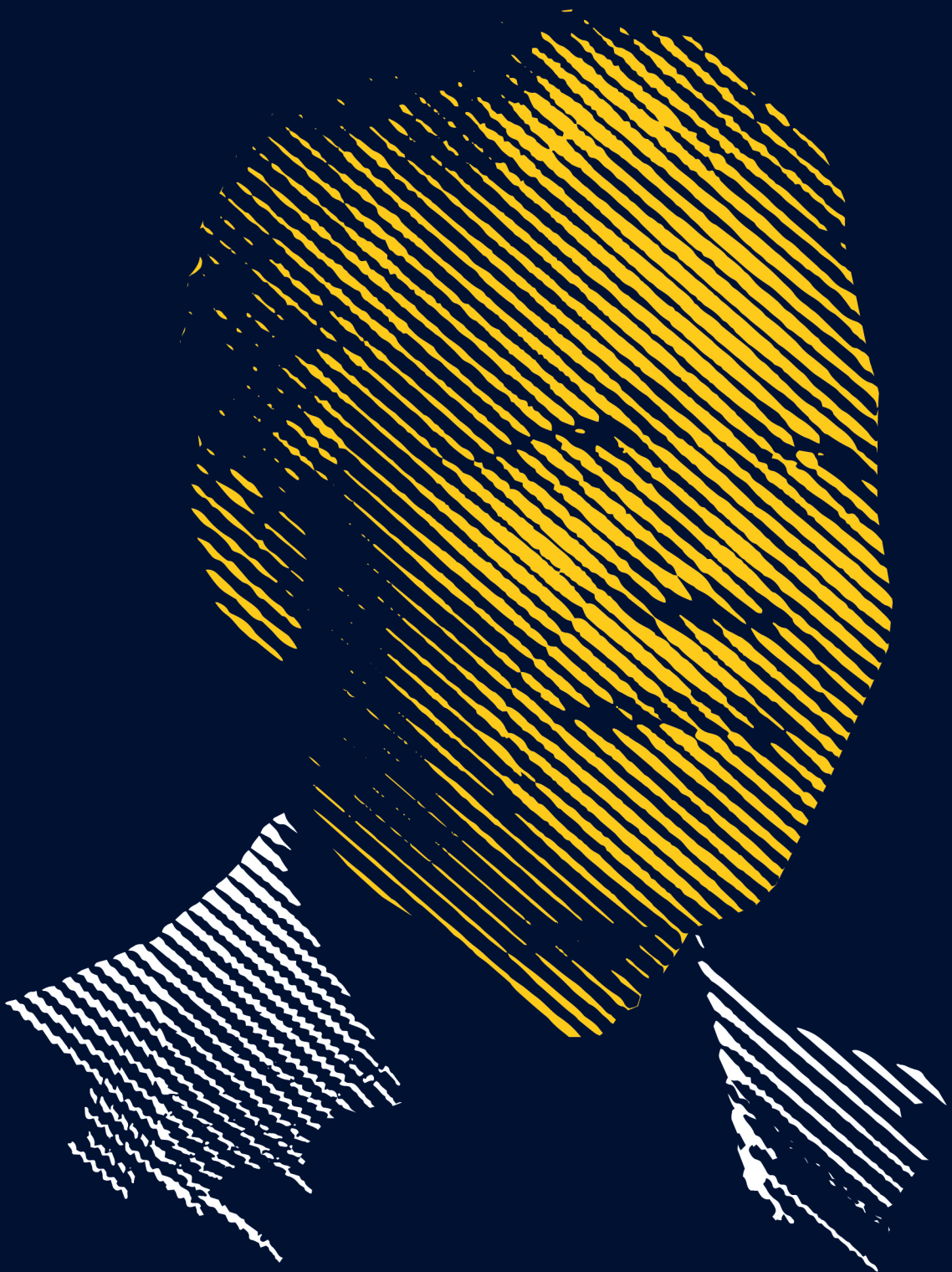
NELSON MANDELA
UNIVERSITY

Faculty of Law

Nelson Mandela University Student Law Review



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Foreword

It is my pleasure to write this foreword to the first volume of the Nelson Mandela University Law Review. The need for this Law Review was born during the 2016 #feesmustfall student protests which swept through South Africa.

> **Law students at Nelson Mandela University's Faculty of Law approached my office of their own accord, acknowledging the difficulties experienced by law students in respect of writing and the use of language, and requesting support for the establishment of a journal to inspire students and to provide an outlet for their writing.**

This journal is the product of those engagements.

It gives me great pleasure to congratulate the editorial team, led by Reward Nxumalo, and the contributors for their tenacity and hard work. I would also like to acknowledge the academics and Adjunct Professors who have added their voice to this contribution. Special mention must be made of Ms Matilda Smith, Director of the Faculty's Law Clinic, who served as academic liaison to this project, and Ms Ntemesha Maseka, a former postgraduate associate to the Faculty and doctoral candidate for her editorial assistance.

It is our hope that the writing reflected in the Law Review will inspire more law students at Nelson Mandela University to strive to have their work published, and to disseminate their own ideas on the transformation of the legal landscape. It is crucial that students in general, and law students in particular, continue to engage (practically and through their speaking, writing and online communications) with the challenging issues and realities faced by people in South Africa and abroad, and that they channel their voice and energy into advancing cogent legal arguments to improve the society in which we live.

Professor Avinash Govindjee
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Editorial Committee

Editors Note

It is my privilege to have been involved in editing the Nelson Mandela University Law Review, the first student journal to be established by law students at this university. This initiative would not have been possible without the assistance of Professor Avinash Govindjee, the Executive Dean of the Faculty. The editorial team thanks Professor Govindjee for his innovative leadership skills and for inspiring determined law students through the example he sets. Ms Matilda Smith must also be acknowledged for facilitating the process of publication, resulting in the publication of some provocative papers. We would like to thank every staff member in the Faculty of Law for their guidance and constructive input.

I would also like to thank the editorial team for their stubborn perseverance. The project was difficult and could easily have been abandoned. I will remember the debates we had regarding this project - it is true when they say 'different melodies tuned well, creates a good song'. Well, today we are dancing at the long-awaited establishment of the Nelson Mandela University Law Review. I wish each and every one of you the very best in life, but most importantly the very best wishes in this noble profession of ours!

This first edition comprises seven contributions. Advocate Lilla Crouse SC reflects on her life as an advocate. She explains three components for being a successful advocate, namely; integrity, hard work and the importance of legal knowledge. Leah Ndimurwimo and Margot Riley discusses the right to decolonized education in South Africa. This paper investigates how education was used before the onset of Constitutional democracy to marginalize people and how education must be reformed post-democracy to serve as a tool for transformation. Reward Nxumalo discusses his position on the prohibited marriage between adoptive siblings and the natural children of the adopted parents. Eddy Nkosi, writes on the doctrine of separation of powers, contending that a judicial candidate must first resign if such a candidate holds public office and in the absence of such resignation this would result in violation of the doctrine of separation of power. Dioné Botes examines the role played by the court in legalising assisted suicide, she also examines how foreign jurisdictions went about legalising assisted suicide. An investigation into the United Nations' integration of the millennium development goals in its African member states is conducted by Inge Laubscher, who finds that the African Union is gradually steering away from its reliance on the United Nations by developing its own decentralised policies. Musonda Nsakanya investigates the validity of same-sex customary marriages. She submits that the Constitution allows for the development of customary law, and if customary law is developed in accordance with the Constitution then a same-sex marriage would be valid.

The contributions are thought-provoking and reflect a high level of thinking.

We congratulate all authors on their first foray into academic publishing and trust that readers will enjoy the contribution and find the articles to be informative and interesting.

Reward Nxumalo
September 2019

Reflections of an advocate

Lilla Crouse

1. Introduction

Not so long ago, a young doctor working at a state hospital told us how hard she had worked to save an unborn baby's life, because this was a "precious baby". Asked what the term "precious baby" means, she explained that after a patient had already lost three babies, the following pregnancy is termed a "precious baby" ¬– and the medical staff goes to great lengths to ensure that the baby is born healthy.

I was appalled. Why could every baby not be a "precious baby"? Each of my own children were precious to me and I wanted the best care for them before and after their birth.

How does this relate to your request that I write something about my career as an advocate? Simply this: each matter that comes across the desk of a lawyer is someone's "precious baby" and should receive the best attention it possibly could.

I want to thank you for the opportunity to share some insights on how to be a good practitioner that I gained during the past 30+ years.

I will share only three of the attributes of a good practitioner.

2. Integrity

Integrity is paramount in any profession. Integrity is unfortunately not something that others can readily measure in you, unless you are found out on an indiscretion or something worse. Integrity is something that you must consciously monitor and continuously develop to ensure that your conduct always reflects ethical behaviour. Each person must be the guardian of his/her own ethics and must live a life according to a well-established code of principles. I am surprised that people think that we can have two or more sets of values, for example: I will never lie to a court versus I have to lie to my husband versus I will lie to the traffic officer. I often jokingly state that I do not lie, because my memory is so bad that I would be caught out every time.

A legal practitioner swears on admission to uphold the Constitution of the Republic of South Africa, only thereafter to trample the dignity of another practitioner or to ignore the rule of law if they do not have good ethical standards. One must constantly evaluate one's conduct against one's own set of values to see whether one is genuinely adhering thereto. This is an inward part of being a good practitioner.

The outward part of integrity and good ethics lies in doing the right things in our daily lives, which will eventually lead others to recognise you as an ethical practitioner/spouse/friend. I remember when I was treasurer of the Bar, we wanted to appoint a bookkeeper and advertised the position. One of the best candidates used the stationery of her employer to apply for the position. (Please remember this was the time before computers and we still used envelopes and paper.) Based on this small indiscretion, I recommended that she not be appointed. Many years later whilst acting as a judge, I issued an *ex parte* interim restraint order against her property in terms of the Prevention of Organised Crime Act. Fast forward a few years and she was convicted of fraud, and went to jail.

Did the Bar dodge a bullet or did this person's honesty just became more and more compromised? I do not know. I do know that, as a lawyer (or a spouse or a parent or friend), your integrity is too important to play fast and loose with. You must actively guard against any compromise as the consequences can be your removal from the roll of practitioners and/or ruin your life in the long run.

3. Legal Knowledge

Integrity alone, unfortunately, does not make a good lawyer. You will need legal knowledge. A good place to start getting this is at university. Students should not be asking for "scopes" to limit their learning or try to pass with the minimum work. Students should look at broadening their knowledge, and sharpening the skills necessary for practice. This will give you an advantage when you start practice. An example of such a student is Nathi Dwayi, an LLM student who actively seeks ways to broaden his knowledge. On many days he would come to my office to offer whatever assistance I might have needed. He seeks out all training opportunities. I have seen students like Jenna Beckett, Twaambo Mukuni, Nomathamsanqa Stock, Zamadlomo Matshaya (and other moot court module students) who took time to research and prepare for moot court. They made themselves vulnerable

by allowing others to evaluate them. I have seen countless others who listen and engage in class. I see a bright future for those students who go the extra mile to absorb knowledge.

Applying yourself at university is, however, only a beginning. Academic excellence is not enough to be a good lawyer. One needs to be able to use the legal knowledge in practice. Probably for this reason, the judges at the Supreme Court of Appeal (SCA) have continuously expressed their disapproval at quoting numerous court cases in Heads of Argument instead of applying the law to the matter at hand. This is often easier said than done. Legal knowledge learned at university is subject-based, whereas court cases ask for a holistic understanding of the law. Court cases are about the facts which one must know and understand before applying the law. One needs techniques to extract all the relevant facts, prior to expressing or concluding what the law entails. I always say that only bad lawyers and second year students shoot from the hip without researching both the facts and the law. Bad lawyers think they know it all, whereas good lawyers know how to get all the facts and the applicable law, bearing in mind that the law could have changed since you last dealt with it.

A practitioner must stay relevant, constantly improving one's knowledge and ability. I read a lot, and I have also discovered audiobooks. I have taken to listening to worthwhile non-legal and non-fiction audio books whilst driving. Travelling time is now well-spent, with the added advantage of being less aggressive in traffic.

For at least the last 30 years I have read all new published judgments, and for at least the last 10 years also all new Constitutional Court, SCA, and Eastern Cape judgments as soon as they are delivered. This takes time, but I think it has improved my legal knowledge and my ability to understand legal thinking. I store all new cases under a relevant Word file on my computer. This presents a good starting point for any legal research as I invariably have the latest (often unreported) law available. It is worth remembering there are few things more unsettling to an advocate's equilibrium than their opponent having access to an unreported judgment which may upset the apple cart. As this is a student publication, I must caution that ethically you should never ambush your opponent with such a judgment, he or she should be made aware of it before you argue on it.

Although I cannot always remember the name of the case or the exact decision, I can find it easily enough in the database that I have built up over the years. My Word system works well for me, but each person should find a system that suits him/her best. My son uses Evernote for instance. He explains its usage at http://chroh.com/hooks/.

On a daily basis practitioners and stakeholders approach me for advice and I am only too eager to share my knowledge or relevant cases with them. In fact, I cherish these opportunities as it gives me the opportunity to think about problems and to seek answers with others.

An important way to stay relevant and true to one's calling is to write for legal publications and to address colloquiums or conferences. You expose yourself to peer review and to criticism, both of which may be painful, but will improve your skills. One of my current functions is to write PowerPoint presentations for legal training at Legal Aid South Africa. This gives me the opportunity to sharpen my legal sword. Whatever one is writing, it challenges one to think about issues and to hopefully formulate your thinking into something that others can understand and appreciate.

4. Hard Work

Unfortunately, good ethics and legal knowledge alone are still not enough to make you a good lawyer. You also need the ability to work hard and to lead a balanced life. There are a few caveats to this (for the students without Latin, you will have to use Google translate here) that you will have to work out for yourself as you develop.

Hard work consists in working constantly and efficiently. You need self-discipline and good planning. Good routine makes life easier. Good routine does not mean 18-hour workdays every day. It also does not mean only working when pressure and deadlines force you to work without sleeping. From October 2017 to February 2018 I represented survivors in the Life Esidimeni Arbitration in Johannesburg before Justice Moseneke. During this time, I had to argue two appeals in the SCA and one opposed motion against a good silk in Port Elizabeth, and a lot of drafting in other matters, and the week after the arbitration I had five SCA appeals. For this period, I was working at least 18-hour days mostly for seven days a week to attend to the arbitration and my other work.

I do not think this is a sustainable way to run a good life or practice. Besides working hard, good routine includes healthy habits such as good family relationships, sufficient exercise, good nutrition, lasting friendships and active community involvement. In order to try to live such a life, I try and limit my work to 10-12 hours for weekdays, and only a half day on a Saturday. I try to go to the gym before work, otherwise I find that I do not go. Unless there are really pressing reasons, I do not work on Sundays.

People can fool themselves into thinking that being at work or sitting in front of a computer equates to working. It does not. "Working" is determined by output. To work optimally, one needs to find just the right amount of pressure to drive you. If I have too much time available my research goes over the top and I do not

work optimally. If I have too little time available my ulcers give me uphill, and I am generally not a nice person to be around. Pressure is important but it needs to be just enough to allow you to work optimally. To manage this, you need to understand your own tolerance for it, and also your family's needs and their tolerance for your pressure and plan accordingly. As said, a good routine is best. Incidentally at the Life Esidimeni Arbitration the experts were all ad idem (again please use Google translate) that good routine equals good mental health. We can all do with a full portion of good mental health. I can do 18-hour stints seven days a week if I must, because I really try to engage in good routines to buffer the frequency and the effect of those stints on my quality of life.

5. Conclusion

Bottom line, as legal practitioners we must continuously develop our ethics, legal and general knowledge and routines to ensure that our precious babies (our clients, our families and our health) and the rule of law are optimally served.

I wish you well on the new publication.

Justification and thoughts on a roadmap: the right to a decolonised education in South Africa

Leah Ndimurwimo and Margot Riley

1. Introduction

The right to decolonised education is not popular in the academic discourse. After just over twenty years since the fruition of the South African democratic state,[1] there are ongoing struggles to bring the Final Constitution[2] to life. A majority of South Africans, especially indigenous black South Africans,[3] have yet to realise their constitutionally entrenched rights.[4] The gradual pace at which transformation is taking place, from the previously oppressive apartheid era to a 'new' South Africa, is exceptionally negative on those who have been previously disadvantaged.[5] Many South Africans may face the reality of never realising their rights within their lifetime. And for others, the negative impact, could be detrimental to their future.

In 2016, this issue was highlighted in the education sector by the social movements of Rhodes Must Fall and Fees Must Fall.[6] Among other contentions, the respective groups, averred that the current education system remains a colonial tool of the apartheid era, which continues to marginalise and oppress indigenous South Africans.[7] Although these social movements operated in the higher education sector, colonial education can be seen throughout the various levels of education in South Africa.[8] The result is that the majority of South Africans have not realised their right to education, among other constitutionally entrenched rights.[9]

In light of the above, this article attempts to examine how the right to decolonised education can be legally enforced and realised. From this perspective, a nationwide concern to decolonise the education system has arisen. It is equally accepted that transformation of colonial education is among the national priorities. The student protests in South African universities of 2015 and 2016 presented a reminder that the effective decolonisation of education system in South Africa, is a broad concept that must be interpreted in line with the constitutional entrenched values. However, widespread misconceptions of the decolonisation of education has brought about unwarranted resistance for change.

There is a call for the right to a decolonised education, under the Constitution of South Africa which may provide legal justification to respond to the current national education dilemma. This is in line with the Supreme Court of Appeal's view in the case of *Hotz v University of Cape Town*[10] which emphasised that the right to protest against colonial education and injustices of the past is protected under the Constitution.[11] This article looks at the historical overview and the realisation of the constitutional right to education and points out that such realisation is still inadequate in terms of availability, acceptability, accessibility and adaptability, in order to potentially transform and empower persons from disadvantaged backgrounds and promote social justice in a manner that is consistent with the Constitution. Finally this article proposes a roadmap to the right to decolonised education in South Africa.

2. Historical Context

The history of South Africa is central to the rationale and justification for decolonisation of education in the post-apartheid era. It is therefore, advocated that the concept cannot be divorced from colonisation and racial segregation. In fact, the history of colonisation and apartheid form the foundation for understanding decolonisation in the context of Africa in general and South Africa, in particular.[12]

2.1 Pre-colonial Era

African education has been regarded as a part of the normative values of African indigenous communities. From a modern education point of view, this would be considered as a part of the education curriculum. Mawere promotes this by stating that, in fact, African indigenous knowledge systems (AIKS) were used to promote peace, harmony and order amongst the people and their environment.[13]

Before colonialism, formal and informal education practices through the transmission of indigenous knowledge from adult to child was evident among the African communities such as the Khoi, San and Bantu-speaking people of Southern Africa.[14] The children were raised and educated about their culture and traditions by the community and specialised educators. The AIKS educational curriculum covered many aspects, such as, hunting and gathering, food preservation, pottery, agriculture, pastoralism, indigenous brewing, mining, building houses, traditional medicine, circumcision, midwifery, family life, leadership and administration (through kings, queens, princes, chiefs, tribal leaders and headsmen), values, trading in the form of barter systems,[15] legal rules, punishment for non-adherence, dispute resolution and history through mythologies and tales.[16] The transfer of knowledge was associated with rituals which would be handed down orally from generation to generation within each tribe. This process was intimately integrated with the social, cultural, artistic, religious and recreational life of the African indigenous communities.

Hammel and others, for example, posit that indigenous mining used complex methods to collect metal ores in pre-colonial Southern Africa.[17] Those methods included minimal division of labour, underground mining, planning to overcome obstacles such as the need for illumination and ventilation. The AIKS are unique to African culture and society as they incorporate many facets of technology, philosophy, social, economic, legal, educational and governance.[18] In other words, the AIKS had a close link with social life both in a material and spiritual sense and were collective in nature because there was no separation of education and productive activities, nor was there a division between manual and intellectual well-being. Thus, the AIKS curriculum focused not only on education but also the development of a child and so, producing a well-rounded individual that would fit in the society. For that reason, the AIKS were usually embedded in community practices, institutions, relationships and rituals. And they were communicated tacitly through demonstrations, which are not easily reduced to writing, in contrast with the western education.

The relevance of AIKS to-date is embedded in the philosophy of Ubuntu with the view of maintaining peace and values which include tolerance, trust, caring, co-operation, empathy, love and non-violent behaviour. The Truth and Reconciliation Commission or the transitional justice model which was adopted in South Africa after apartheid, was largely influenced by the African philosophy of Ubuntu. In this context, forgiveness was preferred instead of revenge. As Reverend Desmond Tutu and former President Nelson Mandela have emphasised, *Ubuntu* means the interconnectedness of human beings.[19] In terms of Ubuntu philosophy, indigenous dispute resolution involves dialogue, problem solving, active listening and the creation of mutual relationships which strive to promote social justice, equality and human rights, as demonstrated in the case of *Kadume* which concerned land dispute between the applicant (Kadume) and his step brother Soine.[20]

The case of *Kadume*[21] shows how the processes of mediation and conciliation were valued in the pre-colonial societies across Africa. The oral traditions (legends, narratives, myths) constituted valid forms of knowledge, although their use, transmission and dissemination may not be the same as western education texts and literature.[22]

The promotion of the right to education by international bodies, has primarily focused mainly on improving the availability and accessibility of education. However, the AIKS rarely feature in this process because the international engagement with sub-Saharan Africa, tends to disregard African individual states and rather focuses on equal generalisation of African education.[23]

2.2 Pre-apartheid Era

The pre-apartheid era introduced formal schooling which came to the Cape with the Dutch settler-colonisers in 1652.[24] Formal education was imparted to indigenous South Africans by missionaries. Missionary schooling was aimed at 'Christianising' or integrating the indigenous South Africans to improve their quality of life through 'civilised influence'.[25] These schools were highly uninformed on South African cultures and often taught a community mores and work ethos which undermined indigenous tenets.[26]

The British occupation brought about a proper education system, run by the government.[27] Missionary schools, previously receiving no financial assistance, began receiving government funding.[28] This solidified the governments control over the schools,[29] which led to the establishment of the apartheid era and its Bantu education system all aiming to undermine and disempower indigenous communities.

2.3 Apartheid Era

During the apartheid era, indigenous people of South Africa were subject to Bantu education, which in turn, was a legally enforced colonial tool of subjugation.[30] The Bantu Education Act[31] established the Black Education Department under the Department of Native Affairs and run by the then Minister Dr Hendrik Verwoed. The standard of Bantu education was inferior to that of white education.[32] The sole aim was to create employable domestic workers or servants, who submitted to white domination.[33] The Bantu Education Act deprived a majority number of South Africans of their right to attend decent schools. The effect thereof, was the creation of unskilled labour system which the government is still grappling with.[34] The enactment of the Bantu Education Act

in 1953 effectively legalised and legitimised a system that would provide for what it considered to be high-level education for white South Africans. It would ultimately deprive the majority of South Africans of decent schooling and tertiary education.[35]

Universities too were made 'tribal'[36] when in 1959, 'non-white' universities and colleges were included in the Extension of Universities Act.[37] It is clear that the policy of Bantu education was aimed at driving black or non-white youth to the unskilled labour market. Hendrik Verwoerd who was at the time the Minister of Native Affairs, claimed that the aim was to solve South Africa's "ethnic problems", by creating complementary economic and political units for different ethnic groups. The effects of this policy have been significant in that, South Africa today still struggles to rectify the horrific system that deprived millions of one of the most fundamental and significant rights, namely education.

It was in fact, the lack of adequate funding and quality education which disempowered indigenous students. The government through the Extension of University Education Act, which prevented indigenous South Africans from attending white universities, also controlled further education opportunities. Through its deprivation of further education opportunities and employability,[38] the government was able to force the indigenous people into a state of dependency.[39] The Bantu education system was also the means by which the government naturalised the inferiority of indigenous South Africans and promoted the superiority of the white man.[40] A further aim of the government was to detach and deform the indigenous individual from his or her own culture.[41] Nor did it allow the indigenous individual to fully integrate into the white culture or community.[42]

2.3.1 The consequences of the non-use of indigenous languages in education

The most prominent method of the deformation of the indigenous individual arose through the non-use of indigenous languages in the sphere of education.[43] It was clearly an acculturation mechanism, aimed at integrating and assimilating the indigenous South African from his or her 'primitive' ways into a more 'civilised' individual.[44] This subscribed to the view that indigenous South African philosophies and traditions are inferior.[45]

The use of European languages impeded the learning process of indigenous students.[46] It had the effect that it took longer for those students to conceptualise knowledge.[47] That is, owing to the difficulty in understanding knowledge imparted to them, from another language, other than their home language.[48] It also carries a further challenge to translate their thoughts or understanding into the spoken or written European language.[49] Therefore, they were inhibited from understanding in-depth concepts, as well as impeded from accurately communicating their thoughts. That naturally fed into the superior, white stereotype perception that the black individual, was weak-minded and only capable of physical labour.[50]

2.3.2 The consequences of non-indigenous content in education

The content of education imparted to indigenous individuals by the oppressed served to strengthen the inferiority of these colonised, by means of marginalising indigenous history and ways of thought or world-views.[51] Simultaneously, the content of the education served to strengthen the superiority of western history and world-views.[52] These world-views include capitalism and individualism.[53] This resulted in epistemic privilege and subsequent, epistemic oppression.[54] Epistemic oppression over the course of the colonial rule and the apartheid era, resulted in what is known as epistemicide.[55] Epistemicide occurs where the natural advancement of knowledge of a particular culture, has been oppressed to such a degree that the knowledge has been lost or is not easily available to individuals of that culture. It has lost its value to individuals of that culture as well.[56] The oppressor epistemology has thus overridden and undermined the indigenous epistemology, causing what is called epistemic violence and epistemic injustice.[57] For the foreseeable future, the invalidation of the cultures knowledge and thought system, has caused a great injustice to a culture and its methods of reason.[58]

The marginalisation and oppression of indigenous epistemology can be closely linked to the non-use of indigenous languages.[59] It is also widely understood that language plays a pivotal role in thinking and communicating.[60] It is no coincidence that Dr Verwoed was well educated in psychology,[61] and that the mechanisms put into place in the apartheid education system, were well thought out and intentional.[62] The Bantu education system consequently inflicted mass epistemic violence on the indigenous people of South Africa.[63] The overall result was to silence indigenous history, knowledge and sovereignty. It also created a state of subordination and dependency.[64]

2.4 Post-apartheid Era

In 1994, South Africa became a democratic state, giving a sense of hope and freedom to indigenous South Africans. The Bantu Education Act was repealed and many attempts to change the education system were put into effect by the Education Department and policy-makers.[65] However, the segregation and inequality of apartheid, although no longer directly enforced, still continues to perpetuate privilege and oppression through the current education system.[66] This point was emphasised by Nkabinde J in the *Governing Body of the Juma Masjid Primary School v Essay case* that:

> "Today, the lasting effects of the educational segregation of [a]partheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners".[67]

Budgetary constraints,[68] inferior facilities,[69] privatisation of quality education,[70] unqualified teachers and mismanagement are but a few symptoms of the current education system in South Africa.[71] Incidentally, in South Africa, class and race go hand in hand with the opportunities afforded to individuals in the sphere of education.[72] Class plays a role in acquiring quality education. This is largely owing to the privatisation of quality education institutions.[73] Statistics have shown that the large majority of indigenous South Africans are still marginalised by the current education system, based on both class and race.[74] Here, class related inequalities still allude to a racial element. There is also education institutions illustrating which schools offer to poorer whites. Even these schools are better equipped and funded than those of poor black schools.[75] Thus, raced-based educational inequality is still evident in our democratic South Africa.[76]

2.4.1 Statistics

Statistical analysis of education across South Africa, does not necessarily depict the lack of quality education afforded in most schools.[77] However, the circumstances illustrated in the statistics can create a reasonable inference to such.[78]

2.4.2 Government Funding

Although, private and public schools are given equal funding from the government, it does not create substantive equality.[79] Historically, privileged communities and advantaged races are able to better fund private schools. They also attract adequately qualified teachers and investments.[80] On the other hand, poorer black communities require more funding to remedy lower standards of literacy and numeracy. Generally, these lower standards are because of the lack of early education exposure.[81] The education offered to previously disadvantaged individuals lacks the required quality to enable individuals to overcome the obstacles of poverty.[82]

2.4.3 Students per Teacher

In provinces that enjoy a whiter influence, the average pupil to teacher ratio is 25 to 1.[83] Whereas, in predominantly black provinces, the ratio is around 45 pupils per teacher.[84] Naturally, this would have an effect on the quality of education imparted to individual students. More students per teacher, places greater daily administrative and management burdens on a teacher.[85] That in turn distracts the teacher preventing him or her from applying time and effort to curricular transformation in order to improve of the standard of quality of education.[86]

2.4.4 Facilities and Faculties

Education institutions in predominantly rural South Africa, as well as in some urban schools, face dire conditions.[87] They lack basic facilities such as water and sanitation.[88] Statistics show that lack of amenities follows a racial trend.[89] It has been found that over 50% of predominantly black schools, do not have water and toilet facilities, some schools operate without access to electricity.[90] The conditions under which learners are required to learn, are thus deplorable.[91] The primary cause can be ascribed to the lack of adequate budgeting for and prioritising of education by certain provinces.[92]

Those conditions are also not conducive to attract adequately qualified teachers. In fact, qualified teachers are generally deterred from working in such an environment. They often opt to work in better kept and easily accessible schools.[93] Consequently, the positions in the schools in predominantly black areas, are vacant or filled with unqualified teachers.[94] The end result is attendance without necessarily quality education.

