by section 181(3) of the Constitution which provides that other organs of state, through legislation and other means, must assist and protect Chapter 9 institutions, to ensure their independence, impartiality, dignity and effectiveness.[75] A blatant disregard for the institution of the Public Protector and her findings is an obvious contradiction of this duty.

The Court further based its view on the principle of legality,[76] finding that the decision to institute or reject recommendations made by the Public Protector is undoubtedly an exercise of public power,

68 *DA v SABC* (n 66 above) para 10(1)-(2).
69 *DA v SABC* (n 66 above) para 5.
70 *DA v SABC* (n 66 above) para 13.
71 *DA v SABC* (n 66 above) para 3.
72 *DA v SABC* (n 66 above) para 21.
73 *DA v SABC* (n 66 above) para 58.
74 *DA v SABC* (n 66 above) para 59.
75 *DA v SABC* (n 66 above) para 60.
76 n 52 above.

which is subject to a minimum threshold of rationality which entails that a decision be rationally related to the purpose for which the power to make that decision was given in the first place. If not, such a decision is regarded as arbitrary.[77] The Court further set out a guideline of procedural steps to be followed by an organ of state when deciding to either accept or reject recommendations made by the Public Protector, in order to render such a decision rational.[78]

The above judgment was however appealed by Motsoeneng and the SABC and, subsequently, the Supreme Court of Appeal was given the opportunity to clarify the effect of recommendations made by the Public Protector.[79] As regards the powers of the Public Protector, the Court disagreed with the findings of the High Court and held that the Public Protector cannot realise the constitutional purpose of the institution if other organs of state second-guess her findings and ignore her recommendations.[80] Accordingly the Court held that Section 182(1)(c) of the Constitution should therefore be taken to mean that the Public Protector may take remedial action herself and that she may determine a remedy and direct its implementation.[81] The Court held further, that, any person wishing to challenge the findings and recommendations of the Public Protector may do so by way of a judicial review, and absent of such a review such a person is not entitled to simply ignore the findings, decision or remedial action taken by the Public Protector.[82] The Court also noted that in this case, the SABC called upon an independent law firm (Mchunu attorneys) to investigate the findings of the Public Protector (without her knowledge).[83] The firm then absolved Motsoneng of any wrongdoing.[84] The Court recognised this as a threat to the independence of the Public Protector and held that an individual or body affected by any finding, report or recommendation made by the Public Protector is not entitled to embark on a parallel investigation to that of the Public Protector, and adopt a position that trumps the findings, or remedial action taken by the Public Protector.[85] As such, investigations and commissions of inquiry like these are essentially unlawful and unnecessary. In light of this, it is clear that similarly, in

77 *DA v SABC* (n 66 above) paras 71 & 74.
78 *DA v SABC* (n 66 above) para 72(a)-(d).
79 Legalbrief 'Public Protector Powers in Limbo' http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjcv-mj9-jPAhUMJcAKHaQtDWEQFgglMAA&url=http%3A%2F%2Flegalbrief.co.za%2Fdiary%2Flegalbrief-today%2Fstory%2Fpublic-protector-trussed-in-legal-chains%2Fpdf%2F&usg=AFQjCNGO6afWR-gThi-OkasYHWMVsFUDzQ&sig2=MLjN_A3RC0R9ErGFQoAJAg&bvm=bv.136499718,d.d24 (accessed 20 October 2016).
80 *SABC v DA* (n 18 above) para 52.
81 As above.
82 *SABC v DA* (n 18 above) para 53.
83 *SABC v DA* (n 18 above) para 16.
84 As above.
85 *SABC v DA (*n 82 above).

the Nkandla scandal, the parallel investigation conducted by Minister Nhleko[86] was unnecessary and invalid.

In *Economic Freedom Fighters v Speaker of the National Assembly*[87] the Constitutional Court finally had the opportunity to clarify the position regarding the binding effect of the powers of the Public Protector. In doing so, the court commented on the reasons the institution of the Public Protector exists and highlighted the fact that the time and state resources spent by the institution during its investigations would make no sense if the subsequent decisions of the Public Protector were inconsequential.[88]

In assessing and interpreting the powers of the Public Protector, the Constitutional Court found it inconceivable that the Public Protector Act was intended by the legislature to 'water down' the powers conferred on the Public Protector under the Constitution.[89] The court pointed out that the Public Protector Act would be invalid if it were inconsistent with the Constitution and therefore,[90] the primary source of the Public Protector's power to take remedial action stems from the supreme Constitution, whereas the Public Protector Act serves only as a secondary source.[91] The Court ultimately held that remedial action taken by the Public Protector is binding in nature, but is not unfettered, as a decision taken by the Public Protector is always open to judicial scrutiny.[92]