2.4.5 Intergenerational Educational Mobility

The reality in South Africa is that the majority of those who have been previously oppressed through the apartheid education system, have passed on their disadvantage from one generation to the next generation. This has been confirmed by Statistics of South Africa and has been labelled the 'under-education trap'.[95] The findings by the Community Survey of 2016,[96] reveals that the so-called 'under-education trap' continues, even though a portion of black South Africans have obtained a better education than their parents.[97] Also, studies reveal that families who have educated parents show that their children will succeed. Parental support is the key contributing factor among other factors.[98]

Thus, remnants of structural inequality, caused by the Bantu education system, continue to exert an oppressive force in the education system of South Africa today.[99]

The only means by which an individual can escape this 'under-education trap' is to become a sufficiently educated individual.[100] It highlights the significance of a quality education in the circumstances of South Africa and its historical injustices. In addition, those who have managed to escape this setback have generally opted to move to predominantly white schools in white areas, often taking their skills and wealth away from the poorest areas and schools which are most needy.[101] Unfortunately, this factor contributes to the cycle of inequality in education.

2.4.6 Social Movements

The Rhodes Must Fall and Fees Must Fall social movements advocate for decolonised education in South Africa both, in respect of the curriculum and the institutions of higher education.[102] These movements call for an 'African public university',[103] which centralises South African study and reflects the structure, pedagogies and curriculum of the indigenous South African people.[104]

Those respective social movements aver that the current education system is a colonial education system which has the effect of oppressing and marginalising the majority of South Africans.[105] The non-inclusion of indigenous South African and African knowledge in the education system, implies that such information is not valuable to the South African society.[106] It intrinsically casts African knowledge as inferior, primitive or even as non-existent.[107] This is epistemically unjust and undermines the core of indigenous South African groups.[108]

3. The right to education in South Africa

3.1 The scope of the right to education under South African law

The right to education is enshrined in the Constitution of the Republic of South Africa.[109] The right to education refers to the right to basic education,[110] adult basic education and further education.[111] Basic education refers to both basic education and adult basic education. Basic education is currently undefined by the legislature and case law.[112] In terms of the South African Schools Act,[113] basic education merely refers to compulsory attendance of schooling up to grade 9 or the age of 15, whichever comes first.[114]

The White Paper on Education and Training 1995 (the White Paper) provides that the meaning of basic education can be found in South Africa's relevant policies. But, it also refers to the World Declaration on Education for All (the Declaration).[115] It has been argued that the mere reference to the Declaration by the White Paper, alludes to a standard of quality of education in South Africa,[116] thereby supporting the view that the right to education involves more than merely access to basic education. It also points to a quality education.

Further education, in South Africa, refers to education beyond basic education.[117] According to the Further Education and Training Colleges Act[118] as well as, the Higher Education Act,[119] further education encompasses qualifications beyond basic education. They include qualifications beyond grade 9 and matric.[120] In defining further education, no mention is made to a standard of quality. In accordance with section 39 of the Constitution, the right to education can be better understood in consideration of international law standards for education,[121] as discussed below.

3.2 International Law

3.2.1 World Declaration on Education for All

Using the guide of international law the term basic education most simply means "the acquisition of basic learning needs".[122] According to the Declaration, basic learning needs comprises of the following:

> "[B]oth essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes)".[123]

However, this is not all that education means. The Declaration provides that basic learning needs also have a particular purpose and context, namely:

> "[T]he basic learning needs which are required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning".[124]

This suggests that the purpose of education is to empower individuals. Thus, the basic learning needs imparted must be relevant to the context of learners' circumstances. In essence, an education system should provide the basic learning needs relevant to the learner, in order to fulfil the purpose of empowerment. Consequently, where an education system does not provide the relevant basic learning needs to an individual, it fails to empower that individual. Therefore, this article contends that a Euro-centric education system imparted to indigenous South Africans, cannot meet the abovementioned requirements for education. This rationale is further supported by the following provision of the Declaration, which expresses the culturally and geographically subjective nature of education and the need for education to adapt and remain relevant.[125] That means, "the scope of basic learning needs and how they should be met, varies with individual countries and cultures, and inevitably, changes with the passage of time".[126]

Basic learning needs are essential to human development, individual empowerment and the attainment of other human rights. Therefore, basic education should meet all culturally and geographically relevant basic learning needs.[127] In light of this, the Declaration highlights the value of indigenous knowledge in education and its vital role in shaping human development. The Declaration also makes mention of the importance of education in the mother-tongue as a key factor in laying the foundation

of an individual's education.[128] The Declaration also advances further education which is founded upon basic education.[129] Basic education therefore must facilitate a good foundation for further learning. To meet the standards of education under the Declaration, basic education needs to be relevant, useful, empowering and slowly lay a good foundation for further learning and development of the person.

It has been submitted that the only difference between education and basic education is the stage at which learning begins.[130] That is, basic education refers to basic learning needs which are considered the minimum standard of education necessary to equip an individual to function and flourish in his or her society.[131] Also, what is needed, is all the fundamentals necessary to enable the continuance of education. Basic education is certainly not limited to an age or particular grade, but rather refers to an individual's capacity at any point in time to cope in their society.[132] This provides an explanation as to why section 29(1) of the Constitution refers to both the right to basic education and adult basic education in the same provision.

Basic education has also been described by the Declaration as "a foundation for human development and fundamental to higher levels of education".[133] It encompasses both aspects of access and quality and is not limited to formal schooling.[134] The world-wide deficiency of education has stressed the need to focus on the quality and relevancy of education.[135] Accordingly, the provision of access to education by the state is important. Besides, the education provided by the state must, above all, meet basic learning needs.[136] In summary, education must be qualitative, useful and relevant to ensure an actual learning acquisition is realised. Thus, the learning opportunities afforded by the state must facilitate actual learning.

3.2.2 Universal Declaration on Human Rights

Article 26 of the 1948 Universal Declaration on Human Rights (the UDHR) provides the following in respect of the right to education:

> "Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace".

Therefore, in terms of the UDHR, education must facilitate the attainment of other human rights, making it a central facilitative right or an empowering right. This emphasises the purpose of education in empowering individuals. The UDHR broadens the purpose of education, namely to instil in individuals a respect for diversity among cultures and different races. This is particularly significant in the context of South Africa, given its racist history and its array of various cultures and races within our country. It can therefore be argued that, in light of this, there is a heavier burden placed on the education system in South Africa to instil in individuals, a respect and tolerance for diversity.

3.2.3 African Charter on Human and Peoples Rights

Article 17 of the 1981 African Charter on Human and Peoples Rights (the ACHPR) mentions the right to participate in cultural life under the same Article as the right to education. That cannot be a mere coincidence. In fact, the subsequent provision expresses the duty on the state to promote and protect traditional values within education.[137] It stresses the role of education as a means of transmitting values and morals from one generation to the next. It also places a duty on the state to ensure the education system fulfils its important function within the country.[138]

3.2.4 International Covenant on Economic, Social and Cultural Rights

Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) refers to the right to education and reflects the same standards on education as the UDHR.[139] In the Committee on Economic, Social and Cultural Rights (CESCR) General Comment on education, the right to education is reiterated and expanded upon in the following terms:

> "Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities".[140]

The nature of the right to education as an empowering right is reiterated in the ICESCR. It is also expressly linked with its pivotal role in changing an individual's socio-economic circumstances. It further provides that the most fundamental objective of education is the development of the human personality.[141] It therefore places an obligation on the state to make education available, accessible, acceptable and adaptable (also known as the 4-A Scheme).[142] Acceptable refers to the substance of the education, thereby incorporating reference to a standard of quality of education within the right to education.[143] Acceptability refers to relevance and cultural appropriateness of the curricula and pedagogies.[144] Adaptability is synonymous with flexibility and interrelates with acceptability, in so far as, the ICESCR requires a state to provide an education which meets the demands of an ever-changing society, while still maintaining the aim of education.[145]

3.3 The nature of the right to education

The right to education is interdependent and interrelated. Mokgoro J, when considering socio-economic rights in the Constitution noted that:

> "The socio-economic rights in our Constitution are closely related to the founding values of human dignity, equality and freedom… [T]he proposition that rights are inter-related and are all equally important, has immense human and practical significance in a society founded on these values".[146]

What it means is this, the right to education cannot be understood in isolation from other democratic rights. Instead, it must be understood in light of the democratic values of human dignity, equality and freedom. Language rights or rights in education are also relevant in understanding the nature of the right to education in South Africa.

3.4 The justiciability of the right to education

Section 29 is characterised as a socio-economic right, however, unlike other socio-economic rights enshrined in the Bill of Rights, the right to basic education, is not subject to internal qualifying terms such as: 'access', 'adequacy', 'progressive realisation' or 'available resources'.[147] The right to basic education is therefore direct, immediately realisable and not contingent upon the availability of state resources.[148] Therefore, it is only subject to the general limitations clause under section 36 of the Constitution.[149]

The obligation on the state to provide basic education is a positive one.[150] In other words, the right to basic education does not only place a negative duty on the state to not obstruct individuals from pursuing their right to basic education,[151] it also places a positive obligation on the state to act in making this right available.[152] In addition to this, the state must act to make the substance of the right available.[153] Therefore, because the right is not subject to the term access, this right to basic education is classified as a direct right.[154] It is noted that the right to basic education is not subject to 'progressive realisation',[155] as stated above. That means, the right is immediately realisable and the state is,[156] therefore, required to act immediately in giving effect to the substance of the right to basic education.[157]

The realisation of the right to basic education is also not reliant on the availability of state resources.[158] This suggests that the right to basic education is unconditional.[159] Therefore, the state must act immediately in giving effect to the substance of the right and cannot provide something which falls short of basic education, based on its available of resources.[160] In other words, the state cannot qualify its duty under section 29(1) based on resource constraints.[161] However, it has been suggested that the states resource constraints may be a factor which is likely to be considered when limiting the right to basic education under section 36 of the Constitution.[162] It needs to be highlighted, that the limitation of the right to basic education is a separate enquiry to the meaning of the right under section 29. Had the legislature intended on limiting the right to basic education, it would have expressly done so in that section.[163]

The right to further education under section 29(2) of the Constitution is framed differently to that of basic education,[164] but only insofar as it is subject to progressive realisation. The right to further education therefore, is not an immediately realisable right.[165] The states obligation under sub-section (2) is the same as under sub-section (1), except that the right to further education must be progressively realised by the state through reasonable measures.[166] The availability of resources may thus be a factor in considering whether the state has acted reasonably in executing its duty under this section.[167]

In terms of international law, the CESCR places an express obligation on the state,[168] as a state party to the ICESCR in order to conform to the international standards of education in accordance with Article 13 of the ICESCR,[169] the Declaration,[170] and article 26 of the UDHR.[171] There is an obligation imposed on the state to progressively develop the quality of education as well as reduce existing disparities, especially those affecting previously disadvantaged groups, such as the poor and indigenous people of our country.

4. Interrelated rights and transformative constitutionalism

4.1 Interrelated rights

4.1.1 Equality

The Constitution provides for the right to equality,[172] which means that each individual is entitled to the equal benefit, enjoyment and protection of the law. It also means that the state and other individuals may not infringe upon an individual's right to equality.[173] There are numerous legislative mechanisms which protect and promote the right to equality, most significant is the Promotion of Equality and Prevention of Unfair Discrimination Act.[174] The right against unfair discrimination is on par with the right to equality. In fact, it has been stated the right to equality is essentially an assurance of non-discrimination.[175] Although the law does not prohibit differential treatment, it expressly prohibits unfair discrimination, especially where that discrimination is based on any of the listed prohibited grounds.[176] The Constitution includes race, age, sex, culture and language.[177] The right to equality also includes corrective measures to be taken by the state to protect and advance persons who have been disadvantaged by

unfair discrimination.[178]

The right to equality includes the right to equal opportunity and access to education to all individuals. It entails the right not to be unfairly discriminated against in education. It also ensures that the state distributes its resources as to give effect to equality and non-discrimination in education.[179] The state, in this context, may also have an obligation to remedy the effects of unfair discrimination in education caused by the former apartheid regime.

4.1.2 Human dignity

The right to human dignity is a foundational right and democratic value in the Constitution,[180] It is inherent to all human beings.[181] In the benchmark and post-apartheid case of S v Makwanyane, the Constitutional Court emphasised that the recognition of human dignity is a recognition of the intrinsic worth of every human being.[182] The right to human dignity is closely intertwined with the right to equality, to the extent that every human being is entitled to equal value, respect and protection on the basis of their humanity.[183] Human dignity is the foundation of all other rights and is a necessary component to any democratic state.[184] O'Regan J, in Makwanyane went on to emphasise the significance of human dignity in the post-apartheid era when she stated the following:

> "Respect for the dignity of all human beings is particularly important in South Africa. For [a]partheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new [C]onstitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new [C]onstitution".[185]

Human dignity in education translates to a complimentary environment whereby education promotes, protects and enhances the dignity of individuals and their corresponding tolerance and respect for the dignity of others.[186]

4.1.3 Freedom

According to the Constitution, "everyone has the right to freedom and security of their person",[187] which includes "the right to be free from all forms of violence".[188] This protection against violence against the person of an individual extends to both public and private sources.[189] Therefore, both public and private educational institutions are bound by this provision. In education, freedom and the protection against violence would entail an education that does not epistemically violate the psychology of an individual,[190] nor result in damaging the self-confidence and self-expression of that individual.[191] The right against epistemic violence in education is closely related to the rights to equality,[192] dignity,[193] and the rights to language and culture, discussed below.

4.1.4 Language

Language rights are reiterated throughout the Constitution. For instance, section 6(2) of the Constitution which forms part of the founding provisions, in which a positive obligation is placed on the state to elevate historically diminished indigenous languages. Section 29(2) of the Constitution also provides for the right to receive education in home languages subject to certain requirements being adhered to. Section 30 deals with the right to language and culture. Section 31(1) of the Constitution places a negative obligation on the state and other individuals not to infringe on an individual's right to enjoy their culture and use their language. When considering the nature of colonial education and its historical oppression of indigenous languages, it could be argued that in a democratic society like South Africa, out which in extent that the majority spoken indigenous languages would be at the heart of the education system. Instead, minority colonial languages are still prevalent in the education system.

4.2 Transformative constitutionalism

Transformative constitutionalism is a concept that is gaining pace in the legal sector.[194] It is not expressly entrenched by the Constitution, but its basis can be found in a compilation of rights and values which are constitutionally entrenched. These rights and values include: the founding values of the Constitution;[195] the state's obligation to respect, protect, promote and fulfil all the constitutional rights;[196] the general limitations clause[197] as well as the right to equality and socio-economic rights. These rights and values, read together, form the foundation for articulating the core of what transformative constitutionalism means.[198] The notion is described in essence, owing to the fact that the term is not confined to a particular definition, but rather represents an ideology.[199] This ideology depicts what some legal authors have described as, a 'substantive constitutional revolution'.[200] It is referred to as a 'substantive' revolution, because it measures the rights afforded by the Constitution against the reality of the socio-economic conditions in South Africa.[201]

Transformative constitutionalism is also a philosophy on how the Constitution should be interpreted. It gives weight to all interrelated rights and values in the Constitution and refers to the continuous development of the law to substantively transform South Africa's social, political and economic spheres.[202] It serves as a catalyst in building a future South Africa which gives life to the Constitution, while keeping in mind, the historical context of South Africa.[203] Thus, transformative constitutionalism is remedial as well as progressive in nature.[204]

During the apartheid era, law and policy enforced oppression and segregation.[205] Law justified the Bantu education system and the unequal distribution of opportunities according to race. Those inequalities perpetuated poverty and low socio-economic conditions amongst indigenous people of South Africa.[206] It illustrates the law as a mechanism of disempowerment.[207] The attainment of a democracy in 1994 and the adoption of the Constitution in 1996, produced hope for a better future for all South Africans, especially those previously disadvantaged by the laws and apartheid policies. Transformative constitutionalism therefore, strives to give life to the Constitution. In terms of this notion, the law needs to transform society in accordance with fundamental values of democracy and empower those who have been previously oppressed by colonial education.[208]

5. Conclusion

South Africa has had a tumultuous history in respect of its education system. It was the driving force behind social, epistemological and economical atrocities of the apartheid era, which acted to disempower the majority of the nation. In acknowledging the power of an education system, following the reign of the apartheid regime, Nelson Mandela stated that "education is the most powerful weapon which you can use to change the world". To heal and change South Africa, the power of the education system must be used to empower the majority of the nation and give life to the Constitution, including its democratic values of equality, human dignity and freedom and the rights to education, language and culture.

In consideration of the international law standards of education, there is indisputable reference to quality education, which requires the state to provide more than mere access to education. Additionally, quality education includes cultural and language appropriateness, which can be paralleled with the imperatives of the decolonisation of education in South Africa. Decolonised education would give effect to international law standards of education, as well as other interrelated rights in the Constitution of South Africa.

In line with the international law standards, education must be culturally acceptable and adaptable to the changing needs of a society. Therefore, it must take into account the lived circumstances of learners and the community, including their culture, heritage and language. These factors are considered to be central to human development and individual empowerment. The abovementioned criteria is similar to the characteristics of a decolonised education. Decolonised education seeks to provide geographically, socially, politically and economically relevant information and prioritises the value of education according to how relevant and useful it is, in empowering an individual. In this respect, the right to quality education is synonymous with decolonised education.

As a central facilitative right, the obligation on the state is to ensure that education has adequately empowered individuals to a position where they are able to understand and enjoy their interrelated rights in the democratic state, founded on the values of Ubuntu, human dignity, equality and freedom.[209] Transformative constitutionalism takes these interrelated rights, as well as, South Africa's history into account when interpreting the law. In this context, this article can be regarded as a platform upon which the right to a decolonised education may find root in the law. If there is an implicit right to decolonised education, the state and all private entities must engage in the decolonisation of education as a national imperative.

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[1] The Interim Constitution of the Republic of South Africa, 1993.
[2] The Constitution of the Republic of South Africa, 1996 (the Constitution).
[3] Our Africa "People and Culture" (undated) http://www.our-africa.org/south-africa/people-culture (accessed 2019-09-02), where it provides that the indigenous groups of South Africa includes; the Zulu, Xhosa, Pedi, Sotho, Tswana, Tsonga, Swati/Swazi, Venda and the Ndebele.
[4] Brickhill and Van Leeve "Transformative Constitutionalism- Guiding Light or Empty Slogan?" 2015 20 Acta Juridica 141 171. See also Bishop and Price A Transformative Justice: Essays in Honour of Pius Langa (2015) 149.
[5] *Ibid.*
[6] See Himonga and Diallo "Decolonisation and Teaching Law in Africa with Special Reference to Living Customary Law" 2017 20 *PER / PELJ* 2017 2 3. See also The Oppidan Press "Decolonising the South African University" (undated) https://oppidanpress.atavist.com/decolonisation (accessed 2019-09-02).
[7] *Ibid.*
[8] Adebisi "Decolonising Education in Africa: Implementing the Right to Education by Re-appropriating Culture and Indigeneity" 2016 4 *Northern Ireland Legal Quarterly* 434 434.
[9] *Ibid.*
[10] 2017 2 SA 485 (SCA) par [62-63].
[11] *Ibid.*
[12] Riley The Right to a Decolonised Education in South Africa (unpublished LLB treatise, Nelson Mandela University, Port Elizabeth) 2017.
[13] Mawere "Indigenous Knowledge Systems Potential for Establishing a Moral, Virtuous Society: Lessons from Selected IKSs in Zimbabwe and Mozambique" 2010 12 *Journal of Sustainable Development in Africa* 209 221.
[14] Seroto "Indigenous Education during the Pre-colonial Period in Southern Africa" 2011 10 *Indilinga-African Journal of Indigenous Knowledge Systems* 77.
[15] A system of exchange of goods or services which involves direct exchange of other goods or services without using a medium of exchange such as money.
[16] Higgs, Higgs and Venter "Indigenous African Knowledge Systems and Innovation in Higher Education in South Africa" 2003 17 *South African Journal of Higher Education* 40 45; Human Sciences Research Council "Local is Lekker: Indigenous Knowledge Should be Encouraged" (undated) http://www.hsrc.ac.za/en/review/november-/local-is-lekker (accessed 2019-09-02). See also Riley and Ndimurwimo The Right to Decolonised Education in South Africa. Paper presented at the South African Education Research Association (SAERA) Conference, Port Elizabeth, (October 2017).
[17] Hammel, White, Pfeiffer and Miller "Pre-colonial Mining in Southern Africa" 2000 100 Journal of the Southern African Institute of Mining and Metallurgy 49 56.
[18] The cumulative body of strategies, practices, techniques, tools, intellectual resources, explanations, beliefs, and values accumulated over time in a particular locality, without the interference and impositions of external hegemonic forces.
[19] Orphan Bracelet Campaign "The definition of Ubuntu" (undated) http://orphanbracelet.org/the-meaning-of-ubuntu/ (accessed 2019-09-02); Sachs The Strange Alchemy of Life and Law (2009) 100-101.
[20] Cited and referred to in Swalehe v Salim [1972] HCD 140 (PC) Civ. App. DDM-71, 24/6/72.The matter was taken to the Lineage Council which failed to reconcile the parties but decided in favour of Soine. Kadume appealed to the Internal Moot and was represented by an elder. The Internal Moot after considering the facts of the case and evidence presented before it concluded that the land was to be divided among Soine and Kadume and afterwards everyone was invited to Soine's house to share traditional beer in a friendly manner. The invitees took the opportunity to congratulate both Soine and Kadume on how the matter was resolved. See Eisenber "Private Ordering through Negotiation: Dispute Settlement and Rule-making" 1976 89 *Harvard Law Review* 640 642. See also Gulliver (1963) Social Control in an African Society: A Study of the Arusha: Agricultural Masai of Northern Tanganyika 1964 34 London: Routledge & Kegan Paul 284.
[21] *Ibid.*
[22] Adebisi 2016 Northern Ireland Legal Quarterly 441.
[23] *Ibid* 434.
[24] Rose and Tunmer Documents of South African Education, Johannesburg; AD Donkers (1975) 85.
[25] South African History Online "Missionary Settlement in Southern Africa' (22 March 2011) http://www.sahistory.org.za/article/european-missionaries-southern-africa-role-missionaries.
[26] *Ibid.*
[27] Behr New perspectives in South African Education: a blueprint for the last quarter of the twentieth century (1978) 159.
[28] *Ibid.*
[29] Christie *The Right to Learn* (1991) 226-228.
[30] Adebisi 2016 *Northern Ireland Legal Quarterly* 435.

[31] 47 of 1953.
[32] Simbo "Defining the Term Basic Education in the South African Constitution: An International Law Approach" 2012 16 *Law, Democracy and Development* 162 168.
[33] *Ibid*.
[34] See Feldman "What White People Didn't Learn from Bantu Education" (18 April 2018). https://www.news24.com/Columnists/HowardFeldman/what-white-people-didnt-learn-from-bantu-education-20180418 (accessed 2019-09-02).
[35] Ibid. See further Moore In Class of their Own: The Bantu Education Act 1953 (Revisited unpublished masters dissertation, University of Pretoria) 2015.
[36] Clark and Worger The Rise and Fall of Apartheid (2004) 48-52.
[37] Act 45 of 1959.
[38] Simbo 2012 *Law, Democracy and Development* 168.
[39] Adebisi 2016 *Northern Ireland Legal Quarterly* 435.
[40] Abdi *Decolonising Philosophies of Education* (2012) 2.
[41] Adebisi 2016 *Northern Ireland Legal Quarterly* 435.
[42] Nieftagodien "Soweto Forty Years On" (18 June 2016) http://www.sahistory.org.za/archive/soweto-forty-years-black-student-rebellion-1976-professor-noor-nieftagodien (accessed 2019-09-03).
[43] Adebisi 2016 *Northern Ireland Legal Quarterly* 444.
[44] *Ibid* 435.
[45] *Ibid* 433.
[46] Babaci-Wilhite "Education and Language: A Human Right for Sustainable Development in Africa" 2012 58 *International Review of Education* 619 628.
[47] Adebisi 2016 *Northern Ireland Legal Quarterly* 435.
[48] Shizha "Reclaiming our Memories: The Education Dilemma in Postcolonial African School Curricula" in Abdi and Cleghorn *Issues in African Education* (2005) 67.
[49] *Ibid*.
[50] Adebisi 2016 *Northern Ireland Legal Quarterly* 436.
[51] *Ibid* 433.
[52] Grosfoguel "The Structure of Knowledge in Westernized Universities" 2013 6 *Human Architecture: Journal of the Sociology of Self-Knowledge* 73 75.
[53] Dasgupta Maler and Vercelli *The Economics of Transnational Commons* (1997) 241.
[54] Grosfoguel 2013 *Human Architecture: Journal of the Sociology of Self-Knowledge* 75.
[55] *Ibid* 74.
[56] *Ibid*.
[57] Lebakeng, Phalane and Dalindjebo "Epistemcide, Institutional Cultures and the Imperative for the Africanisation of Universities in South Africa" 2006 13 *Alternation* 70 70.
[58] *Ibid*.
[59] Adebisi 2016 *Northern Ireland Legal Quarterly* 444.
[60] Brock-Utne "Language in Education Policies and Practices in Africa with a Special Focus on Tanzania and South Africa -Insights from Research in Progress" in Lin and Martin *Decolonisation, Globalisation: Language-in-Education Policy and Practice* (2005) 176.
[61] South African History Online "Hendrik Frensch Verwoed" (17 February 2017) http://www.sahistory.org.za/people/hendrik-frensch-verwoerd (accessed 2019-09-03).
[62] Rodney *How Europe Underdeveloped Africa* (1972) 246.
[63] Adebisi 2016 *Northern Ireland Legal Quarterly* 449.
[64] Rutazibwa "Studying Agaciro: Moving Beyond Wilsonian Interventionist Knowledge Production on Rwanda" 2014 8 *Journal of Intervention and State building* 291 294.
[65] Simbo 2012 *Law, Democracy and Development* 170-172.
[66] Berger "The Right to Education under the South African Constitution" 2003 *College of Law, Faculty Publications* 616 623.
[67] *Governing Body of the Juma Musjid Primary School v Essay* 2011 (7) BCLR 651 (CC) par [42].
[68] Berger 2003 *College of Law, Faculty Publications* 617-618.
[69] *Ibid* 619.
[70] *Ibid* 618-619; Nicolaou "The Link between Macroeconomic Policies, *Education Policies and the Education Budget"in Motala and Pampallis Education and Equity: The Impact of State Policies on South African Education* (2001) 89.
[71] Berger 2003 *College of Law, Faculty Publications* 618.
[72] *Ibid* 616-623.
[73] *Ibid* 618-619.
[74] *Ibid* 617.
[75] *Ibid* 620.
[76] *Ibid* 616.
[77] *Ibid* 619.
[78] *Ibid* 620; Education Series Volume III: Educational Enrolment and Achievement, 2016/Statistics South Africa Report No. 92-01-03 (undated) http://www.statssa.gov.za/publications/Report%2092-01-03/ Report%2092-01-032016.pdf (accessed 2019-09-03).
[79] Berger 2003 *College of Law, Faculty Publications* 619.
[80] *Ibid* 618.
[81] *Ibid* 619.
[82] *Ibid*.
[83] *Ibid* 620.
[84] *Ibid*.
[85] *Ibid*.
[86] Education Series Volume III 2016 http://www.statssa.gov.za/publications/Report%2092-01-03/Report%2092-01-032016.pdf.
[87] Berger 2003 *College of Law, Faculty Publications* 620.
[88] *Ibid*.
[89] *Ibid*.
[90] *Ibid*.
[91] *Ibid*.
[92] Education for All 2000 Assessment (March 2000) http://www.dhet.gov.za/Archiving%20Reports%20prior%20to%202009/Education%20For%20All%202000%20Assessment.pdf#targetText=The%20aim%20of%20the%20assessment,basic%20education%20and%20lifelong%20learning.&targetText=The%20Conference%20resolution%20was%20synthesised,26%20to%2028%20April%202000 (accessed 2019-09-03).
[93] Berger 2003 *College of Law, Faculty Publications* 618-621.
[94] *Ibid* 620-621.
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[96] Education Series Volume III: Educational Enrolment and Achievement, 2016/Statistics South Africa Report No. 92-01-03; Stats SA http://www.statssa.gov.za/?p=9530.
[97] The Oppidan Press https://oppidanpress.atavist.com/decolonisation.
[98] *Ibid*.
[99] *Ibid*.
[100] Berger 2003 *College of Law, Faculty Publications* 619.
[101] Berger 2003 *College of Law, Faculty Publications* 620.
[102] See *Hotz v University of Cape Town*; The Oppidan Press https://oppidanpress.atavist.com/decolonisation.
[103] *Ibid*.
[104] *Ibid*.
[105] *Ibid*.
[106] Adebisi 2016 *Northern Ireland Legal Quarterly* 441.
[107] *Ibid* 433.
[108] *Ibid*.
[109] S 29 of the Constitution.
[110] S 29 (1) of the Constitution.
[111] Ss 29(1) and (2) of the Constitution.
[112] Simbo 2012 *Law, Democracy and Development* 163.
[113] Act 84 of 1996.
[114] Simbo 2012 *Law, Democracy and Development* 173; see also s3(1) of the South African Schools Act 84 of 1996.
[115] World Declaration on Education for All, Jomtien, Thailand 1990. See also Department of Education "White Paper on Education and Training" https://www.gov.za/documents/white-paper-education-and-training (accessed 2019-09-03).
[116] Seleoane "The Right to Education: Lessons from Grootboom" 2003 7 *Law, Democracy and Development* 137 143.
[117] *Ibid* 148-151.
[118] Act 16 of 2006.
[119] 101 of 1997.
[120] *Ibid*.
[121] Ss 29(1) and (2) of the Constitution.
[122] Simbo 2012 Law, Democracy and Development 176.
[123] Article 1 of the World Declaration on Education for All.
[124] *Ibid*.
[125] *Ibid*.
[126] *Ibid*.
[127] Article 5 of the World Declaration on Education for All.
[128] *Ibid*.
[129] *Ibid*.
[130] Churr "The Realisation of a Child's Right to a Basic Education in the South African School System: Some Lessons from Germany" 2015 18 *PER / PELJ* 2405 2410.
[131] Devenish *The South African Constitution* (2005) 398.
[132] Churr 2015 *PER / PELJ* 2412.
[133] Article 1 of the World Declaration on Education for All.
[134] Article 3 of the World Declaration on Education for All.
[135] Article 1 of the World Declaration on Education for All.
[136] Article 3 and 4 of the World Declaration on Education for All.
[137] Article 17(3) of the ACHPR.
[138] *Ibid*.
[139] Article 13 of the International Covenant on Economic, Social and Cultural Rights. (ICESCR); the ICESCR was ratified by South Africa in 2015.
[140] S 1 of the General comment No. 13 of the Committee on Economic, Social and Cultural Rights, 1999.
[141] S4 of the General Comment No. 13 of 1999; Article 13 of the ICESCR.
[142] Article 13 of the ICESCR; article 6 of the General Comment No. 13 of the Committee on Economic, Social and Cultural Rights, 1999.
[143] Churr 2015 *PER / PELJ* 2414; s 4 of the General Comment No. 13 of the Committee on Economic, Social and Cultural Rights, 1999.
[144] *Ibid*.
[145] *Ibid*.
[146] *Khosa v Minister of Social Development* 2004 (6) SA (CC) par [40].
[147] Seleoane 2003 *Law, Democracy and Development* 140-142.
[148] *Ibid* 141-142.
[149] *Governing Body of the Juma Musjid Primary School v* Essay 2011 (8) BCLR 761 (CC) par [37].
[150] *Ibid*.
[151] Seleoane 2003 *Law, Democracy and Development* 142.
[152] *Ibid*.
[153] *Ibid*.
[154] *Ibid*.
[155] Seleoane 2003 *Law, Democracy and Development* 141.
[156] *Ibid*.
[157] *Ibid*.
[158] Seleoane 2003 *Law, Democracy and Development* 140.
[159] *Ibid*.
[160] *Ibid* 141.
[161] *Ibid* 140.
[162] *Ibid*.
[163] *Ibid* 140-141.
[164] *Governing Body of the Juma Musjid Primary School v* Essay par [37].
[165] Seleoane 2003 *Law, Democracy and Development* 148-151.
[166] *Ibid* 148.
[167] *Ibid* 149.
[168] S 5 of the General Comment No. 13 of the Committee on Economic, Social and Cultural Rights, 1999.
[169] *Ibid*.
[170] *Ibid*.
[171] S 4 of the General Comment No. 13 of the Committee on Economic, Social and Cultural Rights, 1999.
[172] S 9 of the Constitution, 1996.
[173] *Ibid*.
[174] 4 of 2000.
[175] Van de Lanotte, Sarkin and Haeck *The Principle of Equality: A South African and Belgian Perspective* (2001) 141.
[176] S 9 of the Constitution.
[177] S 9 (3) and (4) of the Constitution.
[178] S 9(2) of the Constitution.
[179] Churr 2015 *PER / PELJ* 2421.
[180] S10 of the Constitution.
[181] *S v Makwanyane* 1995 (6) BCLR 665 par [328].
[182] *Ibid*.
[183] Churr 2015 PER / PELJ 2421.
[184] *S v Makwanyane* par [330].
[185] *S v Makwanyane* par [329].
[186] Churr 2015 *PER / PELJ* 2421-2422.
[187] S 12 of the Constitution.
[188] S 12(c) of the Constitution.
[189] *Ibid*.

[190] Modiri "Law's Poverty" 2015 18 *PER / PELJ* 224 235.
[191] Churr 2015 *PER / PELJ* 2422.
[192] S 9 of the Constitution.
[193] S 10 of the Constitution.
[194] Brickhill and Van Leeve 2015 *Acta Juridica* 147.
[195] Chapter 1 of the Constitution.
[196] *S7(2)* of the Constitution.
[197] *Ss7(3)* and 36 of the Constitution.
[198] Brickhill and van Leeve 2015 s 146-147.
[199] Van Marle "Transformative Constitutionalism as/and Critique" 2009 20 2 *Stell* 286 286.
[200] Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2013) 15.
[201] Brickhill and Van Leeve 2015 *Acta Juridica* 152.
[202] Klare "Legal Culture and Transformative Constitutionalism" 1998 14 *SAJHR* 150; Brickhill and Van Leeve 2015 *Acta Juridica* 146-153.
[203] Langa "Transformative Constitutionalism" 2006 17 3 *Stell* 351 352.
[204] Brickhill and Van Leeve 2015 *Acta Juridica* 146-153.
[205] Wolpe "Capitalism and Cheap Labour-power in South Africa: From Segregation to Apartheid" 1972 1 *Economy and Society* 425 456.
[206] Brickhill and Van Leeve 2015 *Acta Juridica* 143-144.
[207] Brickhill and Van Leeve 2015 *Acta Juridica* 144.
[208] *Ibid.*
[209] Malherbe "The Constitutional Dimension of the Best Interests of the Child as Applied in Education" 2008 *TSAR* 274 275.

Prohibited marriage between adoptive siblings and natural children of adoptive parents

Reward Nxumalo

1. Introduction

Adoption has become a common practice in many democratic societies. In South Africa for example, children from different races have an equal opportunity to be adopted.[210] Section 230(3) of the Children's Act makes provision for when a child can be adopted. Section 231 makes provision for who can adopt a child or children. While section 233(1) provides who must consent to adoption and section 242 sets out the effect of an adoption order. Adoption is a legal process that aims to bring about specific legal consequences. An adoption order has the effect of creating a legal relationship between the adoptive parent and the adopted child provided that this is in the best interest of the child. It provides a child with a constitutionally entrenched form of care and protection. However, the Children's Act is silent on whether or not adopted children have the legal capacity to marry each other, or whether or not adopted children have the legal capacity to marry the children of their adoptive parents. This article analyses whether or not adopted children have the capacity to marry the natural children of the adoptive parents or each other, where no prohibition by consanguinity or affinity exists.

There are several reasons why people would want to adopt children. People adopt because they cannot have children of their own, others are infertile, and as a result they would opt to adopt a child so they are not lonely. For some people it is a medical condition that they have, and they do not want to pass it on to their children. While for others adoption is an act of charity, it often happens that some people have a child but cannot raise due to their financial situation, they would then give the child up for adoption. Someone with money would then adopt the child with the intention of providing a better life style for such a child.[211] Once a child is adopted, he or she acquires the status of being considered as the child of the adoptive parents.

Section 242 of the Children's Act provides that all ties to his or her natural parents are terminated, this means that once a child is adopted, the child is removed from one family tree and engrafted into a new family, and will inherit the roots of that family tree. Although the Act provides for this legal status of the adopted child once he or she has been adopted the law does not, however, exclude a marriage between an adopted child and the natural children of the adoptive parents or two adopted children and the adoptive parents.[112]

Before 2005, the Child Care Act,[213] was also silent on a marriage between an adopted child and the natural child of the adoptive parents. The Child Care Act provides that "an adopted child shall for all purposes whatever be deemed in law to be the legitimate child of the adoptive parents, as if he was born of that parent during existence of a lawful marriage."[214] Robinson is of the opinion that an adoption order, given under the Child Care Act neither permits nor prohibits any marriage or carnal intercourse, which had not been for the adoption order, would otherwise have been permitted.[215] This interpretation coincides with the interpretation under the Children's Act, 2005.

"The legal relationship between adopted children and the adoptive parents is identical to the legal relationship that would exist if the adoptive parents were the natural biological parents of the adopted child".[216] This position is also confirmed by the Children's Act.[217] The effect of an adoption order, does not differentiate between adopted children and the natural children of the adoptive parents. The benefits that a natural child of the adoptive parent is entitled to are the same as those the adopted child would also be entitled to. In other words, the same limitations that a natural child of the adoptive parent is subject to, would apply to an adopted child. The legal position between an adopted child and the natural child of the adoptive parents is undistinguishable.[218]

Domingo suggests that an adopted child is regarded as the child of the adoptive parents for all purposes, in accordance with the South African law.[219] Similarly, an adoptive parent is regarded

as the child's parent for all purposes, and the adoptive parent acquires full parental rights and responsibilities.[220] Therefore, it is legally impossible for an adopted child and the natural child of the adoptive parents to marry each other or two adopted children by the same adoptive parents to marry each other, because of the legal position in which these children find themselves in.[221] In other words, such marriage would be regarded as null and void because they fall within the prohibited degrees of marriage. An adoption court order should be interpreted to give effect to the fact that an artificial family life is created,[222] and the inevitable consequence is that a new family linage is formed.[223] Once an adoption order is made, the Registrar of Birth, Death and Marriages issues a new birth certificate for the adopted child.[224] It follows therefore that, the new birth certificate records the adopted child's adoptive parents as if the child were born of them. In addition, the new birth certificate does not make reference to the child's birth parents unless of course one of them becomes the child's adoptive parent.[225]

2. Historical Background of Child Adoption

Legal scholars have written about child adoption in South African law. For example, Van der Walt, traces the origin of child adoption and opines that, during the 1900s, an increasing number of adoptions took place, which led to the promulgation of the Adoption of Children Act 25 of 1923.[226] The author traces child adoption under three historical periods. She highlights how classical adoption has impacted adoption in the current Children's Act, namely children adopted according to Roman law, Roman-Dutch law and South African law.[227] This paper will analyses why, who and for what purpose a person would want to adopt a child.

2.1 Adoption in terms of Roman law

Adoption played an essential role during the Roman periods mainly as an instrument to continue the family name and unit, not negating the importance of preserving the domestic deities. This goes to reason that the structure of adoption under Roman law according to Van der Walt, focused on serving the needs of the family.[228] In a case where a family did not have a successor, child adoption for such a family was an important option, that which was explored mainly by families of influence. The family name could thus, be carried on through the adopted child. The 'best interest of the family name' was changed during the reign of Emperor Justinian. During his reign, for the first time considerations was given to the needs and interest of the child concerned.[229]

2.2 Adoption in terms Roman-Dutch Law

Although Roman-Dutch law forms part of South African common law, Roman law principles of adoption were not incorporated into Roman-Dutch law. Van der Walt offers the view that Roman-Dutch law knew no formal adoptions. Informal adoption took place but no legal consequences arose from such informal adoptions.[230] In the eyes of the law, the child was not considered as the child of the adoptive parents. The adopted child remained as the child of his original parents.[231] As a result, the 'informally' adopted child could not be regarded as the child of the adoptive parents. In other words, no parental powers could be transferred from the original parents to the adoptive parents.

2.3 Child Adoption in terms South African law

The South African legislative scheme on child adoption was modelled on the New Zealand Infants Act.[232] The need for legislated adoption became apparent in the twentieth century. The first legislation dealing with Child Adoption was Adoption of Children Act.[233] The primary objective of the 1923 Act, was to formulate the legal requirements to sever the existing legal bond between a child and its natural parents or the guardian, and to create a new relationship between the adoptive parent and the child.[234]

Where an order for adoption was made under the Act, the adopted child would be deemed to be the child born of lawful wedlock of the adopting parents. The above-mentioned Act was later repealed and the Children's Act[235] was assented to on 13 May 1937. The most important feature of the new Children's Act was the establishment of the children's court which made provision for adoptions in the court where the child resides. The Children's Act of 1937 was later repealed by the Children's Act of 1960. The aim of the Children's Act of 1960 was to promote the welfare of the child by admitting him or her to an authentic family while simultaneously safeguarding the interest of his or her natural and prospective parents.[236] The Children's Act of 2005 brought with it more efficient procedures for the management of child adoption. It also provided for a register for adoptable children and these prospective adoptive parents.

3. The common law position of marriages of adoptive children

The courts have recognized that they are duty bound to develop the common law so that it does not deviate from the spirit, purport and object of the Bill of Rights.[237] The common-law position is enshrined in the Children's Act by prohibiting an adoptive parent from marrying his or her adopted child.[238] The rationale for this prohibition is, if an adoptive parent were permitted to marry his or her adoptive children such a marriage would undermine the purpose of adoption and the sanctity of marriage not negating the family structure sought by the Act.[239] Equally so, a mother cannot marry her own biological son nor a father his daughter.[240]

It is also common cause that an adopted child and the natural child of the adoptive parents are not permitted to marry each other nor can two adopted children by the same adoptive parents marry, just as it is illegal for blood siblings to marry each other, because of the legal position in which these children find themselves in.[241] In other words, the marriage would therefore be declared null and void because they fall within the legally prohibited degrees of marriage. But some legal scholars have no legal objection to a marriage between adopted siblings their absence of objection stems from the rationale that there is no blood-relations between such adopted children.[242]

The authors have relied on the golden rule of interpretation while neglecting the purposive interpretation of statutes as can be inferred from the Constitution.[243] This article advocates, that the scholarly interpretation of blood relations (that two adoptive siblings adopted by the same adoptive parents can marry each other, or that the adoptive child can marry the natural child of the adoptive parents),[244] is an incongruous one. Such a marriage would defeat the purpose of adopting a child. Just like a natural parent can never marry her own children.

The issue of purposive interpretation for example, was raised in the case of *MIA v State Information Technology Agency* where the court had to decide on whether the commissioning parents to a surrogate motherhood agreement were entitled to a maternity leave.[245] An application was brought in terms of section 6 of the Employment Equity Act by the commissioning parent to have the respondent's decision to deny the applicant four months paid maternity leave following the birth of their child by a surrogate mother declared as unfair discrimination against commissioning parents in the surrogate agreement. The respondent refused to grant maternity leave because of its policies and the Basic Conditions of Employment Act only covered female employees' or rather female employees that were natural parents. Their policies were silent because the employer had not foreseen such a development in medicine. This rationale applies to the Basic Conditions of Employment Act as well. The respondent initially offered the applicant 'family responsibility leave' or special unpaid leave.[246]

The respondent relied on the literal interpretation of the wording as provided for the Basic Conditions of Employment Act.[247] However, the court refused to accept this interpretation and held that, "given the circumstances there is no reason why an employee in the position of the [a]pplicant should not be entitled to 'maternity leave' and equally no reason why such maternity leave should not be for the same duration as the maternity leave to which a natural mother is entitled."[248]

The court not only found that the commissioning parents are in the same legal potion as a natural parent, but also declared that the legal relationship is created between the commissioning parents and the surrogate child, and legislation certifies that the effect of a valid surrogate motherhood agreement is that any child born of a commissioning mother in accordance with the agreement, is for all purposes the child the commissioning parent or parents from the moment of the birth of the child concerned.[249]

In the context of *MIA's* case, it would legally mean that, if the commissioning parents had children of their own before the surrogacy, regardless of whether such children were adopted or not, these children would be included in the meaning of natural children and have the same legal rights for 'all purposes'. The conclusion that can be drawn is that, a child of the commissioning parents, cannot marry the natural children of the commissioning parents, or the adopted children by his commissioning parent, because those children would be regarded in the same legal position with regards to the family life intended by the Children's Act.[250]

It must be noted that an absolute legal certainty must be maintained in law. This view is supported by Christo Botha, who is of the opinion that a person should be able to know the law and be able to conform his or her conduct to the law.[251] According some of the legal writers in South Africa,[252] there is uncertainty as to whether adoptive siblings can marry each other or not, or whether an adopted child can marry the natural child of his or her adoptive parents. Barratt argues that adoption creates no impediments to marriage and adopted children may marry anyone in his adoptive family apart from his adoptive parents.[253] Barratt's argument is exclusively dependent on the absence of blood relations, which defeats the existence of section 242(3) of the Children's Act. An exception is unilaterally made in Barratt's argument who considers the 'child to be the child of the adoptive parents for all intended purposes' but not the natural child of the adoptive parent. The same interpretation is followed by other scholars such as Heaton.[254]

This article holds the view that this form of interpretation does not consider section 39(2) of the Constitution which requires purposive lens when interpreting the law.[255] In other words, one has to investigate why the legislation was drafted in the first place. It is important to note that when the issue on adoption of children is raised, the law must be interpreted broadly to include the social and psychological wellbeing of the adoptive children. For example, the question of *de facto* and *de lege* was raised and dealt with in the case of *Flynn v Farr NO*.[256] The main legal argument in the *Flynn's* case, was whether a child who was not adopted by law as prescribed by Children's Act could inherit intestate from his step-father, merely because the deceased treated, the step-son as his own. The Applicants in this matter sought an order declaring that the words 'adopted child' in terms of section 1(4)(e) of the Intestate Succession Act 81 of 1987 be interpreted to include

both *de lege* and *de facto* adopted children. *De lege* adopted are children who are adopted as the law exists. This means that children are adopted in accordance with the Children's Act while *de facto* refers to informally adopted children, regardless of whether such adoption is right or not.[257]

In *Flynn v Farr NO*, the respondents contended that the legislature's purpose in differentiating between biologically adopted children and step-children was neither arbitrary nor irrational.[258] That means, the applicant was not an adopted child and that the distinction which was maintained in the law could not be set aside on the grounds of caprice, arbitrariness or irrationality. They contended further that the purpose of the differentiation which was attacked by the respondents was directed at bringing certainty and predictability to the law of intestate succession.[259] The court dismissed the application made by the applicants and reasoned that there is justification for the present legal dispensation. They concluded that there is a justifiable ground not to consider factual adoption and separation between factual adoption and legal adoption.[260] Clearly, the reasoning from the *Flynn's* case is that the purpose of legislation must always be given its weight by looking at the primary intention of the legislator.

On closer inspection of the *Flynn* case in light adoptive children argument, it can be inferred that the adoptive children cannot marry their adoptive siblings or the natural of the adoptive parents and two adopted children by the same adoptive parents as the marriage would be considered as void *ab initio,* because it would be against the public policy, intentions of the legislators of the Children's Act and the Constitution.[261]

The legal relationship between adopted children and adoptive parents is thus identical to the legal relationship that would exist if the adoptive parents were the biological parents of the adopted child.[262] The rationale lies in the fact that the legal ties between the adopted child and his or her biological family are terminated. It is imperative that the effect of an adoption order compels parties to be mindful of their sexual relations between an adopted child and the natural child of the adoptive parent(s). Otherwise it may be perceived as an incest, a criminal offence as stated in South African, furthermore the position is the same in the context of the American case *Allen A Muth v Mattew J Frank*[263] which is discussed below.

Therefore, adopted siblings or the natural child of the adoptive parents together with the adopted child who decide to marry each other, such a marriages would defeat the purpose of adoption regardless of their consent to such a marriage. This goes on to suggest that one cannot rely on the fact that these children are not related by blood nor the fact that they consented to such a marriage. The effect of an adoption order, automatically prescribes that such a marriage would be void *ab intio*, regardless of the non-blood relations.

4. Foreign law: a case study of the United States of America

The South African Constitution permits the consideration of foreign law, when interpreting the Bill of Rights.[264] This article analyses the foreign law relating to the adoption of children in the United States of America. The issue of whether two adopted children could marry each other was heard at the court of Common Pleas of Allegheny County, Pennsylvania, and orphans' division in the case of *Mew v MLB*.[265] The applicants were brother and sister by virtue of an adoption order. The case, involved the marriage between adopted siblings who relied on the fact that they were not related by consanguinity. The applicants argued that regardless of the adoption they never looked at each other as "brother" and "sister", but merely as offspring's from different natural parents.[266] In this case due emphasis was placed on the fact that regardless of the adoption order, the applicants are not related by blood, and they have never looked at each other as family, as fabricated by an order of adoption.[267] The court dismissed the application and refused to grant a marriage certificate on the following grounds where the judge reasoned that:

> The law had a duty to protect the integrity of the family and that authorization of marriages between brothers and sisters by adoption would undermine the fabric of family life and fly in the face of the social aims and purposes intended to be served in the adoption process.[268]

Hence, it can be argued that, adoption is allowed with view of promoting the spirit of the family because an adopted child must be regarded for all purposes as the child of the adoptive parents with no exception. Put differently, the effect of an adoption order is that new blood-relations are formed and the legal position would then not supersede the absence of blood relations which would allow for marriages between adoptive children, their parents and siblings. Therefore, an adopted child is legally excluded from marrying his or her adoptive siblings or the natural child of the adoptive parents. Irrespective of, whether the adoptive children see themselves as siblings or not, they are prohibited from marrying each other just as an adoptive parent cannot marry their own adoptive child.

The court in the *Mew's* case, also found that a valid adoption severs the child from its natural family tree and engrafts it upon that of its new parentage. The effect of child adoption amounts to this: child attains the status, in law, of a natural child of the adopting parents. As the court professed in the *Mew* case, to authorize and encourage marriages of brothers and sisters by adoption would undermine the fabric of family life and would be the antithesis of the social aims and purposes which the adoption process is intended to serve.[269] In South African context, this can be inferred

through requirements in the Constitution and the Children Act.

5. The position under the Children's Act

The current statutory position of adopted children in South Africa is certainly indicative of the legislature's intention and the court's willingness to place adopted children on the same footing as biological children.[270] The Children's Act currently regulates the rights of children that include the rights of adopted children. As Dlodlo, has observed, the aim of adoption law, it is to provide a permanent, secure and healthy family life for children whose biological parents have either died or are unable to provide such children with care that is required.[271] Section 242 (2) (c) of the Children's Act prohibits any marriage or sexual intimacy between the adoptive child and other persons which is deemed prohibited had such child not been adopted.

Section 230(3) provides further that a child can be adopted under the following circumstances: when the child is an orphan and has no guardian or caregiver who is willing to adopt the child;[272] the whereabouts of the child's parent or guardian cannot be established;[273] the child is abandoned;[274] the child's parents or guardian have abused or deliberately neglected the child, or have allowed the child to be abused or deliberately neglected;[275] or the child needs a permanent alternative placement.[276] Some scholars are of the view in that section 230(3) (e) - is very widely worded and could cover a range of other circumstances. For instance, where a young girl has a baby and is unable to take care of baby because of her social and economic circumstances.[277]

Section 230(1) of the Children's Act provides that a child may be adopted by the following person(s): jointly by 'husband and wife'; partners in in a permanent domestic partnership or other persons sharing a common household and forming a permanent family unit;[278] by a widower, widow, divorced or unmarried person;[279] by a married person whose spouse is the parent of the child; or a person in a permanent domestic partnership, whose domestic life-partner is the parent of the child;[280] by the biological father of a child born out of wedlock; or by the foster parent of the child.[281]

In terms of section 233 of the Children's Act, a child may only be adopted if the following people give their consent: each parent of the child, regardless of whether the parents are married or not; provided that, if the parent is a child, that parent is assisted by his guardian;[282] any other person who holds guardianship in respect of the child;[283] and the child; if the child is ten years of age or older, or under the age of tens, but is of age, of maturity and stage to understand the implications of consenting to his or her adoption.[284] This sections brings about a very important element in the whole process of consenting to an adoption. The law provides that the following people may consent: parent of the child; any person who holds guardianship and the child if he or she understands the implication of adoption.

Consenting to an adoption is not a simple task, and the lawmaker appreciates that. If we pay attention to people who hold the right to consent, they all together have one common element and that is 'understanding the implications of an adoption'. To know and to understand are words that are commonly used interchangeably. In explaining the word 'understand' in this context it means: to be sympathetically or knowledgably aware of the character of nature of something, this definition is given by the concise Oxford Dictionary.[285] In expansion of this definition, the child understands that, he or she will have a new character in life and fit in to a scene of a new family. Fitting in as a character requires, a new identity, so if the child is adopted into a new family the child will then receive a new surname if not a new name and a new surname. This is because the effect of an adoption order terminates all ties with the previous family and creates new ties with the new family that is adopting the child. In other words, the adoptive parents have a 'new born' that they must name, love, protect, and provide shelter for and an environment that will ordain a child to be a child. When a child is adopted into the family, relationships of affinity and consanguinity are created, this is so because of the effect of an adoption order breaks all ties with the child's previous life and creates new ones with the adoptive parents.