The above landmark judgments have significantly clarified the powers of the Public Protector and simultaneously vindicated the institution as a direct means of enforcing the rule of law in South Africa. It is, however, unclear whether these judgments will be enough to ensure the functionality and independence of the Public Protector in practice going forward. It can be argued that certain loopholes and discrepancies within the Public Protector Act[93] may leave the door open to persons who wish to interpret the Act in a way that favours or mitigates their own reprehensible actions. In particular, the lack of procedural guidelines regarding remedial action and how one may challenge remedial action may result in decisions of the Public Protector repeatedly being subjected to judicial scrutiny merely as a means to delay the implementation thereof. This will result in the Public Protector having to continually rely on the courts to carry out her mandate and effectively uphold the rule of law, meaning that a significant amount of time and state

86 The Minster's Report (n 15 above).
87 *EFF v Speaker of the National Assembly* (n 19 above).
88 *EFF v Speaker of the National Assembly* (n 19 above) para 49.
89 *EFF v Speaker of the National Assembly* (n 19 above) para 57.
90 *EFF v Speaker of the National Assembly* (n 19 above) para 58.
91 *EFF v Speaker of the National Assembly* (n 19 above) para 71(a).
92 *EFF v Speaker of the National Assembly* 9n 19 above) para 71.
93 See para 2.2 above.

resources will be expended on court action, each time the Public Protector wishes to implement remedial action to redress a violation of the rule of law. This would further render the Public Protector's theoretical power as a direct enforcer of the rule of law superfluous in practice.

It is worth mentioning that the Public Protector Act was enacted and promulgated in 1994, before the enactment of the final Constitution in 1996. This is perhaps the reason for the discrepancies between the Act and the Constitution. In order to properly secure the functionality of the Public Protector in future, the Public Protector Act needs to be amended so that it is line with the Constitution. It further needs to give effect to the judgments in *South African Broadcasting Commission v Democratic Alliance* and *Economic Freedom Fighters v Speaker of The National Assembly*.[94] In particular, the Act needs to clarify the definition of 'remedial action' and what steps this term may, or may not, entitle the Public Protector to take in order to redress a violation of the rule of law. Lastly, the Act should be amended to include strict procedural guidelines for bodies or persons who wish to challenge a report or remedial action taken by the Public Protector, with the aim of preventing persons from merely arbitrarily disregarding her reports or delaying the implementation of remedial action prescribed by the Public Protector. Such procedural measures may include, inter alia, an internal appeal/review to the Public Protector herself and adequate time constraints regarding, among other things, the implementation of or appeal against remedial action.

5 Conclusion

The Public Protector is one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in state affairs.[95] The Nkandla scandal, the report by the Public Protector on the issue and the events that followed have brought to light the important role that the Public Protector plays in constraining public power, ensuring the rule of law and upholding the values of our democracy. It has further brought to the attention of many South Africans the sad reality that government does not respect the institution of the Public Protector or its findings and that the independence, dignity and legitimacy of the institution are under serious threat in light of government's attempts to undermine it. This, in turn, has posed a serious threat to the rule of law in South Africa.

94 *EFF v Speaker of the National Assembly* (n 19 above).
95 *EFF v Speaker of the National Assembly* (n 19 above) para 52.

Government's response in the Nkandla scandal as well as in *Democratic Alliance v South African Broadcasting Commission* have brought to light certain shortcomings in the legislature's definitions of the powers that the Public Protector possesses,[96] which may currently contribute to the hindrances that prevent the institution from functioning to its full potential in curbing corruption within government and enforcing the rule of law. It is necessary that the legislature amend the Public Protector Act to clearly define the powers of the institution and the procedural consequences of remedial action taken by the Public Protector. However, until such a time that the Act is amended, there is hope that the judgments in *Economic Freedom Fighters v Speaker of the National Assembly* and *South African Broadcasting Commission v Democratic Alliance* which clarified the binding effect of remedial action taken by the Public Protector, will assist in vindicating the institution, making it clear to all organs of state that the Public Protector and her recommendations may not simply be ignored.

Despite the many challenges that the institution of the Public Protector currently faces it has still in certain instances been successful in indirectly securing the rule of law through the assistance of the courts. It has also been able to serve many additional important roles in practice. It has, for example, achieved a great deal through its reporting function and important value during judicial proceedings. Most importantly, the institution has fulfilled its role in acting as a watchdog for the people of South Africa. The Nkandla report sparked the interest of millions of citizens, lending itself to many debates on the issue in Parliament, on social media and at the dinner table of the ordinary South African. In doing this, I would say, that the institution of the Public Protector has actually achieved the ultimate and most important purpose that any Chapter 9 institution seeks to fulfil, strengthening our democracy. Politically aware and active citizens are the lifeblood of any democracy and the Nkandla report seems to have injected new life into the veins of South Africa's democracy, forcing the ordinary citizen to actively question and hold accountable those whom we have entrusted with public power.

96 *DA v SABC* (n 66 above).