6. Legal requirements for a civil marriage

There are three requirements for a valid civil marriage namely: capacity (the parties must have the capacity to marry each other); consensus (the parties must consent to marry each other) and lastly formalities (the wedding must conform to the prescribed formalities).[286] A marriage "must be undertaken in a public and formal way".[287] The required formalities for a civil marriage are set out in the Marriage Act[288] and the required formalities for a civil union are set out in the Civil Union Act.[289]

Barratt *et al* refers to the Willes's Principle which provides that: a marriage which is null and void ab initio is not a marriage at all, meaning none of the legal consequences of a marriage attach to it.[290] In other words, a void marriage is one which has never come into existence in the eyes of the law. It is as if the parties had never entered into a marriage.[291] The grounds on which a marriage is void are based on the requirements of a civil marriage.[292] A marriage is void if the parties do not have the capacity to marry each other (absolute capacity to marry) or do not have the capacity to marry each other (relative capacity to marry).[293] For example: (a) one of the parties to the marriage is below the age of puberty; (b) one of the parties to the marriage was mentally ill or mentally disable at the time of the wedding; (c) the parties are related to each other within the prohibited degree of relationship and; (d) one of the parties to the marriage is already married (either in terms of civil marriage) or is married in terms of the Civil Union Act.[294]

Outside the framework of adoption, an adopted child and the natural child of the adoptive parents do meet the requirements set out by the Marriage Act and the Civil Union Act to marry each other. This position may be accepted merely because the child to be adopted is not yet adopted into the adoptive family, they have not received their 'new identity' to change their legal and family position. Once an adoption order has been issued this position changes. The change made by an adoption order is this: by default, an adopted child falls within the prohibited degree of marriage[295] in that, relations of consanguinity are now created between an adopted child and the adoptive parents, if the adoptive parents had children of their own prior to the adoption then those children are to be regarded as 'blood-siblings'.[296]This position is supported by the fact that, an adopted child is "for all intended purposes regarded as the child of the adoptive parents".[297]

It should also be understood that placing an adopted child and the natural child of the adoptive parents, on the same footing eliminates any form discrimination between adopted children and the natural child of the adoptive parents. Section 242 of the Children's Act reads in a manner that creates an impression that the adoptive mother was pregnant with the adopted child, and there are 'blood-ties' created since an adoptive parent cannot marry their adoptive child.[298] This kind of reading suggests that there is no way there could ever be an exception to a marriage between an adopted child and the child of the adoptive parents or two adopted children by the same adoptive parents for whatever the reason.

This being said, old family ties are broken and new family ties are created as, the Children's Act provides that an adopted child cannot marry anyone who, if they were not adopted, would not be able to marry, this is because of relationships of affinity or consanguinity, however, family relationship that is created by an adoption order cannot be ignored, in other words an adopted child cannot marry his adoptive siblings or the natural child of the adoptive parents.[299] If ever the law is going to make an exception to this position then, the purpose of adoption is defeated.

The High Court is considered as an upper guardian of children. Therefore, it has consenting powers in situations where there is no one to consent, or person(s) to give consent refuse on unreasonable grounds. Granting the court consenting powers suggests that the court is informed about family values in South Africa and the best interests of the child. As such, adopted children will come to realize that, even if they (adopted child and natural child of the adoptive parents) consent to marriage whether as minors or adults, this is wrong in the eyes of adoption laws or public policy, such a marriage will break relationships created by an adoption order and hinders the desired family structure which adoption seeks to accomplish. The effect of adoption order is that they terminate all rights and obligations between a child and the persons who were his or her parents (natural parents) before the adoption, this also includes any family relations between the child and any blood relatives of the child.[300] The adopted child is for all purposes considered to be the child of the adoptive parent(s).[301]

The Intestate Succession Act confirms this position by providing that an adopted child is deemed to be descendant of his or her adoptive parents and not the descendant of his or her natural or biological parents, except in the case in the case of a natural or biological parent who is also the adoptive parent of that child or was, at the time of the adoption, married to the child's adoptive parent.[302] An adopted child can inherit from his or her adoptive parents and their relatives, but can no longer inherit from his or her natural parents, unless his or her biological father or his or her step-parent adopted him or her.[303] The Intestate Succession Act confirms the position what an adoption order seeks to achieve "for all intents purposes" by placing the adopted child in the same legal position as the natural child of the adoptive parents for the purposes of succession without any form of exception regarding the legal position.[304] Reading the above with section 242 of the Children's Act, it can be deduced, that this form of reading does not embrace a distinguishable position between a natural child of the adoptive parents and the adopted child.

Section 1(5) of the Interstate Succession Act also provides that the adoptive parent(s) shall be deemed to be the ancestor of the adopted child. This means that the effect of an adoption is that it terminates all the rights and obligations that may have existed between the child's natural parents and the child is placed for adoption. Inclusion of the word 'ancestor' extends to create relations of affinity not only between an adopted child and the adoptive parents but also between the adopted child and the relatives of the adoptive parents.

Section 12(1) of the Sexual Offences and Related Matters Amendment Act,[305] defines incest as "persons who may not lawfully marry each other because of consanguinity, affinity or an adoptive relation and who unlawfully and intentionally engage in an act of sexual penetration with each other, are despite their mutual consent to engage in such act, guilty of the offence of incest". By law, an adopted child and the natural child of the adoptive parent(s) may not therefore, have sexual intercourse, even if it is consensual sex, or any of sexual relation (even if it is consensual).

7. Adopted child as the child of the adoptive parents

The effect of an adoption order is that, an adopted child is regarded as the child of the adoptive parents for all purposes. Similarly, an adoptive parent is regarded as the child's parent for all purposes.

The legal relationship between adopted children and adoptive parent(s) is thus identical to the legal relationship that would exist if the adoptive parent(s) were the biological parent(s) of the adopted child.[306] The legal ties between the adopted child and his or her biological family are terminated. Legal scholars are of the opinion that the legal relationship between adopted children and adoptive parents are thus identical to the legal relationship that would exist if the adoptive parent(s) were the biological parent(s) of the adopted child.[307]

That being said, if the adoptive parent(s) were to adopt a child and prior to the adoption they had children of their own, by right of adoption, it is usually, that the adopted child and the natural children of the adoptive parent(s) are siblings according to Children's Act.[308] This interpretation is further confirmed by the Intestate Succession Act. This Act confirms this position by providing that an adopted child is deemed to be descendant of his or her adoptive parent(s) and not the descendant of his or her natural /biological parent(s), except in the case of a natural/ biological parent who is also the adoptive parent of that child or was, at the time of the adoption, married to the child's adoptive parent. Section 1(5) of the Interstate Succession Act provides that the adoptive parent(s) shall be deemed to be the ancestor of the adopted child, this means that the effect of an adoption order terminates all the rights and obligations that may have existed between the child's natural parent(s) and when the child is placed for adoption. So, the effect of an adoption order places the adopted child, in the same legal position as the natural children of the adoptive parent(s).[309]

This being said, the Children's Act and the Intestate Act confirm that the adopted child and the natural children of the adoptive parents fall within the prohibited degrees of marriage so their marriage will be null and void. The grounds on which a marriage is void are based on the requirements of a civil marriage. A marriage is void if the parties do not have the capacity to marry each other (absolute capacity to marry) or do not have the capacity to marry each other (relative capacity to marry). For example, the parties are related to each other within the prohibited degrees of relationship. As a result of adoption and its implications, an adopted child and the natural child of the adoptive parents are siblings legally, and not excluding their legal relationship then, then cannot marry each other, since they do not have the capacity to marry each other. So, they fall within the prohibited degrees of marriage.

8. International and constitutional law perspective

The United Nations Convention on the Rights of the Child, 1989 (CRC), the African Charter on the Rights and Welfare of the Child, 1990 (African Children's Charter), the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (Hague Adoption Convention) and the 2009 United Nations Guidelines for the Alternative Care of Children (UN Guidelines), among others, all place a high premium on the need for children to grow up in a family environment. This is a necessary precondition for the full and harmonious development of a child's personality. Against this background, the CRC, the African Children's Charter and the UN Guidelines give an additional level of assistance and the protection to children deprived of their natural family environment. This is justifiable because of the fact that children who lack the security of a family are more vulnerable to the violation of all other rights that they are entitled to as children and rights-bearing individuals in society.

Section 39 of the Constitution which deals with the extension and development of the common law in an open and democratic society applies in this regard.[310] Analyzing section 14 of the Children's Act which includes the phrase "every child" in conjunction with section 39(2) of the Constitution raises the question whether the legislature intended to amend the common law and if so, to what extent can the common law be amended in respect of adoptive children's capacity to marry?

The paramountcy of the best interests of the child is entrenched in the Constitution as Boezaart and de Bruin have contended.[311] However, the Constitution does not directly address participation of adopted children in marriage related matters. Section 10 of the Children's Act stipulates "[e]very child that is of such age, maturity and stage of development as to be able to participate in any matter concerning that child, has the right to participate in an appropriate way and views expressed by the child must be given due consideration". The gap with respect to marriage of adoptive children remains evident while the application of section 28(1) (h) of the Constitution has raised concerns regarding procedural problems that they may present.[312]

Constitutional interpretation, is a value oriented approach where emphasis is placed not so much on the literal meaning of the words, but rather on the values underlying the text and which the interpreter must give effect to with the process of interpretation cited differently, the interpreter must facilitate the realization of the underlying values in the process when interpreting a legal text.[313]

Even the absence of blood relations between these children does not allow them to marry each other. What needs to be understood is that an identical legal relationship is created by an adoption order. There would be no disagreement if the Children's Act ordained that an adoptive parent can marry their adoptive child. But the Act does not, due to the identical legal relationship created by an adoption. What follows is that regardless of the absences of blood relations, a natural child of the adoptive parent cannot

be permitted legally to marry his or her adoptive sibling, when the word 'consanguinity' with the effects of an adoption order.[314] Section 242(3) of the Act reads as follows, "an adopted child must for all purposes be regarded as the child of the adoptive parent and the adoptive parent must for all purposes be regarded as the parent of the adopted child." Such a marriage would be void. This form of interpretation is confirmed by the courts as it was held in the Bastian Financial Services v General Hendrik Schoeman Primary School.

> "The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence."[315]

The sole purpose of this paper is to argue in law, that two adopted children who are adopted by the same adoptive parent(s) cannot marry each neither can an adopted child marry the natural child of the adoptive parents.

Consider the following:

- A and B are a couple and they decide to adopt C and D who are not related by blood and are born of different natural parents;
- A and B are a couple and they have a child of their own, C. They later decide to adopt D;
- A and B are a couple and they have child C and D who are their biological (natural) children.

The legal position of all three scenarios are the same and undistinguishable in law.[316] Thus, if these categories of children marry each other such marriage would be null and void.

9. Conclusion

At international and regional level in terms of the CRC, the African Children's Charter, the Hague Adoption Convention and the UN Guidelines, there is an emphasis on the welfare and need for children to be raised in a family environment. In South Africa, the Constitution is the supreme law of the land. It provides for a purposive interpretation when interpreting the legislation as afforded by section 39(2). This form of interpretation unequivocally denounces the 'golden rule of interpretation'. The golden rule of interpretation focuses on giving effect to the words as they stand. This interpretation does not have respect for the whole context, and this form of interpretation would be wrong in the eyes of the supreme document. The golden rule of interpretation has a detrimental effect on the purpose of legislation.

Legal scholars who support the view that an adopted child is the child of the adoptive parent for all intents and purposes are correct. They are however, incorrect when they assume that an adopted child can marry the child of the adoptive parents, since they are not related to by blood. Their reasoning is factual and not legal where the law prescribes adherence, it must be followed.

It is genetically accepted that, the adopted child and the child of the adoptive parents are not related by blood and therefore such a marriage would not fall within the bracket of consanguinity. The existence of section 242(3) of the Children's Act demolish the notion that the adopted child and the natural child of the adoptive parents can marry each other. The intention of section 242(3) of the Children's Act is to place the adopted child in an undistinguishable legal position as the natural child of the adoptive parents. Section 242(2) (c) prohibits the adoptive parent from marrying his or her adoptive child. These sections compels us to unequivocally agree that, the purpose of adoption is realized without any exception. Therefore, under no circumstances can an adopted child and the child of the adoptive parent marry each other, or the two adopted children by the same adoptive parents. Such a marriage would legally defeat the purpose sought by an adoption order.

The Children's Act must be amended and a provision be included that provides that an adopted child and a natural child of the adoptive parents are prohibited from marrying each other, and two adopted children by the same adoptive parents are also prohibited from marrying each other. The inclusion of this provision would result in an adoption order being certain, pertaining the family structure the Act seeks to accomplish. The purposive interpretation would also be adhered to.

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[210] 38 of 2005.
[211] Child Adoption India "6 reasons why people adopt a child" http://childadoption.in/reasons-people adopt-child/ (accessed 2019-09-02).
[212] S 242(2) (c) of 38 of 2005.
[213] 74 of 1983.
[214] Bosman- Swanepoel and Wessels "A practical approach to the Child Care Act" in *Adoptions* (1995) 56.
[215] Robinson 'The law of children and young persons in South Africa' in ID Schafer & L Schafer *Children, young persons and the Child Care Act* (1997) 82.
[216] Barratt and Domingo Law of persons and family law (2012) 213.
[217] S 242(1), 242(2), 242(3) of 38 of 2005.
[218] *Ibid.*
[219] Barratt et al *Law of persons and family law* 213.
[220] *Ibid.*
[221] S 242(2) of 38 of 2005; S 242(3) of 38 of 2005.
[222] S 242(2) of 38 of 2005.
[223] Family and Community Services "What happens when an adoption order is made" https://www.facs.nsw.gov.au/families/adoption/birth-parents/orders (accessed 2019-09-02).
[224] *Ibid.*
[225] *Ibid.*
[226] Van der Walt "The History of the law of adoption in South Africa" 2014 35 3 *Obiter* 421.
[227] Van der Walt 2014 *Obiter* 421-422.
[228] *Ibid.*
[229] Van der Walt 2014 *Obiter* 423.
[230] *Ibid* 429.
[231] *Ibid* 429.
[232] 86 of 1908.
[233] 25 of 1923.
[234] Van der Walt 2014 *Obiter* 430 - 432.
[235] 31 of 1937.
[236] Van der Walt 2014 *Obiter* 432 & 433.

[237] See *Nkala v Harmony Gold Mining Co Ltd* 2016 (5) SA 240 (GJ) para [199]. The Constitutional Court considered the impact of the Constitution on contractual law in the case of *In Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) and held that, a given principle of the common law of contract ought to be infused with constitutional values does raise a constitutional issue. The refashioning of the common law in accordance with fundamental constitutional values is mandated by Section 39(2) of the Constitution. The common law, like all other laws, must be viewed through the prism of the objective normative system set by the Constitution and, where it is found to fall short, must be reshaped in order to conform with our supreme law.'
[238] S 242(2)(b) of 38 of 2005.
[239] S 242(3) of 38 of 2005.
[240] Barratt et al *Law of persons and family law* 247.
[241] S 242(3) and S 242 (2)(c) 38 of 2005.
[242] J Heaton, A Barratt, and Ann Skelton. Add reference.
[243] S 39 (1)(a)(b)(c) and 39(2) of the Constitution of the Republic of South Africa, 1996.
[244] Barratt et al *Law of persons and family law* 239; Skelton *Family law in South Africa* 2012 44; Heaton *South African family law* 2012 28.
[245] *MIA v State Information Technology Agency* 2015 7 BLLR 694 (LC)
[246] *Ibid.*
[247] S 2 of 75 of 1997.
[248] *MIA v State Information Technology Agency* par [17].
[249] S 297(1) of 38 of 2005.
[250] S 242(3) of 38 of 2005.
[251] Botha *A Statutory Interpretation Introduction for Students* 5ed 2012 47.
[252] Barratt *Law of persons and family law* 239; Skelton *Family law in South Africa* 2012 44; Heaton *South African family law* 2012 28.
[253] Barratt *Law of persons and family law* 239.
[254] Barratt *Law of persons and family law* 239; Skelton *Family law in South Africa* 2012 44; Heaton *South African family law* 2012 28.
[255] When interpreting any legislation, and when developing the common law or customary law, every court or tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
[256] *Flynn v Farr* NO 2009 *JOL* 23900 (C).
[257] *Ibid.*
[258] *Ibid.*
[259] *Flynn v Farr par [35].*
[260] *Flynn v Farr.*
[261] S 242(3) of 38 of 2005.
[262] Barratt, Domingo, Mahler-Coetzee, Olivier, Denson *Law of the family and persons* 2012 2ed 213.
[263] 412 USA 808 (2005).
[264] S 39(1) (c) of the Constitution.
[265] (12 April 1977) no. 2-77-R-920.
[266] MEW v MLB par [25-26].
[267] *Ibid.*
[268] *MEW v MLB*.
[269] *MEW v MLB* par [57].
[270] *Harper v Crawford NO* (9581/2015) [2017] ZAWCHC 78 (30 June 2017).
[271] *Ibid.*
[272] S 230 (3) (a) of 38 of 2005.
[273] *Ibid.*
[274] *Ibid.*
[275] *Ibid.*
[276] *Ibid.*
[277] Barratt *et al Law of the family and persons.*
[278] S 230 (3) (a) of 38 of 2005.
[279] S 230 (3) (b) of 38 of 2005.
[280] S 230 (3) (c) of 38 of 2005.
[281] S 230 (3) (d) of 38 of 2005.
[282] S 231 (3) (a) of 38 of 2005.
[283] S 231 (4) (a) of 38 of 2005.
[284] S 231 (5) (a) of 38 of 2005.
[285] The Concise Oxford Dictionary (1990) 1332.
[286] Barratt *et al Law of the family and persons* 233.
[287] *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) 64.
[288] 25 of 1961.
[289] 17 of 2005.
[290] Barratt *et al Law of the family and persons* 247.
[291] *Ibid.*
[292] 17 of 2005.
[293] Barratt *et al Law of the family and persons* 248.
[294] 17 of 2006.
[295] S 242 of 38 of 2005.
[296] S 242 (3) of 38 of 2005.
[297] S 242 of 38 of 2005.
[298] S 242 of 38 of 2005; S 242 (c) of 38 of 2005.
[299] S 242 of 38 of 2005.
[300] S 242(1)(a) and (c) of 38 of 2005.
[301] S 242 (3) of 38 of 2005.
[302] 81 of 1987.
[303] Heaton and Roos *Family and Succession Law in South Africa* 2016 2ed 214.
[304] *Ibid.*
[305] 32 of 2007.
[306] Barratt *et al Law of the family and persons* 213.
[307] *Ibid.*
[308] S 242 (3) of 38 of 2005.
[309] *Ibid.*
[310] See Boezaart and de Bruin "Section 14 of the Children's Act 38 of 2005 and the child's capacity to litigate" 2011 *De Jure* 420.
[311] *Ibid.*
[312] Boezaart and de Bruin 2011 *De Jure* 433.
[313] E-mail from Professor Andrew Mark Tait 21 July 2016.
[314] S 242(3) of 38 of 2005.
[315] *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA) par [16 – 19]. That there is little or no difference between contracts, statutes and other documents emerges from *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (4) SA 399 (SCA) par [39].
[316] S 242 (3) of 38 of 2005.

In the matter between active judicial vs public service: the case of judge Tintswalo Makhubele and the doctrine of separation of powers

Eddy Gabriel Nkosi

1. Introduction

Amidst the political controversies and allegations surrounding the person of interest in this paper, the focus of this paper will only dwell on the rule of law, to the exclusion of the tempting politics around the subject-matter. The Constitution of the Republic of South Africa, 1996 (the Constitution) mandates all spheres of government and all organs of state within each sphere to: "[e]xercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere…"[317]

This article seeks to shed light firstly, on the thin line that separates a conflict of interest from the application of the doctrine of separation of powers. Secondly, how the judiciary and its officials must maintain independence and impartiality. And lastly, the need for reform in the current rules of the courts, the Judicial Service Commission and profit public entities with the objective of advancing the doctrine of separation of powers.

2. Tripartite governance and the doctrine of separation of powers

South Africa is one of many constitutional countries that follow the tripartite system of government which consists of the executive, legislature and the judiciary. These branches of government are separate yet interdependent through a collaborative principle known as co-operative government as required by section 41 of the Constitution. History has shown that it is possible for a government to co-operatively exist in three spheres that ensures a certain degree of independence, to the extent that prevents one sphere from unduly and unethically encroaching in affairs of the other. The court in Minister of Police v Premier of the Western Cape held that disputes in the ranks of government departments have the potential to disturb the smooth functioning of both the political system and public administration.[318]

Despite the complexity of co-operative government, Rautenbach and Mojapelo argue that a system that encourages total isolation of government authority within the branches and spheres of government, affording the ranks of government complete autonomy does not exist. Overlapping is, therefore, unavoidable especially for institutions that form part of one government. That is where the doctrine of separation of powers, also known as trias politica, finds application.[319]

Trias politica is a form of safeguard mechanism (checks and balances) that ensures the concentration of power in the State and its abuse thereof is prevented by having specific functions of government allocated to specific institutions, according to their constitutionally defined competence and jurisdiction.[320] The principle of checks and balances is expressed by way of government in its three branches, internally monitoring (checks) and regulating (balances) each other, for purposes of compliance and accountability with the law.[321]

Mojapelo writes that in the United States of America and France, the meaning of separation of powers may mean that, "the same person should not form part of more than one of the three organs of government…"[322] This is perhaps the simplest, yet most adequate way of describing separation of powers in layman terms. This doctrine has formally become a foundational basis for virtually all Constitutions.[323]

Rautenbach notes that the importance of trias politica, however, contrary to the doctrine's concrete objectives, the Constitutional Court in the case of In re: Certification of the Constitution of the RSA, authoritatively noted that the constitutional scheme

around trias politica, is of no complete separation of powers, but rather a 'partial separation'. But, important questions arise in the case of partial separation, namely: where is the line drawn in co-operate governance, especially where the independence, impartiality and dignity of one branch is of vital importance to its effective functioning? What constitutes a conflict of interest where one party exercises simultaneous authority in two branches of government and threatens their independence?[324]

Although an unusual occurrence in the practice of law, the case of Judge Tintswalo Makhubele sheds some light on the importance of the questions posed above, especially in relation to partial separation of powers in a constitutional state and the potential consequences thereof. But, before these issues, it is important to briefly deal with the body that recommends judges for appointment, namely, the Judicial Service Commission and their constitutional powers.[325]

3. The Judicial Service Commission

The Judicial Service Commission (JSC)[326] derives its existence, powers and functions mainly from section 178 of the Constitution, supplemented by national legislation as provided for by section 178(4) of the Constitution. According to the Constitution, the commission must be consulted, and its advice considered in the appointment and removal of judicial officers.[327] It may also advise the national government on any matter relating to the judiciary or the administration of justice.[328] The JSC further interviews judges who apply for permanent appointment and recommends them for appointment, to the President of the Republic.

As mentioned above, one of the key functions of the JSC is the removal of judges from office, as empowered by section 177 of the Constitution. Section 177 provides that only the JSC may remove a judge on the grounds that they suffer from an incapacity; are grossly incompetent or are guilty of gross misconduct. If the JSC finds that one of the grounds alleged to have been met, such a finding is then referred to the National Assembly for a call of removal. For that to be adopted, at least two-thirds of its members, whereupon, the removal is formally made by the President. The JSC also has the authority to order lesser remedial steps, including counselling, an apology or reprehension under the Judicial Code of Conduct.[329] Lastly, it is important to note that a judge may recuse him or herself if they deem it necessary to uphold calls from the profession itself.

4. The concurrent job titles of Tintswalo Makhubele

The first black female chairperson of the Pretoria Bar, Advocate Tintswalo Makhubele was successfully interviewed and recommended by the JSC on the 5th of October 2017 for appointment by the President to the bench of the Gauteng Division High Court as judge.[330] Pending the decision of the President as per section 174(4) of the Constitution, on the 19th of October 2017 Advocate Makhubele accepted an interim appointment to the Passenger Rail Agency of South Africa (Prasa) as board chairperson, exactly two calendar weeks after her recommendation for judgeship by the JSC.[331]

In November 2017, the then President of South Africa, Jacob Zuma, confirmed Makhubele's nomination as a judge, with active service commencing on the 1st of January 2018. Interestingly, Makhubele made an "arrangement" with the Gauteng Judge President Dustan Mlambo to defer her appointment to 1 April 2018.[332] This request was made to allow Makhubele enough time to wind up her practice and resign as chair of Prasa and the Water Tribunal. The Judge President successfully went on to ask the Minister of Justice and Constitutional Development, Tshililo Michael Masutha in a written letter to petition President Cyril Ramaphosa to approve of the request. In all, Makhubele continued to serve as chairperson of Prasa from the 19th October 2017 till March 2018 when she resigned -- an effective five months served on the Board of a State-Owned Company by a nominated Judge.

5. The pressing issue at hand

Article 12(2) of the Code of Judicial Conduct for South African Judges states the following:

> "A judge must, upon permanent appointment, immediately sever all professional links and recover speedily all fees and other amounts outstanding and organise his or her personal affairs to minimise the potential of conflict of interest."

The Code of Judicial Conduct is clear that a judge must not have any professional links. But as a side note, Judges Matter notes that it is not uncommon for judges to sit on boards or to act as trustees. Those judges who undertake roles on boards and trusts tend not to be for-profit entities, such as Prasa but for entities such as the Legal Aid Board chaired by Judge President Mlambo.[333]

The burning issue here and the one that is the basis for this section and ultimately this paper, is the following: how does an experienced and long-time practising Advocate voluntarily applies to serve the public and the Constitution at one of the most demanding positions in society, and simultaneously accept an appointment to a profit-based public entity, thus risk tainting the independence and impartiality sought from her overall judgement? This question is linked to the civil society group #UnitedBehind's complaint to the JSC of Makhubele's tenure at Prasa.[334]

Judge appointees are rightfully permitted time to wind up their practices, resign from all other professional associations and

organise their personal affairs as per the Code of Judicial Conduct before they assume active service in the judiciary. On the other hand, relying on this procedure, despite not being in active service to temporarily assume professional links that are not mandatory nor related to the judicial profession, amounts to questionable ethical conduct on the part of the individual responsible. It further raises questions on the absolute independence and impartiality required of our judiciary.

6. Conclusion

To conclude this paper, the opinion by Judges Matter[335] that the JSC and the Office of the Chief Justice need to bring greater clarity and well formulated rules on what may be done by sitting judges and those appointed but not yet sitting Judges constitutes a good recommendation. Impartiality and independence are the main foundations and identity of the judicial institution and its representatives. A judge must approach every matter they are presented with in their official capacity as objective and impartial as possible. This means anything that hampers or may hamper with their objectivity and impartiality, must be avoided, while acting in their official capacity.

As such, the responsibilities for sitting and appointed but not yet sitting judges need to be made clear by a Code of Conduct as per section 165(4) of the Constitution. So that the independence, impartiality, dignity, accessibility and effectiveness of our Judiciary is upheld and those who represent it are clear from any and every potential conflict of interest.

Failure to observe ethical conduct and the enforcement of the Constitution threatens one of the very foundations of a constitutional state, and specifically the doctrine of separation of powers. Ethics transcend what is already in writing and prescribed, and always seeks to subscribe to a higher standard or expectation where circumstances present a choice of options that can either advance or maintain the status quo.

[317] S 41(g) of the Constitution.
[318] CCT 13/13 [2013] ZACC 33 par [19].
[319] Rautenbach *Constitutional Law* 6ed (2012) 59; Mojapelo "The Doctrine of Separation of Powers: A South African Perspective" 2013 26 *Advocate* 37 37.
[320] Mojapelo 2013 *Advocate* 37.
[321] Mojapelo 2013 *Advocate* 40.
[322] Mojapelo 2013 *Advocate* 37.
[323] Rautenbach *Constitutional Law* 59-61.
[324] 1996 10 BCLR 1253 (CC) par [108] – [109].
[325] Judges Matter "Judge Makhubele: High Court Judge And Parastatal Chair" (19 February 2018) http://www.judgesmatter.co.za/opinions/judge-makhubele-high-court-judge-and-parastatal-chair/ (accessed: 2018-07-26).
[326] The JSC is comprised of the following members:
a) the Chief Justice, who presides at meetings of the Commission;
b) the President of the Supreme Court of Appeal;
c) one Judge President designated by the Judges President;
d) the Cabinet member responsible for the administration of Justice, or an alternate designated by that Cabinet member;
e) two practising advocates nominated from within the advocate's profession to represent the profession as a whole, and appointed by the President;
f) two practising attorneys nominated from within the attorney's profession to represent the profession as a whole, and nominated by the President;
g) one teacher of law designated by the teachers of law at South African universities; and
h) six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly, amongst other members.
[327] Ss 174(3) - (4) and 177(1) - (3) of the Constitution.
[328] S 178(5) of the Constitution.
[329] Judges Matter "How Does The JSC Deal With Complaints Against Judges" (10 May 2016) http://www.judgesmatter.co.za/opinions/complaints_against_judges/ (accessed 2019-04-20).
[330] Judges Matter "Judge Makhubele: High Court Judge And Parastatal Chair" (19 February 2018) http://www.judgesmatter.co.za/opinions/judge-makhubele-high-court-judge-and-parastatal-chair/ (accessed 2018-07-26).
[331] Stone "'Conflicted' Judge Refuses to Leave Prasa" (18 March 2018) http://www.news24.com/SouthAfrica/News/conflicted-judge-refuses-to-leave-prasa-20180318-2 (accessed: 2018-07-26).
[332] *Ibid.*
[333] *Ibid.*
[334] Tolsi "'Conflict of Interest' Could Land Judge in Hot Water" (19 July 2019) http://www.mg.co.za/article/2018-06-22-00-conflict-of-interest-could-land-judge-in-hot-water/ (accessed: 2019-07-19).
[335] Judges Matter "Seeking Clarity on Judicial Conduct" (19 May 2018) http://www.judgesmatter.co.za/opinions/seeking-clarity-on-judicial-conduct/ (accessed: 2019-04-21).

An investigation into the United Nations' integration of the Millennium Development Goals in African member states

Inge Laubscher

1. Introduction

The Millennium Summit[336] saw the dawn of the Millennium Development Goals (MDGs) in 2000, encapsulated in the United Nations Millennium Declaration (the UNMD).[337] With 189 signatory states, the latter is by far the largest binding representation that the United Nations (UN) has ever seen.[338] The UNMD committed nations to be bound within a global partnership which prioritises key areas of concern that affect the least developed countries, especially in Africa. This commitment would ensure global progress by all member states by the end of its timeline.[339] Essentially, the Declaration sets out eight empirical goals to be achieved by member states with the purpose of improving the quality of life for all. Emphasis was placed on the most vulnerable states by focussing on marginalised and splintered groups that face the most adversity.

The purpose of this article is to shed light on the integration of the processes employed within the 15-year period to achieve fulfilment of the MDGs throughout Africa as a continent that is still largely developing. This set of goals were the precursor to achieving sustainable development. The MDGs acted to level out equality amongst states by 2015. A question posed was whether Eurocentric intervention in African member states gave rise to neo-colonialism. Also, whether African member states find themselves in a better position after such intervention.[340] That could be determined through the tracking of the attainment of targets and assessing comparative successes between member states. The successes and failures of the UNMD itself are discussed in terms of the bigger picture.

2. The MDGs: goals, targets, and integration in African member states

The MDGs are contained in an eight-step framework that serve as the basis of this analysis. Member states are mandated to implement these goals in line with prescribed targets, with indicators for monitoring.

2.1 Eradication of extreme poverty and hunger

African countries were tasked with halving poverty by 2015 where Africans are currently still benchmarked as living on $1.25 per day in Africa. It is no surprise that Africa ranks as the poorest continent even today, even with poverty declining by one percentile each year.[341] Where poverty and hunger go hand in hand, food security and advancements in agriculture have been almost unattainable throughout Africa. However, Kenya had succeeded in implementing food policies which ensured quality food production, and utilised their financial reserves to explore bio fortification and diversification options which would have long-term effects for Kenya.[342] In the past decade, countries such as Nigeria succeeded in doubling its food production. Ghana reduced undernourishment by 74%, and Malawi utilised an input subsidy programme to achieve a 53% food surplus in 2007 after experiencing a 43% deficit in 2005.[343]

Nonetheless, financial challenges pose threats in subsidising African countries under the Comprehensive Africa Agriculture Development Programme (CAADP) framework, which serves as a holistic model approach for Africa to tackle matters concerning agriculture and how to manage funds for food production.[344] Although progress has been noted in food growth and poverty alleviation on the continent, African-oriented food programmes contain no confident strategies in the attainment of MDG targets

as donors are advised to donate cautiously.[345]

2.2 The achievement of universal primary education

The United Nations Educational, Scientific and Cultural Organisation (UNESCO) All Global Monitoring Report states that a third of the sub-Saharan youth fail to complete primary school.[346] United Nations Children Fund (UNICEF) put measures in place by introducing universal primary education policies throughout African governments World Health Organisation (WHO) issued grants to households with school-going children.[347] Enrolment rates improved by 30%, with Burkina Faso doubling education standards at twice the rate against the United States. African countries with such vast improvements have improved service delivery, used participatory approaches, and improved policy frameworks. Other measures included eliminating school fees which has lifted a burden off of households and increased enrolment rates even further. However, West Africa has seen a somewhat stagnation in numbers. Governmental funding is near to impossible in countries such as Kenya which was heavily affected by the 2009 global recession.[348]

2.3 The promotion of gender equality and women empowerment

The core focus of MDG 3 was to eliminate disparities in primary and secondary education, and in all levels of schooling by 2015. This includes advocating for female rights, and curbing discriminatory practices such as genital mutilation, child marriage, challenging stereotypes and maltreatment of all women that leads to iniquity.[349] Although Africa has seen fewer disparities over time, sub-Saharan Africa comprises more than half the countries with gender inequality in schools.[350]

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) was considered as a tool to carry out legislative and constitutional reform throughout Africa. Women's political representation has increased, albeit that slow progress in labour force transformation exists.[351] Essentially, member states have succeeded in reducing the gap between men and women through policy changes affecting representation in the economy, and visibility in formal processes.[352]

2.4 The reduction of child mortality

The focus of this goal was to reduce the mortality rate of children below the age of 5 by two-thirds. Africa's case is a double-edged sword: where sub-Saharan Africa has the highest child mortality rate, but this region has also seen the greatest unilateral decline in child mortality since the implementation of the MDGs. For example, Malawi has surpassed the expected decline by 72%, whereas Angola faces the highest failure rate where a child is 84 times more likely to die than a child in Europe.[353] The WHO and UNICEF joined forces to integrate the Every Newborn Action Plan (ENAP)[354] with a special focus on developing countries. This plan is the first global tool aimed at ending preventable deaths and stillbirths through the provision of affordable health services for infants by international governments. ENAP has succeeded as it is evidence-based before implementation which guaranteed success from the start. The provision of cost-effective treatments function to remedy more than 80% of the causes of all new-born deaths.[355] Essentially, means of assistance are available, so citizens must place pressure on their governments to ensure proper enforcement insofar as possible.

2.5 The improvement of maternal health

Most infantile deaths occur within the first month of birth, therefore, a special focus is directed towards mothers to ensure the effective provision of healthcare. The WHO defines maternal mortality as "the death of a woman whilst pregnant, or within 42 days of termination of pregnancy".[356] The MDG target was set to reduce maternal mortality rates by three quarters. A contributing factor to death in maternity is the inaccessibility to antiretroviral medications.[357] In South Africa, for example, programmes such as basic antenatal care were introduced to emphasise the importance of antenatal visits, especially in areas where poverty is rife and cultural beliefs trump Western medicine.[358] The African Union Commission-mandated Campaign for Accelerated Reduction of Maternal Mortality in Africa programme, aimed at advocating against this stigma throughout the continent, as well as to establish partnerships with the community and healthcare stakeholders.[359] Ancillary matters that create accessibility barriers are also being addressed such as transportation to and from clinics and illiteracy.[360]

2.6 The combat of HIV/AIDS, malaria and other diseases

The focus of this MDG was on completely stopping the spread of HIV/AIDS and malaria, and achieve universal access to treatment. Sub-Saharan Africa harbours the highest levels of the HIV/AIDS, malaria and TB trio. Hence, the WHO have instituted antenatal care programmes through public healthcare centres throughout Africa which function holistically to screen, treat and assist all affected by the latter.[361]

The UN General Assembly Special Session on HIV/AIDS in 2011 conceded to the success of the antiretroviral treatment by setting a further goal of ensuring that by 2015, 15 million Africans would have access to such antiretroviral treatment. With regards to malaria, 11 African states had reported declining malaria incidences as Algeria and Cabo Verde edged further to be

certified 'Malaria Free'.[362]

Throughout Africa, the greatest concern is funding, where approximately 70% is derived from the Global Fund to Fight AIDS, Tuberculosis and Malaria by international donors. Essentially, the most effective path is for Africa to continue addressing diseases simultaneously to reduce transmissions.[363]

2.7 Ensuring sustainable development

A special focus is given to sustainable development which was carried through into the Sustainable Development Goals (SDGs) and absorbed by the outcomes of the MDGs at the end of 2015. Sustainable development is "the ability to meet present needs without compromising the ability of future generations to do the same".[364] The 2012 UN Conference on Sustainable Development set the platform for member states to commit to the creation of new goals, as the MDGs were nearing the end of their 15-year timespan. At this UN Conference, it was emphasised that women are, especially, pivotal in the fulfilment of sustainable development.[365] Since sustainability is encapsulated in the SDGs, it is an ongoing goal measured on the outcomes of the MDGs, that is, what their predecessors managed to achieve throughout Africa.[366]

Under this MDG, its targets included integrating sustainable development in state policies, reducing biodiversity loss, and improving access to drinking water and basic sanitation. Africa's greatest challenges relate to climate change, drought and land use. From an economic point of view, Africa's gradual slip away from financial aid is characterised by its development, but it is highly unlikely that accessing public funds would be the best alternative.[367] Sustainable development in Africa is still to be measured over time.

2.8 The development of a global partnership

This MDG emphasises networking amongst states for bargaining power, improved relations and increased foreign aid. In developing countries such as those throughout Africa, the focus was on demonstrating expenditure plans and the application of international assistance in achieving Africa's financial shortfalls. The Organisation for Economic Co-Operation and Development (OECD) held that it is important for states to capitalise on each other's strengths in a symbiotic relationship with the idea that developed countries would increase their aid supply, market access, and debt relief.[368] However, according to the Commission for Africa, much of the debt relief sought was borne out of previously oppressive regimes and adds to neo-colonialist treatment of developing states.[369]

The establishment of new partnerships supports the delivery of commitments made by states to bind itself to programmes which will help it to attain its MDGs. The catch-22 comes into allowing multinational institutions to have an indirect influence in a country's affairs, but this is often the price paid to secure financial assistance and networking growth.[370] Essentially, excessive foreign intervention into states may have to be closely monitored to prevent exploitation.

3. Failures of the MDGs

From the onset, the greatest failure is clear, there is non-achievement of every target by the vast majority of African states. The MDG timeline was concluded in 2015, however, there was no formal endeavour to close negotiations. It is suggested that failing states do not want to carry the burden for being responsible for its failure. It is possible that the MDGs were too ambitious for developing nations, so much so that early failure was foreseen in some implementation mechanisms, despite the aid available to put plans into action. This often resulted in stagnation after a while or dormant policies.[371]

A further query is whether the MDG benchmarks were set too high. Before tackling MDGs, Africa was already condemned as being a disaster-case by the same Eurocentric authorities that set the yardstick. Performance is deemed to be measurable, but in a seemingly non-linear way. It took the United States exponentially longer to implement the same initiatives prior to the commencement of the MDGs, yet the United States is regarded as a forerunner for successful implementation, all-round.[372]

Two points worth raising include whether the MDGs made a difference and whether the MDGs measured what truly matters. It is only logical that every member state would seek strategies to its own problems, regardless of whether there is an international system in place dictating to its signatories that there are problem areas that need fixing. This is evident where countries such as China barely participated in fulfilling the MDGs expressly. Each member state is an individual case and cannot be treated with blanket expectations. On another note, MDG two, for example, set out to achieve universal primary education through measuring enrolment rates. Not only does the expectation of rapid expansion take the focus away from the provision of quality education instead, but it also suggests that children who drop out of school for whatever reason or who are deregistered would still be considered to be receiving an education as the cut-off determinant was enrolment.[373]

Excessive borrowing and bailouts used to necessitate the fulfilment of implementation mechanisms is seen to be contradictory and regresses nations whilst placing the burden of meeting implementation deadlines. In 2012, The World Bank recorded

34 of the 42 countries eligible for debt relief as African member states under its Highly Indebted Poor Countries Initiative.[374]

In terms of MDGs which touch on sustainability, natural phenomena such as climate change is not taken into consideration when assessing performance. The UN Framework Convention on Climate Change (UNFCCC) aims to reduce global warming by two degrees to accompany the continuation of MDG 7 into the SDGs.[375] Once again, Africa would most likely fail by default without proper monitoring.

4. Successes of the MDGs

The instances of success are sobering. The MDGs excelled in leading the most successful anti-poverty movement in history. Also, women receive more representation with the AU recognising 2016 as the year of human rights with a special focus on women's rights. There is no doubt that the provision of funding would improve access to resources, thus eliminating diseases through the provision of treatments and education opportunities. Overall, poverty has halved, school enrolments have increased, gender parity has improved, child mortality and maternal mortality rates have close to halved, treatments of medical conditions is more accessible, financial assistance is still available to African states where needed, and sustainability goals are in check for further fulfilment.[376]

5. Conclusion

The MDGs served as an attempt to make development mutual amongst UN member states prior the introduction of the SDGs. The SDGs hold more promise as participating states were polled on issues for improvement by means of embracing democratic decision-making. The African Union is gradually steering Africa away from its reliance on the UN by developing its own decentralised policies. Sustaining the momentum of development requires new approaches and constant monitoring. Despite the failures of the MDGs, early intervention and a hands-on approach by African member states could potentially have resulted in more accomplishments. It seems that Africa will fail as long as it adheres to a Eurocentric yardstick for performance and is expected to answer to an authority outside of Africa.

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The role of the courts in legalising assisted suicide

Dioné Botes

1. Introduction

Euthanasia has been practiced for many centuries. Despite this, it remains a topic of much debate all over the world[377] and has developed into a highly controversial issue.[378] There are several factors that contribute to this debate such as the development of medical sciences and the increasing awareness of human rights.[379] When certain diseases come to mind, one cannot help but think of the detrimental consequences that accompany them. Pain and suffering, for instance, is part and parcel of numerous diseases. Some diseases render individuals entirely dependent upon others for assistance in completing basic tasks. Certain illnesses bring about death quickly whilst others cause individuals to endure suffering for months or years before dying.[380] Medical science and technology have advanced to such an extent that it is now possible to prolong the lives of ill people as well as slow the process of dying.[381] Whilst many people welcome the notion of having a prolonged life-expectancy, some people consider this to be a burden.[382]

Many medical treatments that are aimed at prolonging the lives of ill individuals (such as cancer treatments) inevitably cause more suffering and hardship. Some individuals therefore, prefer the option of death above that of having a prolonged life-expectancy during which they would have to endure further suffering.[383] Doctors are consequently placed in an uncomfortable situation in which they are torn between providing their patients with appropriate medical treatment and respecting patient autonomy.[384]

As mentioned, the increased awareness in human rights have contributed to the debate concerning euthanasia.[385] Individuals are better informed about their rights as patients. In addition, individuals are given the right to make choices regarding their health care and to have such choices respected. Patients are also more informed about their illnesses and the treatments available to them.[386] As a result, patients are well aware of the consequences of their illnesses and the manner in which they are likely to die. The right to have control over the manner and time of one's death has thus become a legitimate concern.[387]

2. Euthanasia and Assisted Suicide

2.1 Introductory Remarks

Euthanasia and assisted suicide are terms that are used to describe a situation in which a terminally ill person is aided in dying.[388] Although euthanasia and assisted suicide are closely related concepts, it is important to note that they do not refer the same thing.[389] It is imperative to familiarise oneself with the meanings of these two terms and how they differ from each other. This chapter is primarily aimed at explaining these two concepts to the reader. The purpose hereof is to ensure that the reader has a clear understanding of the subject matter of this research paper.

This section is divided into two main sub-sections. The first sub-section deals solely with euthanasia. In this section, various aspects relating to euthanasia will be considered. These include explaining what euthanasia is, defining the various forms of euthanasia and briefly discussing passive and active euthanasia. The second sub-section deals with assisted suicide. This section will be considerably shorter as it merely seeks to shed light on what assisted suicide is and how it differs from euthanasia. Before proceeding with this chapter, itIt should be noted that the term "assisted suicide" will be used throughout this research paper. When used, it must be taken to refer to both assisted suicide (in the medical context) as defined in this chapter and voluntary active euthanasia.

2.2 Euthanasia

2.2.1 The Concept of Euthanasia

Euthanasia is not a foreign concept. It is something with which people have been familiar with for many years. In ancient Greece, for example, euthanasia had been widely practiced. The Greeks made use of a poisonous plant, known as hemlock, to hasten the death of persons suffering from painful or incurable ailments. Its practice continued throughout the 16th and 17th centuries until it was met by the growing opposition of Christians and the professionalising medical community.[390]

The advocating of euthanasia is something that has also been in existence for quite some time. Many pro-euthanasia groups have been established across the globe. An example of such a group is the British organisation, Dignity in Dying.[391] Dignity in Dying advocates the right to a good death as well as the option of assisted suicide for terminally ill individuals.[392] Another example of a pro-euthanasia group is an organisation known as Dignity South Africa. The mission of this organisation is to advocate for a change in South African laws which will provide mentally sound individuals with the option of a dignified death.[393] It should be noted, however, that there are also organisations established which are opposed to the idea of legalising euthanasia.[394]

2.2.2 Defining Euthanasia

Euthanasia originates from the Greek word euthanatos. The term euthanatos can be broken up into two parts. The prefix eu refers to good and the latter part of the word, namely thanatos, refers to death. Euthanasia therefore refers to a good death or gentle death.[395] Providing a conclusive definition for euthanasia has proven to be a difficult task. It is something that has baffled the minds of philosophers, moralists, and ethicists. This has resulted in definitions ranging from simple sentences to book chapters.[396] The term is also regarded as ambiguous and has various connotations attached to it.[397] To illustrate this point, the various ways in which euthanasia has been defined, will be set out in the subsequent paragraph.

Euthanasia has been defined as the killing, either by means of conduct or omission, of another individual for the latter's benefit.[398] It has also been defined as the ending of a terminally ill individual's life coupled with a compassionate motive when doing so.[399] It has more recently been described as conduct that brings about a painless death for individuals suffering from incurable and painful diseases.[400] Euthanasia has also been accepted as synonymous with mercy killing.[401] Mercy killing has been taken to refer to the act of providing an individual suffering from an incurable or painful illness, with an easy and painless death.[402]

It is evident from the above that euthanasia does not have a conclusive definition.[403] Regardless, euthanasia is generally associated with persons who suffer from terminal illnesses, persons who have no hope of recovery and persons whose health have declined to such an extent that further medical treatment would be futile and serve no purpose.[404]

2.2.3 Voluntary, Non-Voluntary and Involuntary Euthanasia

Euthanasia is generally classified as being voluntary, non-voluntary or involuntary. A further distinction is made between active and passive euthanasia.[405] Voluntary euthanasia is a form of euthanasia which is carried out at the request of an individual who is of sound mind.[406] The individual thus consents to his or her death.[407] Put differently, it is the killing of an individual with his or her consent.[408]

With non-voluntary euthanasia, a patient neither requests death nor gives permission for it.[409] Non-voluntary euthanasia is performed on individuals who lack the capacity to understand and appreciate the choice between life and death. An example of such an individual would be someone who is permanently comatose.[410] The individual's wishes are therefore unknown or cannot be ascertained.[411] Non-voluntary euthanasia is often carried out by a family member or a doctor who believes that the patient wants his or her life to end.[412]

Involuntary euthanasia refers to a situation where a person, who has not requested that he or she be assisted in terminating his or her life, is killed.[413] It is submitted that such conduct amounts to an abuse of power within the medical society.[414] This form of euthanasia generally occurs where an individual is in a vegetative state or coma and is unlikely to regain consciousness.[415] Involuntary euthanasia is accepted as murder regardless of a person's motive for doing so.[416]

2.2.4 Passive Euthanasia and Active Euthanasia

As mentioned above, there are three forms of euthanasia: voluntary, non-voluntary and involuntary euthanasia.[417] These three forms may further be categorised as either passive or active euthanasia. The purpose of the subsequent paragraphs is to explain the difference between passive and active euthanasia.

Passive euthanasia is a form of euthanasia which takes place by way of an omission.[418] It is typically performed on terminally ill patients with the purpose of bringing about natural death sooner. Passive euthanasia may occur in various ways. However, it usually involves removing an individual's life support or ceasing the provision of medication aimed at keeping the individual alive. Passive euthanasia may also take place by the failure to deliver cardio-pulmonary resuscitation to a patient, which subsequently results in the patient's death. It is submitted that passive euthanasia may also involve stopping the provision of food and water to an individual.[419]

Active euthanasia is defined as the intentional killing of another human being, the latter suffering from an incurable ailment.[420] It therefore involves a positive act of killing. Unlike passive euthanasia, which consists of an omission, active euthanasia involves a direct action and is performed upon request by an ill person.[422]

The following examples may be used to illustrate the difference between active and passive euthanasia. If a terminally ill patient

requests that he or she not be put on a respirator and the medical practitioner carries out this request and the patient subsequently dies of respiratory failure, this would amount to passive voluntary euthanasia. Here, the medical practitioner refrained from keeping the patient alive. This fits the definition of passive euthanasia as set out above as it involves an omission on the part of the medical practitioner. However, if a person requests a medical practitioner to administer some sort of lethal agent or to provide him or her with a lethal agent which he or she can administer themselves, this would amount to active euthanasia. This scenario fits the definition of active euthanasia as the doctor would be committing a positive act by providing the lethal agent, upon request of the individual.[423]

There exists some controversy as to whether the withdrawal of life-sustaining treatment amounts to passive or active euthanasia. On the one hand, it is argued that the withdrawal of life-sustaining treatment amounts to passive euthanasia because the cause of death is the individual's illness and not the conduct of the person who withdraws the life-support. On the other hand, it is contended that the withdrawal of life-sustaining treatment amounts to active euthanasia on the basis that the act of withdrawal can be regarded as actively doing something. In other words, the withdrawal of the life-sustaining treatment is deemed to be a positive act.[424] This article is not concerned with the question of whether the withdrawal of life-sustaining treatment amounts to passive or active euthanasia. As such, this issue will not be discussed in any further detail.

3. Assisted Suicide

3.1 Defining Assisted Suicide

Having dealt with euthanasia and its various forms, it is now necessary to briefly focus on the concept of assisted suicide to see how it differs from euthanasia. Assisted suicide refers to a situation in which a person is assisted by another in ending his or her own life. In other words, assisted suicide takes place where a person provides another with the means and information necessary for the latter to end his or her life.[425]

3.2 Doctor-Assisted Suicide

If the person who provides such assistance is a doctor, the term doctor-assisted suicide or physician-assisted suicide is used.[426] With doctor-assisted suicide (or physician-assisted suicide) a medical practitioner may either administer the lethal agent to the patient or the medical practitioner may supply the patient with the lethal agent. In the latter instance, the patient is enabled to administer the lethal agent and consequently terminate his or her own life. It has been contended that there is no difference between a situation where the medical practitioner administers the lethal agent or a situation where he provides the lethal agent for self-administration by the patient. In both situations, the medical practitioner would be deemed to have caused the death of the patient.[427]

Doctor-assisted suicide is aimed at assisting a terminally ill patient in hastening his or her own death. The purpose being, to allow the patient to die with dignity. It has been suggested that the phrase doctor-assisted suicide be replaced with "death with dignity".[428]

3.3 The distinction between euthanasia and assisted suicide

As mentioned above, euthanasia and assisted suicide are related concepts. This is evident from the explanations provided in the preceding paragraphs. However, as mentioned, one must be aware of the distinction between these two concepts. The first difference may be found in the context in which euthanasia and assisted suicide take place. Euthanasia is deemed to take place in a medical context. Assisted suicide, however, can occur both in a medical context (doctor-assisted suicide) and outside of a medical context.[429] With regards to the latter context, South African courts have on numerous occasions been faced with situations in which one person assisted or encouraged another to commit suicide for non-medical reasons.[430]

The second difference relates to the individuals who are involved when the final act (the termination of one's life) is carried out. With euthanasia, the patient does not end his or her own life. The patient's death is the result of another's conduct. With assisted suicide, the patient takes the final step in ending his or her life. However, the patient is only capable of ending his or her life with the assistance of another. For example, a medical practitioner must provide the information or means necessary so to enable the patient to terminate his or her life.[431] As mentioned, euthanasia and assisted suicide do not mean the same thing. However, they are both used to describe situations where terminally ill individuals are relieved of suffering. It was therefore the goal of this section to shed light on the meanings of these terms and how they differ from one another.

3.4 Assisted suicide under South African law

3.4.1 The legal position of assisted suicide in South Africa

Having dealt with the distinction between euthanasia and assisted suicide, it is now necessary to examine the legal position of assisted suicide under South African law. As mentioned earlier, any reference to assisted suicide should be taken as referring to assisted suicide in the medical context (doctor-assisted suicide). Presently in South Africa, assisted suicide is a crime.[432] Therefore,

if one individual, such as a doctor, assists another person in terminating his or her own life, the former may be found guilty of murder.[433]

In its report titled "Euthanasia and the Artificial Preservation of Life", the South African Law Commission (hereafter referred to as the "Commission") proposed that doctor-assisted suicide be allowed by statute.[434] This report and the recommendations made by the Commission will be discussed in more detail. Currently, South Africa does not have any legislation dealing with assisted suicide.[435]

3.4.2 Relevant Case Law

South African courts have been confronted with cases dealing with assisted suicide on numerous occasions.[436] The most recent being that of *Stransham-Ford v Minister of Justice and Correctional Services*[437] and *Minister of Justice and Correctional Services v Estate Late James Stransham-Ford*.[438] These two cases will be dealt with in detail later on. The older judgements dealing with assisted suicide will, however, be discussed in this section.

The purpose of this section is to examine how the South African courts have dealt with assisted suicide. This is important as it ties in with the ultimate objective of this research paper, which is to examine the role played by courts in legalising something as controversial as assisted suicide. As will be seen from the case law discussed below, the punishments that have been imposed in assisted suicide cases have been lenient. It has been submitted that the reason for this, is the presence of mitigating factors. It is common practice for courts to consider the personal circumstances of the accused as well as the facts of the case when dealing with assisted suicide cases.[439]

3.4.2.1 *R v Davidow*

The unreported case of *R v Davidow*,[440] was the first case to deal with the issue of active euthanasia.[441] In this case, the accused shot and killed his terminally ill mother. She suffered from an incurable illness which caused her great pain. The accused had done everything possible to ensure that his mother received the best treatment. However, her health continued to worsen and soon enough she was suffering from depression. The accused's mother had indicated that she wanted to be relieved of her suffering.[442] The accused was charged with murder. However, at the time the accused shot and killed his mother, he had been overcome by emotion. The court therefore concluded that the accused lacked the necessary capacity and he was subsequently found not guilty.[443]

3.4.2.2 *S v De Bellocq*

In S *v De Bellocq*,[444] the accused had given birth to a premature baby who subsequently developed a condition known as toxoplasmosis whilst in the hospital.[445] This condition negatively affected the child's mental capabilities and shortened her life expectancy considerably.[446] After being informed by doctors that there was nothing they could do for the child, the accused took her baby home. Whilst at home, she subsequently drowned her baby in the bath with the intention of sparing the child any further suffering.[447]

The mother was charged and found guilty of murder. However, the court took into consideration the mitigating factors which placed pressure of the accused to end her baby's life.[448] The court held that, based on the facts of the case and the mitigating circumstances, subjecting the accused to prison or imposing a suspended sentence would serve no purpose. The court further held that the law does not permit a person to kill another. This applies even in situations where the latter is seriously ill. The court concluded that such conduct remains unlawful and amounts to murder. Therefore, the punishment the court ultimately laid down was that the accused could be summoned to court for sentencing at any time during the following six months. The accused was not summoned back to court.[449]

3.4.2.3 *S v Hartmann*

S v Hartmann[450] was the first case in which a medical practitioner performed active euthanasia on a terminally ill person.[451] It is further regarded as one of the most important cases in South Africa dealing with the issue of euthanasia.[452] In this case, a medical practitioner was charged for the murder of his father. The deceased had been suffering from prostate and bone cancer, for which there had been no available cure. Medical evidence indicated that the deceased was in a critical state of ill-health and that he was close to dying. This prompted the accused to repeatedly increase the dosage of morphine which his father had been receiving. The accused also administered pentothal to his father. The deceased died within seconds after receiving the pentothal.[453]

Van Winsen J held that by injecting pentothal into the drip of the deceased, the accused had performed an unlawful act. It was held that this unlawful act constituted the direct cause of the deceased's death. The learned judge indicated that the motive behind the accused's action was a compassionate one, aimed at relieving his father's suffering. However, the accused had performed the act whilst knowing he would end the deceased's life. He thus had fault in the form of intention.[454]

Evidence indicated that the deceased was already in a dying condition at the time the pentothal was administered and that the deceased could, in any event, have died a few hours later. However, in response to this Van Winsen J contended that the act remained an act of murder even if it was carried out with the purpose of hastening the death of a person who was already close to dying.[455]

The accused submitted that he had asked his father if he wanted to sleep. The deceased had apparently nodded in approval. Van Winsen J contended that the deceased's consent to being killed did not exclude the criminal liability of the person who carried out the act.[456] In terms of this, the judgement of Van Winsen J refers to the case of *S v Robinson*.[457] This case is relevant as it was also held that it is not a defence to murder if the deceased had consented to his or her own death. It is submitted that even though the deceased consents to the taking of his own life, the accused nevertheless acts unlawfully. The reasoning behind this submission is that the community's interest in the preservation of life should be upheld.[458]

Van Winsen J sentenced the accused to one year's imprisonment. The accused was subsequently ordered to be detained until the rising of the court with the remainder of his sentence suspended for a year.[459] It should be noted that the accused was further punished by the South African Medical and Dental Council and struck of the roll as a practicing medical practitioner.[460]

3.4.2.4 *S v Marengo*

In *S v Marengo*,[461] the accused killed her father. The deceased suffered from cancer. The accused described her father as being in severe pain and in a hopeless state. The accused was charged with murder, and pleaded guilty. She contended that she only killed her father to relieve him of his suffering.[462] In deciding the appropriate punishment, the court took cognisance of the fact that the accused acted out of mercy. However, the court also considered the personal circumstances of the accused. The court ultimately concluded that the accused suffered from personality disintegration. She was therefore not accountable for her conduct.[463] The court expressed the opinion that the facts of this case resembled[464] the facts of *S v Hartmann*.[465] The court agreed with the punishment imposed by Van Winsen J and sentenced the accused to three year's imprisonment which was suspended for five years.[466]

3.4.2.5 *S v Smorenburg*

In *S v Smorenburg*,[467] a nurse was charged with two counts of attempted murder after she administered a lethal dose of insulin to two terminally ill patients. This was done to relieve them of their suffering. The accused pleaded guilty to the charges of attempted murder. She submitted that the two patients had indicated that they wanted to be relieved of their suffering.[468] Here, the accused acted entirely out of compassion. However, the court indicated that this could not render her actions lawful. The accused was therefore sentenced to three months imprisonment which was suspended completely.[469]

3.4.2.6 *Clarke v Hurst*

In *Clarke v Hurst*,[470] Dr Clarke went into cardiac arrest whilst being treated for an injury. This caused him to stop breathing for a considerable amount of time. By the time his breathing and pulse had been restored, Dr Clarke had suffered severe brain damage.[471] Dr Clarke was deemed to be in a permanent vegetative state.[472] Dr Clarke's wife, Mrs. Clarke, subsequently approached the court for an order appointing her as her husband's curator, with the power to make decisions regarding the refusal or withdrawal of her husband's treatment, including the cessation of any artificial feeding.[473]

The application was opposed on the ground that withdrawing life-sustaining treatment would hasten Dr Clarke's death and subsequently constitute the cause of his death. Mrs. Clarke would then be liable for murder as she foresaw the death as a probable consequence of the withdrawal of treatment. The court recognised that the withdrawal of artificial feeding or any other life-sustaining treatment would indeed result in the termination of Dr Clarke's life.[474]

The court therefore had to determine whether the withdrawal of artificial feeding, which would result in Dr Clarke's death, could be regarded as wrongful. The court held that this question centred on whether the legal convictions of society deemed the withdrawal of artificial feeding as reasonable. The court further submitted that it was the quality of the patient's life which would be the determining factor in this regard. The court concluded that, based on the legal convictions of society, artificial feeding was not considered a means of supporting human life. Mrs. Clarke was therefore allowed to discontinue the artificial feeding and her actions would not be deemed wrongful.[475]

It is important to note that Dr Clarke had a living will which stated that should he ever be in a condition similar to the one in which he is now, he must not be kept alive by artificial means and should be allowed to die.[476] A living will is a document which is signed by a person indicating what he or she wants should they be rendered incapable of surviving without some form of permanent medical assistance.[477] In essence, a person signing a living will is declaring that should he or she suffer from an incurable illness which cannot be treated, any life-sustaining support must be ceased and he or she must be left to die naturally. It was argued on behalf of Dr Clarke, that the court should recognise his living will and that

a curator should be allowed to give effect thereto. The court rejected this and held that the curator is obliged to act in the best interests of the patient and not necessarily in accordance with the latter's wishes. Under South African law, living wills are not given effect to and there exists no legislation dealing with it.[478]

Presently, assisted suicide is unlawful and any person who engages in such conduct may be found guilty of murder. As is evident from the case law, assisted suicide remains unlawful, regardless of a compassionate or merciful motive. Nevertheless, the case law discussed indicates that courts understand the reasons behind the accused's actions. Lastly, it is a common practice for courts to consider the facts of the case as well as the personal circumstances of the accused when confronted with assisted suicide cases. It is evident from the case law that courts have generally been quite lenient when dealing with these cases which indicates that they have a measure of sympathy for the accused.

4. The Stransham-Ford Case

4.1 Introductory Remarks

In 2015, the North Gauteng High Court was confronted with the issue of assisted suicide in the case of *Stransham-Ford v Minister of Justice and Correctional Services*.[479] The High Court found that, in certain circumstances, voluntary active euthanasia and doctor-assisted suicide may be legally justified.[480] It has been submitted that this decision, although regarded by some as a much-needed development in the law, holds far-reaching consequences for South African law.[481] The decision of the High Court was subsequently set aside by the Supreme Court of Appeal in *Minister of Justice and Correctional Services v Estate Late James Stransham-Ford*.[482]

The applicant in this case, Robert James Stransham-Ford, was an unmarried, adult male. He was a highly qualified advocate with many years of practical experience.[483] The applicant was terminally ill with stage four cancer.[484] His cancer had spread to his lower spine, kidneys, and lymph nodes.[485] The applicant endured pain, nausea, vomiting, stomach cramps, constipation, disorientation, high blood pressure, a loss of appetite and weight loss. He was weak, frail and unable to get out of bed. He relied on pain medication to aid him in sleeping which often made him extremely drowsy. The applicant also suffered from anxiety.[486] During his fight with cancer, the applicant underwent various treatments. He also made use of different medicines and traditional remedies. The applicant was also placed under palliative care. However, none of these measures had been successful in relieving him of his suffering.[487] The applicant therefore expressed the view that assisted suicide was the only way in which he could avoid his eventual, undignified suffering.[488] With only a few weeks left to live, the applicant approached the North Gauteng High Court. He sought the following order:[489]

> "2. Declaring that the Applicant may request a medical practitioner, registered as such in terms of the Health Professions Act 56 of 1974 ("a medical practitioner"), to end his life or to enable the Applicant to end his life by the administration or provisions of some or other lethal agent;
> 3. Declaring that the medical practitioner who administers or provides some or other lethal agent to the Applicant, as contemplated in prayer 2 supra, shall not be held accountable and shall be free from any civil, criminal or disciplinary liability that may otherwise have arisen from:
> 3.1 The administration or provision of some or other lethal agent to the Applicant;
> 3.2 The cessation of the Applicant's life as a result of the administration or provision of some or other lethal agent to the Applicant;
> 4. To the extent required developing the common law, by declaring the conduct in prayers 2. and 3. supra, lawful and constitutional in the circumstances of this matter."[490]

The applicant also posed several questions to the court. These included: whether it is possible for a person's health to deteriorate to such a level where he would be justified in wishing to take his own life, whether the sufferer ought to be allowed to take his own life, whether another person should be allowed to assist the sufferer in ending his life, whether this person may be a medical practitioner and which safeguards would be required.[491]

4.1.1 The Applicant's Arguments

The arguments presented by the applicant will be dealt with in the subsequent paragraphs. The applicant relied on numerous provision in the Constitution.[492] These provisions will be set out briefly below. Furthermore, the right to dignity featured prominently throughout the applicant's arguments. The concept of dignity and the way in which it was approached by Fabricius J will therefore be discussed as well. Thereafter, more focus will be placed on specific arguments raised by the applicant and how the court dealt with it.

The basis of the applicant's relief was the Constitution. The applicant relied on the founding provisions of the Constitution which, in section one, states that:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values: Human dignity, the achievement of equality and the advancement of human rights and freedoms."[493]

The applicant also relied on chapter two of the Constitution which contains the Bill of Rights. More specifically, the applicant referred to sections 7 and 8 of the Constitution.[494] Section 7 of the Constitution states the following:

> "(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
> (2) the State must respect, protect, promote and fulfil the rights in the Bill of Rights."[495]

Section 8 deals with the application of the Bill of Rights and reads as follows:

> "(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court – in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right."[496]

The applicant further relied on sections 10 and section 12 of the Constitution.[497] Section 10 provides that "everyone has inherent dignity and the right to have their dignity respected and protected"[498] and section 12 guarantees everyone the right to freedom and security of the person.[499]

The applicant expressed the view that death with dignity is a fundamental human right which courts are required to advance, respect, promote, protect and fulfil.[500] The applicant's counsel submitted that there is no dignity in having to suffer severe pain, having to endure the dulling effects of opioid medication, not being aware of one's surroundings or the presence of loved ones, being in a constant state of confusion and not being able to care for one's hygiene. It was also submitted that there is no dignity in dying in an environment which was not one's home. The applicant emphasised the fact that he wanted to die with dignity. He wanted to be surrounded by his loved ones. He wanted to speak to them, hear them, see them and be aware of their presence. He also wanted to be able to breathe on his own. The applicant wanted his life to end in circumstances where he knew that he ended his life with sovereignty through active voluntary euthanasia or assisted suicide. The applicant held that by giving a person the choice to decide how he or she wanted to respond to a terminal prognosis, was to respect, protect, promote, advance and fulfil a person's subjective sense of dignity and personal integrity, and ultimately their constitutional right to inherent dignity.[501]

It is evident from the constitutional provisions set out above that human dignity is both a value and a human right.[502] The concept of dignity has been described as a representation of humanity. It is also submitted that dignity imposes an obligation to recognise and respect such humanity.[503]

In a constitutional context, human dignity has been described as the embodiment of three distinct elements.[504] The first element is known as the ontological element. In terms of this element, the qualities that are possessed by individuals are deemed to be unique to the individual. These qualities embody the individual's inherent dignity.[505] The second element is known as the relational claim. In terms of this, every individual is entitled to have his or her inherent dignity recognised and respected.[506] The third element is known as the limited-state claim. This element requires that the state provide minimal living conditions for individuals.[507] These three elements are present in section 10 of the Constitution.[508] It has been submitted that the first and second element is present in this case due to the fact that Fabricius J recognised that everyone has the right to inherent dignity and that the state was under an obligation to respect and protect such dignity.[509]

Fabricius J began his discussion on the role of dignity within South Africa's constitutional dispensation by emphasising the fact that human dignity constitutes a central value of the objective, normative value system established by the Constitution.[510] In addition to this, Fabricius J referred to the following statement in the case of S v Makwanyane, "thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution."[511]

Fabricius J held that the concept of human dignity requires that the value and worth of individuals be recognised. The learned judge further held that human dignity constitutes the source of the right to freedom and physical integrity.[512] It is clear that Fabricius J chose to approach the applicant's case on the basis that dignity constitutes both a value and a right.[513]

As mentioned above, the applicant contended that dying with dignity is a fundamental human right which has to be upheld by South African courts. Fabricius J agreed with this submission. In this respect, Fabricius J referred to the Commission's report on Euthanasia and the Artificial Preservation of Life. The learned judge agreed with the Commission's view that in cases such as this, any decision to be taken or order to be given had to be informed by the Constitution. Fabricius J further held that emphasis had to be placed on the sacredness of the quality of life rather than on the sacredness of life itself.[514]

Fabricius J made it clear that he does not understand how societies can accept the high murder rates and the number of people who die on the roads due to reckless driving. The learned judge indicates, as quoted below, that the state has no concern for those persons dying from AIDS and hunger and who have limited access to appropriate hospitals, but rather it chooses to concern itself with the manner in which people choose to die:[515]

> "The State says that it cannot afford to fulfil all socio-economic demands, but it assumes the power to tell an educated individual of sound mind who is gravely ill and about to die, that he must suffer the indignity of the severe pain, and is not allowed to die in a dignified, quiet manner with the assistance of a medical practitioner."[516]

Fabricius J substantiates this by referring to the Commission. The Commission pointed out that individuals are taught from a young age to take responsibility for their lives, but the same individuals are not allowed to take responsibility for their deaths. The learned judge expresses the view that this submission is ironic. He indicates that people are free to choose how they wish to live their lives but people cannot choose how to die. Fabricius J further expresses the view that in situations such as these, one should not be concerned with the opinions of third parties.[517] In this respect, the learned judge states the following:

> "The choice of a patient such as the present, is consistent with an open and democratic society and its values and norms as expressed in the Bill of Rights."[518]

As will be seen from the discussion dealing with the Supreme Court of Appeal judgement, a similar view is held by countries in which assisted suicide is legal. These countries consider assisted suicide to be a private matter between the individual and his or her doctor. It does therefore not involve the views of third parties.[519] The applicant also argued that it was not in the best interest of a patient to remain alive and endure unbearable suffering.[520] To this the applicant added that effect had to be given to the wishes of such a patient. In response to this submission, Fabricius J referred to *Clarke v Hurst*.[521] The judge in this case emphasised the fact that, when dealing with the best interests of patients, courts had to favour the preservation of life. However, this did not mean that life had to be preserved at all costs.[522]

A further argument raised by the applicant related to the developments that were occurring in respect of euthanasia in other parts of the world. The applicant submitted that there are at least eleven countries which have legalised assisted suicide. In this respect, Fabricius J referred to a decision of the Supreme Court of Canada in which it was held that the complete prohibition on assisted suicide was invalid. Fabricius J agreed with this submission and held that if the proper safeguards were put in place, the total prohibition on assisted suicide would be unnecessary. The Supreme Court of Canada also emphasised the fact that the law allows terminally ill individuals to seek palliative sedation, refuse artificial feeding and consent to the removal of life-sustaining medical treatment, but it prevents such patients from being assisted in dying by a medical practitioner. The Canadian Supreme Court held that this infringes the bodily integrity of these individuals as well as their right to make choices regarding medical treatment. Fabricius J submitted that this, in his opinion, applied to the case before him.[523]

Before dealing with the respondents' arguments, it is necessary to briefly discuss one last argument raised by the applicant. The applicant argued that from a philosophical viewpoint, there was no difference between assisted suicide where the patient is provided with a lethal agent, where life-sustaining treatment is withdrawn, or where a high dose of morphine is administered with the intention to relieve suffering while knowing that it will probably result in the patient's death. The applicant, in his replying affidavit, submitted that there is no ethical distinction between the withdrawal of life-sustaining treatment and doctor-assisted suicide.[524]

The applicant submitted that in a situation where a medical practitioner withdraws the life-sustaining treatment, the medical practitioner is aware of the fact that he or she is hastening the patient's death. The applicant contends that in such a situation, the medical practitioner would be quite capable of avoiding such conduct, but he or she nevertheless chooses to proceed with his or her intended course of action. The applicant further argues that the withdrawal of life-sustaining treatment constitutes a commission as it is an active step taken by the medical practitioner. In the event of the patient refusing any treatment, the failure to provide such treatment amounts to an omission on the part of the medical practitioner.[525]

The issue as to whether the withdrawal of life-sustaining treatment amounts to active euthanasia has been touched on briefly in chapter one. In chapter one it was indicated that it has been argued that the withdrawal of life-sustaining treatment amounts to active euthanasia because it can be seen as actively doing something.[526] As mentioned, whether or not this is so, is outside the scope of this work. However, I do agree with the argument raised by the applicant that there is no distinction between the active and passive euthanasia. The applicant argues that the withdrawal of life-sustaining treatment amounts to *dolus eventualis*.[527] *Dolus eventualis* exists in a situation where the perpetrator subjectively foresees the possibility of conducting himself or herself in an unlawful manner, but nonetheless proceeds with his or her actions.[528] The writer hereof submits that dolus eventualis is present where life-sustaining treatment is withdrawn and where a medical practitioner administers a lethal agent. In both situations, the medical practitioner commits an act which he or she knows will result in the death of the patient, but still proceeds with such conduct.

4.1.2 The Respondents' Arguments

There were four respondents in this case, namely: The Minister of Justice and Correctional Services (first respondent), the Minister of Health (second respondent), the Health Professional Council of South Africa (third respondent) and the National Director of Public Prosecution (fourth respondent).[529]

On behalf of the first respondent, it was submitted that a medical practitioner who assists another in ending his or her life, would be committing a criminal offence. The first respondent also refused

to acknowledge that the applicant's dignity was involved in the present situation. It was further submitted by the first respondent that the granting of the application would promote inequalities and discrimination of the poor in that access to courts would be limited to rich individuals only. Fabricius J disagreed with the latter submission by indicating that it was irrelevant in the present case. The learned judge held that this issue might become relevant in future cases if appropriate safeguards are not put in place by courts or by legislation.[530]

The third respondent was not convinced that the applicant's condition violated his right to dignity nor that he was being treated in an inhumane way. It was submitted that the applicant suffered from a condition which might affect his dignity just as it would affect the dignity of people who died of natural and unnatural causes. Furthermore, it was held that the applicant's right to dignity was not violated because his view was subjective. This argument was also put forward on behalf of the first respondent. In the first respondent's answering affidavit, it was denied that the manner of death as described by the applicant was not dignified. In the affidavit, it was also submitted that this was merely the applicant's own subjective view. It was argued that the undignified suffering of the applicant was natural and that his right to dignity was therefore not infringed. Fabricius J expressed his disagreement with this submission by asking whether the deponent of the affidavit had ever seen a terminally ill cancer patient. The learned judge further held that this submission could not be justified on any factual basis.[531]

Fabricius J had admitted Doctors for Life and Cause for Justice as amici curiae. The argument regarding the applicant's subjective view arose here as well. It was argued that the applicant's view of dignity and his medical condition was tainted by his subjectivity. It was submitted that the values of the Constitution warranted an objective rather than subjective approach. Fabricius J disagreed with this submission and argued that a court must have regard to the subjective views of an individual who contends that his or her constitutional rights have been infringed. In addition to this, the learned judge held that, in a situation such as this, the issue that had to be determined was whether the individual's complaint is justified. In light of this, Fabricius J came to the conclusion that any person would deem the applicant's view of dignity and his medical condition as being justified.[532]

The counsel for the first respondent argued that the right to life was paramount and that life was sacred. Fabricius J agreed with this submission.[533] However, the learned judge held that section 11 of the Constitution was aimed at safeguarding an individual's right in relation to the state and society.[534] Fabricius J further indicated that the right to live cannot be interpreted as meaning that a person is obliged to live, regardless of what the person's quality of life is.[535]

The fourth respondent was represented by a Senior State Advocate. The only argument presented by the fourth respondent was that assisted suicide was a crime. A further argument that was presented in court was that the court was not allowed in law to declare that the fourth respondent is prohibited from prosecuting a medical practitioner who assists another in suicide.[536]

4.2 Minister of Justice and Correctional Services v Estate Late James Stransham-Ford

On 30 April 2015, Fabricius J made the abovementioned order.[537] The applicant, however, passed away two hours before the order was made. The Ministers of Justice and Health, the National Director of Public Prosecutions and the Health Professions Council of South Africa subsequently appealed to the Supreme Court of Appeal.[538] On 2 June 2015, Fabricius J granted leave to appeal to the Supreme Court of Appeal. The estate of the late Stransham-Ford resisted the appeal on the basis that it was entitled to step into the shoes of Stransham-Ford for the purpose of the appeal.[539]

The Supreme Court of Appeal upheld the appeal and set aside the order of the High Court.[540] The Supreme Court of Appeal upheld the appeal for three reasons. The first reason related to the death of Stransham-Ford. As mentioned, Stransham-Ford had passed away two hours before the High Court made its order. The Supreme Court of Appeal held that, as a result of his death, the cause of action had ceased to exist and the death did not cause a claim to pass to his estate.[541] The estate of Stransham-Ford therefore had no legal standing in the appeal. The second reason related to the High Court's consideration of South African law relating to euthanasia. The Supreme Court of Appeal held that the High Court failed to conduct a proper examination of the current stance of euthanasia under South African law. As its third reason, the Supreme Court of Appeal held that the order of the High Court was made on an incorrect factual basis. The Supreme Court of Appeal further submitted that the High Court did not comply with the Uniform Rules of Court and that it failed to provide all interested parties with adequate opportunity to be heard.[542] Each of these three reasons will be briefly considered in the subsequent paragraphs.

4.2.1 Death of the Applicant

As mentioned above, the applicant had passed away before the High Court made its order. The Supreme Court of Appeal held that this affected the applicant's application in a material way. The court emphasised the fact that the application had been of a personal nature. The court submitted that there was no need for the High Court to grant relief as it would serve no purpose.[543] The Supreme Court of Appeal contended that certain causes of action,

particularly personal actions, are extinguished upon the death of a party and cannot therefore be transferred to the deceased's estate.[544] The applicant's claim was of a personal nature and as such, extinguished by his death. Consequently, the application ceased to exist as a result of the cause of action falling away. The Supreme Court of Appeal thus held that, due to there being no claim, there was nothing for the High Court to adjudicate on.[545]

4.2.2 Examination of the Law

As mentioned above, the second reason related to way in which the High Court dealt with the law relating to assisted suicide and euthanasia. The second reason given by the Supreme Court of Appeal for setting aside the High Court order is set out as follows:

> "There was no full and proper examination of the present state of our law in this difficult area, in the light of authority, both local and international, and the constitutional injunctions in relation to the interpretation of the Bill of Rights and the development of the common law."[546]

In its discussion on this reason, the Supreme Court of Appeal firstly focussed on the issue of suicide and the refusal or termination of medical treatment.[547] The Supreme Court of Appeal indicated that, under South African law, neither suicide nor attempted suicide constituted crimes. The Supreme Court of Appeal acknowledged the fact that the applicant was entitled to commit suicide, but held that the actual issue was whether the applicant had a right to choose the manner in which he would commit suicide.[548]

The Supreme Court of Appeal then went on to consider the refusal or termination of medical treatment. The court acknowledged that patients are allowed to refuse treatment which would prolong their lives and held that this does not amount to suicide. The Supreme Court of Appeal submitted that by refusing medical treatment, patients are allowing the natural process of their diseases to take its course.[549] With respect to cases where the patient lacks the necessary capacity to refuse medical treatment, the Supreme Court of Appeal submitted that medical practitioners do not commit a criminal offence if they withdraw medical treatment that do not serve a therapeutic or palliative purpose.[550] In addition to this, the court held that medical practitioners do not commit a criminal offence in instances where they prescribe medication for pain whilst knowing that it will have the effect of hastening the patient's death.[551]

The purpose of addressing suicide and the refusal or withdrawal of medical treatment was to show that there are many options available to terminally ill patients and the doctors that care for them that would not amount to meaningless treatment. The Supreme Court of Appeal further submitted that there have been advancements in the area of palliative care that would serve to alleviate the pain and suffering of terminally ill patients.[552] Relying on evidence tendered by experts in the field of palliative care, the Supreme Court of Appeal made the following comment:

> "It appears from it that the spectre commonly conjured up of a helpless patient confined to a hospital bed and attached to an array of machinery is, in the vast majority of end-of-life situations, not what occurs, even with patients suffering from extremely grave diseases."[553]

The writer hereof agrees with the submissions made by the Supreme Court of Appeal in respect of the various options available to patients and the advancements that have taken place in the field of palliative treatment. However, the writer hereof expresses the opinion that many people who are subjected to palliative care are not aware of their surroundings and are often incapable of communicating with their loved ones. Such individuals, bluntly put, are waiting to die. The writer hereof submits that the idea of being able to choose when and how one dies is more comforting than the thought of being in a vegetative state.

As mentioned above, the Supreme Court of Appeal acknowledged that Stransham-Ford had the option of suicide available to him.[554] The writer hereof agrees that it is so. However, the writer hereof does not see how a court could pose suicide as a possible option for a mentally competent person seeking a dignified death. Many people will be unwilling to commit suicide through the conventional means such as hanging or over-dosing on pills. There is a risk of the suicide being unsuccessful, which in turn will lead to more hardship. The writer hereof thus submits that suicide will not be the likely option for any terminally ill person.

The Supreme Court of Appeal then goes on to deal with the issue of mercy killing and active voluntary euthanasia.[555] Here, the court referred to the following cases: *S v Hartmann*,[556] *S v De Bellocq* [557] and *S v Marengo*[558]. These cases have been discussed above and will therefore not be discussed in detail here. The Supreme Court of Appeal noted that none of these cases deal with assisted suicide or active voluntary euthanasia. The court further emphasised the fact that the deceased in these cases did not request that their lives be ended.[559] The Supreme Court of Appeal contended that these cases were relevant in determining whether consent could function as a valid defence in cases of active voluntary euthanasia.[560] The Supreme Court of Appeal emphasised that active voluntary euthanasia amounts to murder and held that any medical practitioner who administers a lethal agent to a patient will be deemed to have committed murder even if the patient consented to it.[561]

The Supreme Court of Appeal further considered the position of assisted suicide and active voluntary euthanasia under foreign

law. The Supreme Court of Appeal indicated that, due to the complexity of these issues, the approaches taken by countries have varied from legislation to court decisions in which the courts develop the common law or applicable criminal codes.[562] The court held that assisted suicide and voluntary active euthanasia were unlawful in majority of countries. However, the court submitted that in the countries where it is indeed lawful, assisted suicide and voluntary active euthanasia are deemed to be a matter falling within the private relationship between a medical practitioner and patient.[563]

The Supreme Court of Appeal submitted that the High Court intended to develop the common law crimes of murder and culpable homicide in respect of this case only. The Supreme Court of Appeal indicated that the common law could not be developed to suit the needs of one individual only. It further submitted that the High Court did not have the power to exempt the applicant and the medical practitioner who would provide the assistance from the application of criminal law.[564]

Following from that which has been stated in the preceding paragraph, the Supreme Court of Appeal questioned whether the High Court would have been able to make the order even if the applicant was still alive at that time. In this instance, the emphasis would have fallen on the general requirements of law relating to the common law crimes of murder and culpable homicide.[565]

4.2.3 The Factual Basis

The Supreme Court of Appeal expressed the view that no medical evidence had been placed before the court to corroborate the description given by the applicant as to how he was likely to die.[566] The court indicated, however, that the evidence that was in fact placed before the court showed that the applicant's condition was nothing like how he had described it to be. The evidence further indicated that the applicant had expressed doubt as to whether he should go through with the assisted suicide.[567] Furthermore, the Supreme Court of Appeal held that there was no indication that the applicant had consulted with a medical practitioner who was willing to provide the required assistance. The Supreme Court of Appeal emphasised the fact that there was no medical practitioner in this case willing to do so.[568]

4.2.4 Conclusion of the Supreme Court of Appeal

The Supreme Court of Appeal held that the High Court had no authority to order that the common law crimes of murder and culpable homicide be developed to accommodate assisted suicide. The Supreme Court of Appeal concluded that the common law will only develop when the appropriate case comes before court and that these developments will take place in terms of that case and the developments in foreign jurisdictions.[569]

It is evident from the above that the High Court approached the matter from a human rights viewpoint, emphasising the importance of the right to dignity and the right of individuals to have control over their lives and the way they wanted to die. The High Court ultimately allowed Stransham-Ford to be assisted by a medical practitioner in ending his life. The Supreme Court of Appeal decided to overturn this decision for three reasons. The Supreme Court of Appeal concluded that common law could not be developed in order to suit one individual only and held that the matter was best left to parliament.

5. South African Law Commission Report: Euthanasia and the Artificial Preservation of Life

5.1 Introductory Remarks

The Commission's report was intended to contribute to the debate surrounding end-of-life decisions.[570] The report sets out recommendations relating to end-of-life decisions and the treatment of terminally ill patients.[571] The report deals with four end-of-life situations namely, managing terminal pain; withholding or withdrawing life-sustaining treatment; advance directives and assisted suicide.[572] This section will focus solely on the Commission's approach to assisted suicide and active voluntary euthanasia. The subsequent paragraphs will provide a brief background as to how the report came about. This will be followed by a section dealing with the recommendations proposed by the Commission in respect to assisted suicide and active voluntary euthanasia.

5.2 Background

In October 1991, the South African Voluntary Euthanasia Society (Society) requested the Commission to consider possible legislation pertaining to living wills. In 1992, the Commission approved the Society's proposal as a research project.[573] However, the Commission decided to expand the research project to investigate other issues related to the termination of life.[574] During the first stages of this investigation, the Commission primarily dealt with the termination of medical treatment and the legality of living wills.[575] However, due to international developments relating to active euthanasia in countries such as the Netherlands, and related enquiries by respondents, the project was expanded to address the issue of active euthanasia.[576]

In November 1998, the Commission compiled the report entitled "Euthanasia and the Artificial Preservation of Life".[577] The report included a draft bill, which was titled End of Life Decisions Act.[578]

The report was submitted to the Minister of Justice,[579] but it did not receive the requisite attention from the minister.[580]

5.3 Assisted Suicide and Active Voluntary Euthanasia

5.3.1 The Distinction

In dealing with assisted suicide and active voluntary euthanasia, the Commission submitted that there should be no distinction between the two concepts. According to the Commission, assisted suicide is merely another form of active voluntary euthanasia. The Commission did however highlight that the only difference between the two concepts relates to who performs the final act.[581] It has been explained that in the case of euthanasia, the patient does not end his or her own life. The patient's death is brought about by the conduct of another. In the case of assisted suicide, the patient takes the final step in ending his or her life, but he or she does so with the assistance of another. The assistance being in the form of a medical practitioner providing the information or means necessary to enable the patient to end his or her life.[582]

It has been submitted that there is no distinction between active voluntary euthanasia and assisted suicide. It is submitted that in each case, be it active voluntary euthanasia or assisted suicide, the doctor assists in bringing about the death of a patient who gave informed consent thereto. The medical practitioner and the patient thus acts together in terminating the patient's life.[583] The writer hereof agrees with the above contention and makes the following submission. There should not be a distinction between active voluntary euthanasia and assisted suicide on the basis of who carries out the final act. In both instances, it is the medical practitioner's actions which brings about the death of the patient. In active voluntary euthanasia, the medical practitioner terminates the patient's life by means of a direct act which usually consists of the administration of a lethal agent. The medical practitioner does so with the patient's consent. With assisted suicide, the doctor also directly contributes to the termination of the patient's life by either administering or providing the patient with a lethal agent. Similarly, the doctor does so with the informed consent of the patient. It is the writer's opinion that no distinction should be drawn as the action which results in the death of the patient remains that of the medical practitioner, regardless of whether the medical practitioner is the one administering the legal agent or the patient him or herself.

5.3.2 The Commission's Options

The Commission did not put forward any recommendations dealing with active voluntary euthanasia or assisted suicide. Instead, the Commission set out three options. These options will be discussed in the paragraphs to follow. The first option centres on the acceptance of the current legal position surrounding active voluntary euthanasia and assisted suicide. The second and third option deal with decision-making by a medical practitioner and decision-making by a panel or committee, respectively.[584]

In terms of the first option, there should be no change to present position of active voluntary euthanasia under South African law. In other words, active voluntary euthanasia and assisted suicide should remain prohibited.[585] The Commission submitted that if active voluntary euthanasia was to be legalised, it would be extremely difficult to lay down safeguards to ensure that the act was indeed voluntary and to prevent any coercion. The Commission further pointed out that active voluntary euthanasia does not only affect the interests of the individual, but is also affects the interests of the society.[586]

Option two focusses on the decision-making of the medical practitioner.[587] Here the view is put forward that active voluntary euthanasia should be legalised. However, the practise thereof should be controlled. A medical practitioner may thus give effect to a patient's request to end his or her life by providing the patient with or by administering a lethal agent. In this instance, the medical practitioner would be bound to comply with safeguards as a means of preventing abuse.[588] The following requirements are set out under option two:

> "Should a medical practitioner be requested by a patient to make an end to the patient's suffering, or to enable the patient to make an end to his or her suffering by way of administering or providing some or other lethal agent, the medical practitioner shall give effect to the request if he or she is satisfied that
> (a) the patient is suffering from a terminal or intractable and unbearable illness;
> (b) the patient is over the age of 18 years and mentally competent;
> (c) the patient has been adequately informed in regard to the illness from which he or she is suffering, the prognosis of his or her condition and of any treatment or care that may be available;
> (d) the request of the patient is based on a free and considered decision;
> (e) the request has been repeated without self-contradiction by the patient on two
> separate occasions at least seven days apart, the last of which is no more than 72 hours before the medical practitioner gives effect to the request;
> (f) the patient, or a person acting on the patient's behalf in accordance with subsection (6), has signed a completed certificate of request asking the medical practitioner to assist the patient to end the patient's life;
> (g) the medical practitioner has witnessed the patient's signature on the certificate of request or that of the person who signed on behalf of the patient;
> (h) an interpreter fluent in the language used by the patient is present in order to facilitate communication when decisions regarding the treatment of the patient are made

where the medical practitioner as contemplated in this section does not share or understand the first language of the patient;
(i) ending the life of the patient or assisting the patient to end his or her life is the only way for the patient to be released from his or her suffering."[589]

The requirements provided under option two are similar to the due care criteria which is imposed by the Termination of Life on Request and Assisted Suicide (Review Procedures) Act in the Netherlands.[590] The due care criteria reads as follows:

"1. The requirements of due care, referred to in Article 293 second paragraph Penal Code mean that the physician:
a. holds the conviction that the request by the patient was voluntary and well-considered,
b. holds the conviction that the patient's suffering was lasting and unbearable,
c. has informed the patient about the situation he was in and about his prospects,
d. and the patient hold the conviction that there was no other reasonable solution for the situation he was in,
e. has consulted at least one other, independent physician who has seen the patient and has given his written opinion on the requirements of due care, referred to in parts a - d, and
f. has terminated a life or assisted in a suicide with due care."[591]

It has been submitted that the requirements under option two provide more adequate safeguards than the due care criteria.[592] The reason for this is based on the fact that option two requires the patient to make repeated requests and it requires the patient to sign a certificate of request. This is not provided for in the due care criteria.[593] The third option also provides for the legalisation of active voluntary euthanasia.[594] In terms of this option, the Commission recommends that legislation should be enacted which allows for the creation of a panel of ethics committee. This panel or committee will be tasked with considering requests for active voluntary euthanasia.[595]

Such committees have also been established in the Netherlands.[596] As a means of controlling the practice of euthanasia and assisted suicide and to prevent abuse, the Netherlands introduced a reporting system. In terms of this, the practitioner who performs the euthanasia or assisted suicide is required to report his or her case to a review committee. This is done by completing a registration form. After performing the euthanasia or assisted suicide, the medical practitioner is required to notify a medical examiner who is tasked with examining the deceased's body to determine how the patient was euthanized and the agents that were used. The practitioner must provide the medical examiner with the registration form and the report containing the findings of a second medical practitioner. The medical examiner will then submit his or her findings to the review committee.[597] The review committee will then review the things such as the written report by the medical practitioner as well as that of the second practitioner. The review committee also considers the patient's medical record, whether the request was made voluntary and the manner in which the euthanasia was performed.[598]

Commentators of the Commission's report have suggested that because the cases would differ, they had to be dealt with independently by the panel or committee[599] as this would make it unlikely for the patient to have been influenced by a medical practitioner or family member.[600] It should be noted that in terms of euthanasia laws prevailing in the Netherlands, cases are brought before the review committees only after euthanasia or assisted suicide has taken place. In terms of option three, cases will be brought for consideration before the euthanasia or assisted suicide takes place.[601]

It has further been suggested that the panel or committee should consist of medical practitioners, a psychiatrist, a judge and an individual who is capable of communicating in the language of the patient.[602] In the Netherlands, these committees consist of a lawyer, medical practitioner and ethicist.[603] In the Commission's report, commentators have submitted that the panel could include relatives. The panel would then listen to the request and consider all relevant medical documentation.[604]

The commentators further suggested that strict rules should be in place before requests may be considered before the panel or committee. The commentators contended that having such rules in place would make it difficult for a person to obtain permission for euthanasia or assisted suicide. This would then have the result of putting at ease those members of society who oppose euthanasia on the basis of potential abuse.[605] The Commission proposed three options. The writer hereof submits that option two has merit in that it provides adequate safeguards which would limit the potential of abuse.

However, the writer hereof expresses scepticism as to the medical practitioners involved and their qualifications. Will the request be made to a general practitioner or to a specialist? If the request is to be made to a specialist, would the specialist require additional training in euthanasia or assisted suicide? A further question that is posed is whether the medical practitioner who is requested to perform the euthanasia or assisted suicide requires any training in psychology. The writer hereof expresses the opinion that it might be necessary to have a medical practitioner with a background in psychology or as an alternative, an external psychologist.

6. Assisted Suicide in Foreign Jurisdictions

6.1 Introductory Remarks

After having dealt with the legal position of assisted suicide under South African law and the relevant case law, it is now necessary to analyse and discuss the position of assisted suicide in foreign jurisdictions. The subsequent sections will focus on selected countries in which assisted suicide and euthanasia have been legalised. The aim of this section is merely to examine the law relating to assisted suicide and euthanasia in these countries and the legislative measures that are put in place in order to regulate the practice of assisted suicide and euthanasia.

6.2 The Netherlands

6.2.1 History of Legalisation of Euthanasia

In the Netherlands, euthanasia was initially prohibited under the Dutch penal code. In terms of the Dutch penal code, any person who terminated the life of another individual upon the latter's request, was guilty of a criminal offence.[606] Despite of this, medical practitioners who were charged with assisted suicide were often not found guilty. In the event that a medical practitioner was convicted, he or she would receive a light punishment.[607]

In 1981, the Rotterdam criminal court established certain guidelines for the practice of assisted suicide. Similar guidelines were subsequently developed by the Royal Dutch Medical Association. In 1991, the attorney general of the Dutch Supreme Court conducted a study on euthanasia. The findings of the study were released in what was known as the Remmelink Report. In 1993, the Dutch parliament decided to allow the practice of euthanasia under certain conditions.[608] In the same year, the country passed legislation which dealt with a euthanasia reporting procedure. Although this did not legalise euthanasia, it provided protection to medical practitioners who complied with certain guidelines in practising euthanasia.[609] The Dutch courts furthermore developed a practice in terms of which they would recognise the defence of necessity as a valid defence to euthanasia and assisted suicide.[610]

6.2.2 The Termination of Life on Request and Assisted Suicide (Review Procedures) Act

The Netherlands in 2002 introduced the Termination of Life on Request and Assisted Suicide (Review Procedures) Act. In terms of this, doctors who carry out euthanasia will not be held criminally liable provided that they comply with the prescribed procedures, the due care criteria and have reported the death to the regional euthanasia review committee.[611] The objective of this legislation was aimed at increasing the level of due care exercised by a medical practitioner in terminating a patient's life. The Termination of Life on Request and Assisted Suicide (Review Procedures) Act further established a framework in terms of which doctors had to account for their actions in such circumstances.[612]

The due care criteria established by the Termination of Life on Request and Assisted Suicide (Review Procedures) Act has been set out above. The first due care requirement states that there must be a voluntary and well-considered request for euthanasia or assisted suicide by the patient. It is submitted that this request can be made orally or in writing.[613]

As mentioned above, after the medical practitioner has performed the euthanasia, he or she is required to notify the municipal forensic pathologist[614] who conducts an examination of the deceased's body. The municipal forensic pathologist is then tasked with notifying the relevant review committee.[615] As stated previously, the review committee will then determine whether the medical practitioner complied with the due care criteria in performing the euthanasia or assisted suicide.[616] If the review committee finds that the medical practitioner failed to comply with the due care criteria, it will refer the matter to the public prosecutor who has the discretion to conduct an independent investigation.[617]

6.3 Belgium

In 2002, Belgium legalised euthanasia.[618] The legislation that had been enacted was based on the laws relating to euthanasia in the Netherlands. However, unlike in the Netherlands, Belgium displayed no tolerance to the practice of euthanasia prior to its legalisation. The legalisation of euthanasia was a quick process, driven by politics.[619] The Belgian Act on Euthanasia (the Act) sets out the conditions under which medical practitioners may terminate the lives of patients who are ill and subjected to agonizing suffering.[620] Furthermore, under Belgian law, euthanasia is defined as the termination of life upon request.[621] Assisted suicide is not explicitly mentioned under the Belgium law, but it has been accepted by the Belgian oversight body for euthanasia, that the definition of euthanasia extends to assisted suicide.[622]

6.3.1 The Belgian Act on Euthanasia

The Act is divided into six chapters. Chapter one provides the definition of euthanasia. Chapter two sets out the conditions under which euthanasia may be legally performed.[623] Chapter three provides for the creation of an advance directive in which persons may request euthanasia. In terms of the Act, a medical practitioner may adhere to the advance directive if the patient has an incurable disorder and if the patient is unconscious. Chapters four and five deals with the manner in which the practice of euthanasia should be reported. A Federal Control and Evaluation Commission has been established in this regard. This commission

is tasked with examining whether or not the euthanasia was performed in a manner which complied with the Act. Lastly, chapter six of the Act deals with special provisions which provides that medical practitioners are under no obligation to carry out a request of euthanasia.[624]

In terms of section 3 of the Act, a medical practitioner who performs euthanasia will not be criminally liable provided that he or she has ensured that the patient requesting euthanasia is a major or emancipated minor, legal competent and conscious to make such a request and that the request has been made voluntary and without influence.[625] It is clear that euthanasia may be performed by medical practitioners only.[626] Section 3 imposes a third requirement which reads as follows:

> "The patient is in a medically futile condition of constant and unbearable physical or mental suffering that cannot be alleviated, resulting from a serious and incurable disorder caused by illness or accident."[627]

The patient's medical practitioner must be certain about the patient's constant physical or mental suffering[628] and must consult another medical practitioner about the serious and incurable nature of the patient's disorder. The second medical practitioner must review the medical records of the patient and satisfy him- or herself as to the patient's constant and unbearable physical or mental suffering. The second medical practitioner must also be satisfied that the patient's suffering cannot be alleviated.[629]

The Act does not specify whether the medical practitioner requested to perform the euthanasia should be a specialist or not. This is also the situation in the Netherlands. The Act is furthermore silent on whether it should be an attending medical practitioner who carries out the euthanasia or merely a medical practitioner who might not have had previous dealings with the particular patient. It has been submitted that this raises a concern known as "travelling euthanasia doctors.[630] In terms of this, medical practitioners who have had no prior dealings with a patient, are put in a position to make end-of-life decisions concerning that patient. It is submitted that this can corrupt the doctor-patient relationship.[631]

6.3.2 Luxembourg

Luxembourg legalised the practice of euthanasia in 2008. Luxembourg's laws on euthanasia and assisted suicide are similar to the laws of the Netherlands and Belgium. The legalisation of euthanasia and assisted suicide in Luxembourg not only changed the options available to terminally ill patients, but it also resulted in a change in the structure of the Luxembourg government.[632]

6.4 The United States

6.4.1 Oregon and Washington

In 1994, Oregon passed the Death with Dignity Act.[633] In terms of this, patients who are terminally ill are allowed to terminate their lives through the voluntary, self-administration of lethal medication. Such medication is provided by medical practitioner specifically for this purpose.[634] It is interesting to note that the Death with Dignity Act does not allow medical practitioners to practice euthanasia. In other words, medical practitioners are not allowed to administer lethal agents to patients.[635]

The Death with Dignity Act provides that in order for a person to be eligible for a prescription for lethal medication, such a person must be over the age of eighteen and resident in Oregon. In addition, such a person must be capable of making effective health care decisions and must have been diagnosed with a terminal illness, with only six months left to live.[636]

The Death with Dignity Act further prescribes steps that have to be followed before a prescription for lethal medication can be provided to a patient. The patient is required to make two oral requests for such a prescription. These requests must be made at least fifteen days apart. The patient is also required to submit a written request which must be signed in the presence of two witnesses. The medical practitioner who has received the request is required to consult with a second medical practitioner to confirm the diagnoses of the patient. Furthermore, the two practitioners should examine and be satisfy themselves as to the mental capability of the patient to make such a request. Should the medical practitioner suspect that the patient might be suffering from a psychological impairment which could affect the latter's judgement, the medical practitioner is required to refer the patient for a psychological examination. The medical practitioner is also under the obligation to inform the patient of any appropriate alternatives. Lastly, the medical practitioner must request that the patient inform a family member of his or her request.[637]

The medical practitioners who are requested to prescribe lethal medication is placed under an obligation to report such prescriptions to the Oregon Health Authority. Furthermore, the Death with Dignity Act also requires that pharmacists be notified of the intended use of the prescribed medication.[638]

In 2008, Washington followed suit by approving Ballot Initiative 1000. Washington enacted the Death with Dignity Act which was modelled according to the Death with Dignity Act of Oregon. The statutes contain the same provisions. Washington's Death with Dignity Act is enforced by the State Department of Health. This

department collects data reported by medical practitioners and publishes annual reports on the practice of euthanasia.[639]

6.4.2 Montana

In 2008, the Montana District Court affirmed a plaintiff's right to choose assisted suicide. The plaintiff in the matter challenged the constitutionality of the application of Montana's homicide statutes to medical practitioners who performed assisted suicide. The Montana District Court held that competent, terminally ill individuals had the right to die with dignity and that medical practitioners who assisted such individuals, was to be regarded as immune to the homicide laws of the country.[640]

The Supreme Court of Montana declined to consider the constitutionality of the above matter, focusing its attention rather on the Montana Rights of the Terminally Ill Act. The court held that this statute provides terminally ill patients with a right to have their end-of-life decisions followed. The court further held that this right extended to situations in which medical practitioners directly participated in withdrawing or withholding life-sustaining treatment. The court held that this protects medical practitioners from liability when they withdraw or withhold life-sustaining treatment at the request of the patient.[641]

It is clear that in the Netherlands, euthanasia had been frequently practiced by medical practitioners without them being subjected to convictions or severe punishments. It is also evident that the Dutch courts played a crucial role on developing the guidelines that have been codified in the Termination of Life on Request and Assisted Suicide (Review Procedures) Act. Furthermore, it is quite evident from the above discussion on the countries in the United States of America that Oregon and Washington follow a different method when it comes to the practice of euthanasia and assisted suicide. In contrast to the Benelux countries, Oregon and Washington do not allow a medical practitioner to perform the assisted suicide. Instead, these countries only allow assisted suicide in so far as it is the patient who actually performs the act of terminating his or her life.

7. Conclusion

The goal of this paper was to examine the role played by courts in legalising assisted suicide. It is evident that euthanasia and assisted suicide are highly controversial issues, which will remain topics of debate regardless of their possible legalisation. This article touched on numerous aspects relating to the issue, which ranged from explanations of concepts to the law in foreign jurisdictions.

In first part of this, the distinction between euthanasia and assisted suicide was highlighted in order to indicate to the reader that although they are closely related concepts, they still differed in some respects. The second and third part focussed on what can be considered the most important parts of this paper: the case law. It is evident from the cases discussed that courts generally display a sympathetic attitude to the accused in such matters. As can be seen from *Stransham-Ford v Minister of Justice and Correctional Services*, courts consider dignity and patient autonomy to be of paramount importance when it comes to the question of whether assisted suicide should be legalised. After analysing the different court decisions, it seems that courts are leaning towards the legalisation of assisted suicide. This much is evident from their lenient punishments and acknowledgement of the importance of the Constitution. However, due to the law being that which it is, South African courts have been forced to acknowledge assisted suicide as a crime.

The fourth part focussed on the options proposed by the Commission with respect to assisted suicide and active voluntary euthanasia. Option two and three, as mentioned above, have merit as they correspond to the law implemented in the Netherlands. The writer hereof submits, however, that these options will only progress from mere words on paper to actual practice once the issue has been given the appropriate attention by parliament.

The fifth part of this paper makes it clear that in certain countries, courts play a key role in the legalisation of assisted suicide. In the Netherlands, for example, courts have acknowledged the practice of assisted suicide which subsequently resulted in the development of guidelines medical practitioners had to adhere to in order to practice assisted suicide lawfully. In concluding, the writer hereof submits that South Africa could potentially follow the same path as the Netherlands in legalising assisted suicide. When faced with assisted suicide cases, South African courts can develop guidelines which could perhaps operate and serve as the basis for the eventual legalisation of assisted suicide in South Africa.

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The validity of same-sex customary marriages

Musonda Nsakanya

1. Introduction

In South Africa's new constitutional dispensation, there has been legal accommodation in terms of our legislative enactments for same-sex South African couples. However, the question that needs to be addressed is whether couples of the same sex who wish to conclude a customary marriage will be able to do so and adhere to its purpose, which is fundamentally to bear children and begin a new family unit. This article embarks on an analysis of the lacunae in South African law and the enigma caused when a same-sex couple wishes to conclude a marriage in terms of customary law. There is also no provision for a same-sex customary marriage in our current law. In addition, it is questionable whether such a same-sex union will be entitled to protection under the Civil Union Act.

This article does not propose to undertake an in-depth study of the existing marriage legislation in South Africa, but will focus primarily on the current formal requirements for a valid customary marriage under the Recognition of Customary Marriages Act (RCMA).[642] An analysis of existing marriage legislation such as the Marriage Act,[643] case law and the Constitution of the Republic of South Africa, 1996 (the Constitution), reveals that there is minimal legal literature about the validity of a same-sex customary marriage. This type of marriage will be contrasted with traditional woman-to-woman marriages, which lack consummation between the couples involved.

This article also enquires whether the traditional customary law has readily evolved to provide for modern developments. In the popular press, there has been a report of a potential same-sex customary marriage between Olympic athlete Caster Semenya and her partner Violet.[644] The article concludes by stating that despite the constitutional and social developments regarding volatile variables such as sexual orientation and gender identity, there is still no certainty whether a customary same-sex marriage is valid or not in our post-constitutional dispensation.

2. Background

A phenomenon that is not frequently encountered in South Africa occurred in 2015, as South African 800 metres inter-sex athlete, Caster Semenya, married her long-term girlfriend, Violet Raseboya, in Ga-Digale, Limpopo. Semenya, who was then 24 years old, held her traditional wedding ceremony in the Capricorn District, where both families negotiated lobolo. Semenya's family paid an estimated amount of R25 000 to Raseboya's family before their formal white wedding.[645] Caster and her makoti Violet had been engaged for a long time and received approval from each other's families for them to marry. Caster's father was speculated to be in talks of lobolo negotiations with Violet's father.[646]

Despite being a lesbian couple in the new constitutional era, there is minimal legal literature for Caster and Violet about the validity of a same-sex customary marriage. The equality clause contained in the Constitution was notably not referred to in the tabloid coverage of their marriage. This could bring to light the widely held beliefs about the disconnection between customary marriage law and the South African Constitution.[647]

There seems to be no provision for same-sex customary marriage in our current law. The question that begs to be answered is whether the couple's union will be a valid customary marriage under the RCMA or perhaps a civil union under the Civil Union Act. For the couple, it is necessary to know the legal consequences that flow as a result of their union, as well as, following the polygamous nature of customary marriage, whether Caster may take on another wife after Violet. This article assesses the validity of same-sex customary marriages, firstly by considering, traditional customary law, followed by relevant legislation, that is, the RCMA, the Civil Union Act, and thereafter the Constitution.

3. African customary law

African customary law in the conventional sense of the word implies all those legal systems derived from African societies as part of the culture of specific tribes or groups of people that have been affirmed, augmented, and/or superseded by long-held community beliefs that evolve according to the needs of the ever-transforming world.[648]

3.1 A brief history of homosexuality in South Africa

Homosexuality can be described as "the orientation of sexual need, desire, or responsiveness towards other persons of the same gender."[649] Colonial Roman criminal law explicitly forbid "unnatural practices" between men and other men. Subsequently in Roman-Dutch common law, numerous sexual exploits between of the same-sex were found to be criminal, because they were not aimed at procreation.[650]

The belief that homosexuality is generally un-African or that it does not exist in African communities has led to many African communities remaining silent about it. Evidence however, does exist that pre-colonial African societies acknowledged homosexuality in specific circumstances. Homosexual acts were described as hlobongo amongst the Zulu and metsha amongst the Nguni. Although homosexuality could have been tolerated by these communities, it was rarely accepted.[651]

Amongst the Ndebele tribes of Zimbabwe and South Africa, persons trying to participate in sodomy in the pre-colonial era were penalized by being made to pay one beast to the traditional headmen, which was less than the penalty for adultery. This fine equated to a misdemeanour – which shows that it was not heavily discouraged in the community.[652]

Customary law was unwritten before European settlement in the Cape Colony in 1652, which enabled it to adapt to the evolving socio-economic conditions in South Africa. Due to the lack of indigenous writing systems and literature, not much information is known of sexual unions between women in Africa and the stance the communities had taken with regard to woman-to-woman marriages.[653]

As the Afrikaner nationalist movement advanced in the 1900s, the apartheid and nationalist Afrikaner ideology considered homosexuality is unnatural and immoral, which had a bearing on public policy. The Immorality Act[654] was passed, aimed at prohibiting relationships between people of the same-sex. Homosexuality was thus made illegal.[655] The Criminal Law (Sexual Offences and Related Matters Act 2007 repealed most of the provisions of the 1957 Act. The South African legislature later repealed laws that criminalised homosexual activity, in addition to the common law crime of sodomy.[656]

3.2 The nature of a traditional customary marriage

Section 35 of the Black Administration Act referred to customary marriage as a

> "'Customary union' of an association of a man and a woman in a conjugal relationship according to black law and custom where neither the woman nor the man is party to a subsisting marriage."[657]

This traditional form of marriage exemplified a more communal, definite and ritualistic character than the western-nature of marriage. Although age requirements were necessary for the conclusion of a legal marriage, the principle generally applied was that the two individuals must at least have reached puberty.[658]

Traditional customary marriage contained guidelines concerning the choice of a marriage partner. Marriage between ascendants and descendants was forbidden, as well as marriage between children of the same biological father. Sexual relations between a woman and a man of the same clan was considered as incest and there was often conflict between the traditional legal system of the black people and the law of the land.[659]

The usual way the proposal of marriage was initiated was by way of request, either by the man or his family group approaching the family of the woman. The father or guardian of the man normally initiated the pursuit of a first wife, as he was required to deliver the lobolo.[660] Primarily, informal negotiations took place between the representatives of the man's family and that of the woman. The bride-to-be and her mother would not participate in these discussions. If the man was already married, he typically managed the negotiations himself. Consensus was then achieved, specifically with regards to the amount of the lobolo to be paid and other wedding matters. The effective conclusion of the marriage negotiations usually led to the formal engagement. However, this was neither a vital prelude to, nor a prerequisite for a customary marriage.[661]

A formal engagement then led to the marriage ceremony. After the ceremony, the bride finally left her family home and was then transferred and incorporated into the groom's family. It can therefore, be concluded that the traditional marriage agreement was chiefly an agreement between two family groups, which was entered into with the view of authenticating a marriage between the two individuals, thus forming a new household and family.[662] In African culture, the weight placed on marriage and child bearing, creates major grounds for rejecting same-sex partnerships. In addition, rarity of scholarly literature on the subject indicates the

struggles that researchers encounter in obtaining information on African homosexuality.[663]

3.3 The purpose of a customary marriage

The basic aim of the traditional customary marriage was the formation and strengthening of relations between two family groups.[664] The woman would increase the lineage of her husband when she had given birth to a satisfactory number of children. This preferably involved, one or more sons to endow an heir to continue her husband's lineage. This expectation could not be fulfilled if, the woman and her husband are sterile or died before she gave birth to an adequate number of children. Also, if her husband became impotent or if the marriage dissolved.[665]

In addition, traditional customary marriages brought about key changes in the status and other legal rights of the individual. Regarding the male, it meant that he was entitled to a piece of land on which his homestead could be built. This land could be used for the cultivation of food for his family. Marriage also denoted the beginning of a new family unit, in which a new proprietary unit was created. This unit was under the control of the husband, with his various wives in separate proprietary entities. Marriage also boosted the status and involvement of the man in his community.[666] In the woman's case, marriage meant that she fell under the guardianship of her husband. Thus, a new status and respect were gained, as she was now able to control her own household (under her husband's guardianship). In addition, the children born from her were acknowledged as legitimate and were treated as such.[667]

3.4 The validity of a traditional customary marriage

The following were the legal prerequisites for a traditional customary marriage:

a) Consensus between the two-family groups (or between the man and the family group of the girl) in respect of the lobolo payment by the man's family group. The consent of the man or of the girl was not required.
b) The transfer of the bride by her family group to the man himself or the family of the man.[668]
c) The lack of physical consummation did not invalidate the marriage. There existed a rebuttable presumption in traditional customary law that when two people lived together explicitly as husband and wife a valid marriage had been contracted.[669]
d) When the wedding took place, it was supplemented by wide-ranging ceremonies which could last several days. These ceremonies, visibly created a concrete marriage bond between the family groups.[670]

No valid customary marriage could exist without an agreement that lobolo cattle would be delivered. Traditionally, lobolo transferred the authority that the family head had over his daughter to the husband, and the status of a wife was therefore subject to a deep-rooted tradition of patriarchy.[671] The number of cattle was determined by custom and these customs differed as to the exact time delivery should have been made. Generally, a minimum of one beast had to be delivered prior to the wedding ceremonies.[672] The marriage was only regarded as complete when the wife had satisfied the expectation of producing children and the lobolo cattle had been transferred.[673]

3.5 The consequences of a traditional customary marriage

Traditional customary marriages created a new family unit consisting of, the man as husband and head of the household, the woman as wife and mother as well as the children she had borne. Within this family household there were standard relationships, rights, privileges, duties and obligations.[674]

A distinction was made between a monogamous household for a husband, his wife and their children, and the polygamous household or "house" system, which comprises of the husband, his different wives with their children residing in his homestead.[675] The women customarily, remained part of their husband's families even after his death.[676]

In the polygamous households, generally each wife had her own rank and status and formed an independent proprietary family unit within the polygamous family structure. Her rank and status established her social status, her affiliation with the other "houses" of her spouse, and the legal standing of her male children with regard to inheritance.[677]

All children born of the marriage were legitimate and enjoyed the benefits and privileges of being identified as his legitimate offspring, irrespective of the eventual course of the marriage. They had the right to be supported by their father and his family. However, not all of them had the right to inherit his property as it depended on the testate and intestate circumstances, and succession to his political and social rank.[678]

4. Traditional woman- to-woman marriages

Traditional woman-to-woman marriages, which happen in certain parts of South Africa, can be described as a union either whereby one woman marries one or more women due to her powerful position or because she is childless and wishes to bear children for her family lineage.[679] These marriages are concluded by following all the customary marriage formalities, for instance, the payment of bride-wealth. While these marriages might not arise often, they are not considered irregular in the communities that support them.[680]

A "female husband" can be defined as a woman who is legally and socially married to another woman. Kevane opines that an estimated 5-10 percent of the African women in South Africa are wedded in woman-to-woman marriages. In such communities, gaining social status as the head of the household in a woman-to-woman marriage is made possible for the women.[681]

It is not a well-known fact of customary law but some Southern African societies have long allowed marriages between women. These marriages were frequently concluded by older widows whose husbands had died childless. The widow would then proceed to marry another woman (the "wife") who was required to have sexual intercourse with an assigned man, in order to bear children.[682]

The children from the marriage would thus be regarded as the children of the deceased man, therefore accomplishing the purpose of these marriages, that is, to raise children for the deceased man's family circle. Although these woman-to-woman marriages do not involve sexual relationships between the female spouses, they do provide a well-known example of socially acceptable and legally integrated same-sex marriage.[683]

4.1 Woman-to- woman marriages among the Lovedu and the Zulu people

Among the Venda, Zulu and Pedi people, an additional marriage arrangement that is accepted in customary law and practised in their communities, is the so-called "independent" woman-to-woman marriage where the reason was not to raise offspring for a particular man, but to found a homestead and consolidate the status and wealth of an influential woman.[684]

The Zulu saying umuzi awuboi kwaZulu (a Zulu kraal is not allowed to decay) gives the impression that woman-to-woman marriages have a purposeful niche among the Zulu people. These marriages are supposedly founded on two reasons: firstly, to nurture an heir to property, and secondly in a case where a female diviner has become affluent enough to found a large kraal and a following.[685]

Among the Venda, the best-known example is the custom of the Lovedu tribe, headed by the Rain Queen. The Queen was not allowed to enter into a marriage with a male, only with another female. These independent woman-to-woman marriages were not initiated for sexual desire, but functioned as a means of diplomacy, establishing alliances to stabilising allegiance to the Rain Queen. The Rain Queen could choose men from the nobility to have children (through her wives) with, and she subsequently acquired the role of father. In addition, her prospective wives were drawn from the households of the subordinate chiefs.[686]

After the marriage had taken place, a patriarchal arrangement was maintained when a woman was concurrently a wife and female husband. She was also independently wealthy thus she could elect to establish her own compound. This compound remained disconnected from the "wife's" compound. This could also happen if she married one or more other women as her subsequent wives and child-bearer. This would also meant that she would now become a "female-husband" in her own compound and a 'wife' in her female husband's compound. However, must be noted that there are no male marriages to male wives.[687] The female "husband" got to enjoy legal and social benefits over her wife, as an ordinary male husband would enjoy over his wife. For example, the rights over children are not shared between the female husband and her wife, further maintaining the system of patriarchy.[688]

4.2 The purpose of a woman-to-woman marriage

Cadigan proposes that woman-to-woman marriages serve as a viable opportunity for young women who have children out of wedlock, and as way to achieve social recognition and economic stability. Female husbands are more likely to negotiate lobolo of higher value than men because of the potential benefits that stem from woman-to-woman marriages.[689] The Rain Queen's influence is extended through her to her wives, because there is a political association between them and the other families or villages. Her status of marrying women did not signify lesbianism, but rather her exceptional proficiency to rule over others.[690]

4.3 Woman-to woman marriages and the go-nyalela-lapa

Another form of customary marriage is the curious case of the go nyalela mosadi lapa which can be described as a marriage wherein a woman is married into a family (lapa/house/kraal) to revive and continue with the family name of her new parent-in-law. The go nyalela mosadi lapa is one of the oldest forms of traditional customary marriage among the Sepedi and Tshivenda people. This marriage operates as an intervention to preserve or revive a family name on the brink of extinction. This takes place when there is no one within a family/kraal to bear and carry on a family name to have children and raising them.[691]

For this type of marriage to take place, when the bride consents to become a mosadi wa lapa, the prospective parent-in-law pays lobola/magadi for the prospective bride. The marriage is then celebrated and settled between the bride's family and her parents-in-law. Practically, the same procedure is followed as in the case of a valid conventional customary marriage, that is, consent of the bride is given, negotiation with her family, payment of magadi/lobolo, exchange of gifts, transfer of the bride and celebration of the wedding all take place.[692]

This practice has been inaccurately and mistakenly described or translated into the English language as denoting to a woman-to-woman marriage or marriage comprising a female husband or woman-to-woman marriage .Ironically in this type of marriage, the relationship between the bride and her parents-in-law does not result in a "husband and wife couple" between the bride and the groom.[693]

As no sexual relationship ever occurs in the go nyalela mosadi lapa, it is also not considered as a lesbian marriage, nor as a woman-to-woman marriage. Customary law obliges the woman married for lapa to guarantee the continuation of the family name of her new parents-in-law. That is the paramount motive of marrying her for lapa. In contrast, the veritable nature of a same-sex marriage is entered into in response to the sexual emotions or attractions of the persons concerned.[694]

The absence of biological family members to carry on the family name can be plagued by various factors such as the demise of the family head survived by the wife only, or by married daughters only, or by a childless woman with no brothers or sisters or by a purely childless couple.[695]

4.4 Evaluation of woman-to-woman marriages and constitutional rights

If women-to-women marriages can be measured against the requirements of a valid customary marriage, it would pose a challenge to persons wishing to conclude a same-sex customary marriage because of the traditional reality of the parties being of the opposite sex. Since reproduction outside the framework of marriage is not supported, in the event that a married couple is not able to give birth to children, alternative options are adopted. These options, as determined by custom, include the husband's family participating in the calling for a surrogate mother and the surrogate thus being regarded as a seed raiser.[696]

However, since this scenario would not apply in the instance of a same-sex customary marriage, the validity of the marriage cannot automatically be disqualified because in Fourie, the court held that a marriage cannot be considered invalid merely for the reason that the couple are unable to bear children.[697] The court held that judging a marriage's validity by a couple's procreative capacity was not only erroneous, but also, equally demeaning for couples who are infertile or couples who decide not to bear children. It also disregards the reality of pregnancies out-of-wedlock and the progressing scientific innovations in the discipline of assisted fertilization.[698]

5. The Recognition of Customary Marriages Act

The 1998 amendments to the RCMA were aimed at recognising that customary marriages afforded its participants legal protection. This legal reformation retrospectively register many customary partnerships. It also concurrently formalised a new set of legal expectations.[699] Customary law is defined as the customs and usages traditionally observed among the indigenous African people of South Africa and which form part of the culture of those peoples. The main condition for the validity of a customary marriage, apart from adulthood and consent of the spouses, rests in the fact that the marriage must be "negotiated and entered into or celebrated in accordance with customary law."[700]

Section 2 of the RCMA states that a marriage that is valid at customary law is for all purposes recognised as a marriage, whether it already existed at the beginning of the Act or was entered into after that. The RCMA's provisions regarding customary marriages are that: for a valid customary marriage to be concluded after 15th November 2000, there must be consensus between the parties to be married under customary law, both parties must be 18 years or older, and the marriage must be negotiated and entered into or celebrated in accordance with customary law.[701]

5.1 Consensus

Traditionally, consensus must be sought between the families of the prospective bride and groom's families. Since the Recognition of Customary Marriages Act came into effect, consensus is a requirement between the individuals and not their families. If either of the spouses is a minor, either the parents or the guardian of that spouse must consent to the marriage.[702] If the consent of the parent cannot be obtained, section 25 of the Marriage Act applies.[703]

5.2 Age requirements

According to customary law, no specific age requirement exists. However, the RCMA included a minimum age requirement of 18 years in section 3(1)(a)(i) which correlates with section 1 of the Civil Union Act and section 24(1) of the Marriage Act. Age and consent are straightforward to determine and have not garnered much attention from the courts.[704]

5.3 Negotiated and entered into or celebrated in accordance with customary law

The wording of this provision seems to imply that the nature of a customary marriage is a process rather than an event. It also not provide further guidance as to the essential requirements of the custom, which is left to the courts to decide, thus leading to

conflicting decisions.[705]

5.3.1 Payment of lobolo

Under the RCMA, a customary marriage is valid on the agreement to pay lobolo. However, it does not require the payment of it.[706] Court judgments have differing views as to whether partial or full payment of lobolo, as specified by a custom or decided upon by parties, is crucial for the validity of a customary marriage. Certain decisions seem to advocate that mere negotiations about lobolo would be adequate. A primary source for this proposition is the Constitutional Court case of Bhe v Khayelitsha Magistrate where the court held that it was not a necessity that lobolo should be paid fully before a marriage is concluded, and that a promise to pay lobolo was appropriate.[707]

The process of lobolo negotiations is potentially lengthy and complex, involving many members from both the bride and the groom extended families. Normally, the fathers and uncles of the marrying parties control these negotiations, where custom allows. Occasionally, women are also permitted to be present in the negotiation, but may not actively take part in them.[708] In the case of a purported same-sex customary marriage post-2008, it would seem evident that the process of lobolo negotiations is gender-specific, which according to custom, would invalidate a contemporary same-sex customary marriage.

The court in *Mabena v Letsoalo*,[709] however, held that a woman's mother was legally justified to negotiate for the lobolo and receive it in respect of the bride. She was also justified to act as the woman's guardian in approving her marriage. This is an illustration of unofficial "living" customary law, which enables change. By analogy, a same-sex marriage's validity with regard to lobolo negotiations is dependent on actual custom and whether it has evolved to include same-sex marriages.[710]

To draw a contrast, in a civil marriage concluded by black persons, lobolo can be paid but it is not a necessity. The courts have decided that it is a subject of a separate agreement and subsidiary to a civil marriage. Therefore, it only has social implications only.[711] The conflicting court decisions as to whether full, partial or mere agreement on lobolo is a requirement demonstrates a lack of legal certainty, which attempts to protect the institution of marriage and not the vulnerable parties.[712] It can however be concluded that, payment of lobolo in general would not necessarily validate the marriage as a customary one, because lobolo can be paid for a civil marriage as well.[713]

5.3.2 The transfer of the bride and formal integration

The transfer of a bride is not an expressly stated requirement for the validity of a customary marriage in the Recognition of Customary Marriages Act.[714] In terms of section 3(1)(b) of the Recognition of Customary Marriages Act, the marriage must be negotiated and celebrated in accordance with customary law. This includes the handing over of the bride. During the registration of the customary marriage, the husband must declare that the marriage has been concluded in line with the traditional community's rules and customs.[715]

The court in Fanti v Boto held that a valid customary marriage is concluded when the bride has been ceremoniously transferred or handed over to the husband or his family. After this act has taken place, the ties between her and her family are disconnected. Her acceptance by the groom and her incorporation into his family is normally supplemented by recognised rituals and ceremonies involving both families.[716] This presents another challenge for same-sex marriage in that since it is gender specific. The question would be which family would accept the bride, and whether the marriage would end up being invalid due to the lack of the husband to transfer the bride.[717]

In *Mabuza v Mbatha*,[718] the court had to decide whether in terms of siSwati law, formal integration (*ukumekeza*) of the bride into her husband's family should not take place. The court held that this omission was not crucial to the validity of the marriage, and that African customary law was flexible in application and would always evolve. The inconsistent method used by courts on the issue of formal integration of a bride, possibly leaves a potential same-sex customary marriage without legal certainty as to the parties' statuses, and it is uncertain in the case of two females marrying one another, which bride will be transferred.[719]

5.4 Equality and the patrimonial consequences of marriage

Regarding the important issue of equality, the RCMA has fortified the position of wives in customary marriages by implicitly stating that they are equal to their husbands.[720] This stands in contrast to the previous provisions of the Black Administration Act which declared women in customary marriages to be perpetual minors. The concerned spouses are by default married in community of property unless otherwise agreed, and it stipulates their legal position in the event of a divorce.[721]

Section 6 of the RCMA appears to be the only provision in the Act that refers to gender. It provides explicitly that a wife has full status and capacity, including the capacity to acquire assets and to dispose of them. It provides that she can enter into contracts

and to litigate, in addition to any powers she may have had at customary law.[722]

Although Section 6 appears to provide for equality between the spouses, it however seems to be … is in in fact ineffectual when dealing with the issue of patrimonial consequences as it refers to the word "husband", which might seem to suggest that the RCMA is applicable only to heterosexual couples and does not appear to support same-sex customary marriage. Doubts have been raised as to whether the full implications of this section have been previously considered.[723]

5.5 Polygamy in customary marriages

Customary law, which has been largely patriarchal by nature, recognises the concept of multiple marriage partners while civil law does not. Polygyny in customary law is described in sections 2(3) and (4) of the RCMA as "the right of a husband to have more than one wife". Polyandry, in contrast, authorises a woman to have more than one husband, but is neither explicitly forbidden nor is it permitted in the RCMA.[724]

The custom of polygamy is gender-specific in the traditional context because marrying more than one wife is a symbol of patriarchal supremacy and success in the community. There is uncertainty whether a same-sex customary marriage between two females would amount to polyandry. Furthermore, no two wives are equal in rank and the position held by the wife in the family hierarchy defines her status and that of her children. Thus, the question of the validity and legal consequences of a same-sex marriage remain unaddressed.[725]

6. The Civil Union Act

6.1 Background to the promulgation of the Act

Same-sex marriage was made achievable because various South African leaders embraced a far-reaching vision of equality to remove the scars of apartheid by the passing of the Civil Union Act.[726] The Civil Union Act[727] defines a civil union as "a voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures in section 8 and 10 of the Act."[728]

6.2 Requirements for the validity of a civil union

Couples marrying in terms of the Civil Union Act may decide on whether their union is entered into as a civil marriage or a civil partnership. In either case, the legal results are equal to those of a marriage under the Marriage Act, except for such changes as a required by the context. Any reference to "marriage" in any law, including the common law, is deemed to include a marriage or civil partnership in terms of the Civil Union Act. In the same way, any reference to a "husband", "wife" or "spouse" in any law is deemed to include a reference to a spouse or civil partner in terms of section 13(2)(b) of the Act.[729]

The limitations are that the participants to a marriage or civil partnership must be 18 years or older and not already married or civilly partnered. The prohibited degrees of affinity and consanguinity that apply under the Marriage Act also apply under the Civil Union Act. Such that, a person may not marry their direct ancestor or descendant, sibling, uncle or aunt, niece or nephew, or the ancestor or descendant of an ex-spouse.[730]

Regarding the issue of solemnisation, marriages and civil partnerships under the Civil Union Act must be formalised by a certified marriage officer. Government officials who are employed as marriage officers under the Marriage Act, are also capable of solemnising marriages in terms of the Civil Union Act, but religious leaders appointed under the Marriage Act are not automatically adept to solemnise marriages.[731]

Government marriage officers who have an objection of conscience to solemnising same-sex marriages may notify the Minister of Home Affairs in writing to that effect. If they do so, they cannot be forced to solemnise same-sex marriages. This provision, has been argued to be unconstitutional because it represents a violation of the right to equality of the parties who purport to marry.[732]

6.3 The application of the Civil Union Act to same-sex customary marriages

At the time of promulgation of the Civil Union Act, the Minister of Home Affairs indicated that both homosexual and heterosexual couples would be included within its ambit. However, irrespective of whether or not this actually occurs in practice, a literal reading of the Act still conveys the message that it only applies to homosexual couples. This implies that, if constitutionally challenged, the Civil Union Act would need to be interpreted in accordance with section 39(2) of the Constitution and the Bill of Rights.[733]

Bonthuys is of the opinion that the Civil Union Act is unsuccessful in reflecting a perception or understanding of the difficulties and distinctions of the same-sex relationships in African communities. It also suggests a characteristic and fixed 'gay or lesbian identity' which may be more essentialist and less progressive than the fluid sexual practices in Black African communities.[734]

She concludes by suggesting that the Civil Union Act is rather weak and inadequate in providing an extensive range of mechanisms

and forms for accommodating same-sex relationships. Instead of drawing upon the customary law examples to envisage more productive concepts and more sophisticated forms of legalisation, the legislature overlooked the customary law and offered the civil law of marriage to same-sex couples.[735] Bonthuys further opines that the legislature could have made a reference to customary marriage in the Civil Union Act, so that same-sex couples would still be married in terms of separate legislation but could establish their marriage either on a civil or customary marriage.[736]

6.4 Notable comparisons between the different types of marriages

Homosexual marriages and traditional woman-marriages are two totally different institutions with regard to their validity requirements. The homosexual type of marriage envisioned in the Civil Union Act has many parallels with the Western-style modern heterosexual marriage; given that it would also be a union of two persons who wish to celebrate and confirm their love for each other, but who just happen to be of the same sex.[737] The woman-to-woman customary marriages, in contrast, must be seen as an arrangement between two families, like most traditional marriages are more concerned with procreation and redistribution of wealth which is where their validity stems from.[738]

7. The Marriage Act

Civil marriage can be described as a life-long matrimony between one male and one female to the exclusion of all others, while it endures. Only monogamous heterosexual marriages may be solemnised in terms of this Act.[739] Civil marriages are concluded in terms of the common law as amended by the Marriage Act.[740] Generally, both prospective spouses must have reached the age of majority (18 years) to marry in terms of this Act but there is a provision,[741] for minors to be permitted to marry under certain circumstances. The legal minimum age for boys is 18 years, and 15 years for girls.

8. The Impact of the Constitution

In the post-1994 period, the institution of marriage undertook noteworthy changes from its heavy Roman-Dutch and Christian roots.[742] The monogamous form of marriage, although accessible to all population groups, irrespective of race, nationality or religion, was out of step with the vital views expressed by some groups of diverse cultural and religious backgrounds.[743]

8.1 Constitutional provisions that protect the right to practice one's culture

The new constitutional dispensation of 1994 deviated from the discriminatory provisions of the previous era in order to provide an open and democratic society. Section 30 of the Constitution, which deals with language and culture provides that "everyone has the right to use the language and participate in the cultural life of their choice, but no one may do so in a manner inconsistent with any provision in the Bill of Rights". In addition, section 31(a) of the Constitution, which deals with cultural, religious and linguistic communities, provides that "people belonging to a cultural community may not be denied the right, with other members of that community to enjoy their culture." Furthermore, the Constitution in section 211(3) states, "the courts must apply customary law where that law is applicable". This section goes further to provide that traditional authorities, in furthering customary law, must function subject to any applicable legislation and customs.

8.2 Constitutional provisions that would protect the parties' rights in a same-sex customary marriage

The Constitution of South Africa is unique because of its equal protection before the law of all citizens regardless of sexual orientation. Parties who wish to conclude a same-sex customary marriage, are equal before the law, and have the right to equal protection and benefit of the law. No person may discriminate against them unfairly on the grounds of gender, sexual orientation and culture.[744] Thus, a purported same-sex customary union would not be invalid because of the parties' sexual orientation. Such a union would be valid by virtue of the Bill of Rights in the Constitution, rather than because the customary union incorporated elements of civil law.

Even though the Constitution calls for customary marriages to be accommodated and not merely tolerated, a customary marriage continues to be subject to the constitutional gender and equality contentions. While "living" customary law is considered to be more flexible and accommodative of women's rights, official customary law is perceived as the embodiment of institutionalised gender inequality.[745] The focus on equality has resulted in narrow questions about the form a customary marriage should take. A fraction of the problem is the assumption that integrating certain features of civil marriage into customary marriage will resolve existing gender inequalities. This has led to customary marriages having been "hybridised" whereby they seem to contain elements of civil law.[746]

9. Conclusion

This article began with reference to Caster Semenya's bride-price negotiations and her purported marriage to Violet Raseboya, in order to highlight the volatile variables of sexual orientation and gender identity in a society that allows same-sex unions. In answering the question as to whether their union will be a

valid customary marriage or not, from an analysis of the legal framework set out, it appears that the foundational elements of a customary marriage, such as payment of lobolo by Caster, and consent provided by Violet and their respective families, and that the parties are above the age of 18 years, are in accordance with the RCMA.

Section 1 of the RCMA recognises customary marriages as valid if they are negotiated and concluded in accordance with customary law. That shows that we have moved away from the original objects and purports of a traditional customary marriage, which was to bear children and for the formation and strengthening of relations between two groups.

No valid customary marriage could exist without an agreement that lobolo cattle would be delivered. Thus, even without the Recognition of Customary Marriages Act, Caster and Violet's union would still be subject to the judgment in *Mabena v Letsoalo*, in the case, a woman's mother was legally justified to negotiate for the lobolo and receive it to respect of the bride.

South Africa is a constitutional state, section 30 of the Constitution allows citizens to participate in the cultural life of their choice. No person may discriminate against them unfairly on the grounds of gender, sexual orientation and culture in terms of sections 9(3)-9(4) of the Constitution. Caster and Violet's union would thus not be invalid because of their respective sexual orientations.

The Fourie case must be borne in mind where the court held that a marriage cannot be considered invalid merely because the couple are unable to bear children. Caster and Violet have many options available to them if they wish to have children, or if they do not. Whatever their decision, their marriage will still remain valid.

Regarding the legal consequences of their marriage, key changes in the status and other legal rights of the individual will still take place such as the a wife having full status and capacity, including that capacity to acquire assets and to dispose of them, and to enter contracts and to litigate, in addition to any powers she may have had at customary law.

Caster and Violet's marriage cannot be considered as a woman-to-woman marriage because the marriage was not initiated for the reason of barrenless or to found a homestead and consolidate the status and wealth of an influential woman. A "wife" in such a marriage was required to have sexual intercourse with an assigned man, in order to bear children. It must be note that there is a lack of physical consummation between the two women in the woman-to-woman marriages.

Additionally, Caster and Violet's marriage cannot be considered as a go nyalela mosadi lapa, because such a marriage can be described as a marriage wherein a woman is married into a family (lapa/house/kraal) to revive and continue with the family name of her new parent-in-law. The relationship between the bride and her parents-in-law does not result in a "husband and wife couple" between the bride and the groom and no sexual relationship ever occurs in it.

Lastly, Caster and Violet's marriage cannot be considered a civil union as it was not concluded in accordance with the procedures in section 8 and 10 of the Civil Union Act. It has not been enacted for homosexuals who wish to have a marriage akin to a civil marriage under the Marriage Act and wish to be registered or solemnised under it. The Civil Union Act has not made made a reference to customary marriages because of the cultural chasm between the two. That being said, the crucial payment of lobolo is symbolic of solemnisation in relation to the indigenous ceremonial practices and deeply family-rooted beliefs about what marriage and marriageability require. Thus, this requirement is no longer applicable to, and does not focus on the sexual orientation or the gender of the parties concerned.

Caster may take on another wife in addition to Violet, but it is still uncertain what the consequences will be since polyandry is neither explicitly forbidden nor is it permitted in the Recognition of Customary Marriages Act. Practical considerations dictate that reasonably minor changes should be made to the legislation. In conclusion, it therefore does not matter much about the genders of the parties wishing to marry, but rather whether the spirit of customary law is evident.

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