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AFRICAN HUMAN RIGHTS LAW JOURNAL

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Editorial

This issue of the *African Human Rights Law Journal (AHRLJ)* appears as the world celebrates 75 years since the adoption of the United Nations (UN) Declaration of Human Rights (Universal Declaration). The Universal Declaration did not include a 'right to development'; the closest it has come was to provide, in article 22, that 'everyone' is entitled to the realisation of 'the economic, social and cultural rights indispensable for his dignity and the free development of his personality'.

Over the last few years the right to development has received increasing attention. While the right, as such, has not been made justiciable under any UN human rights treaty, the 1981 African Charter on Human and Peoples' Rights (African Charter) enshrines it (in article 22) as an unequivocally binding provision. At the global level the contours of the right are set out in the non-binding 1986 Declaration on the Right to Development. The year 1986 marked the midway point between the adoption of the Universal Declaration and the present celebratory moment, making this an appropriate time for the ongoing movement towards the adoption of a binding treaty to receive impetus, as indeed happened when the draft International Covenant on the Right to Development was submitted to the Human Rights Council in September 2023. This draft was referred to the UN General Assembly where its consideration by the Third Committee commenced in October 2023.

In the first article of this issue Wanki laments the lack of realisation of the right to development in 'Francophone Africa'. He ascribes this state of affairs to the secret agreements (*Accords de Coopération*) concluded between France and 14 Francophone African states in the immediate post-colonial period, and the colonisation of the minds of Francophone Africans due to the deliberate colonial policy of cultural and educational assimilation. Wanki recommends that the Accords be rescinded as a means to restoring the full political and economic sovereignty of the states and to invest in the decolonisation of the peoples' minds in these states.

The remaining articles have a country-specific focus.

The first of these deals with the right to political participation. This right is contained in the Universal Declaration (article 21) and, like many of its provisions, subsequently became concretised in a legally-binding treaty (article 25 of the International Covenant on Civil and Political Rights). Departing from the recognition of a similar right in the 2010 Constitution of Kenya, Bwire interrogates the evolution of a constitutionally-legitimised 'Big Man' political culture over the political regimes of Kenyatta, Moi, Kibaki and Uhuru, and analyses its influence on political participation by Kenyan youth. The article applies insights from these past experiences to inform recommendations on how the state can ensure the full(er) political participation of Kenyan youth.

Olayanju considers the importance of the 2020 decision by the Nigerian High Court in Lagos State in the case of *SERAP v Attorney-General Lagos State* dealing with maternal health. In the decision the government's duty to give effect to the right to health on the basis of the law domesticating the African Charter on Human and Peoples' Rights (African Charter Ratification Act) was upheld. Before this ruling, there had been unsuccessful attempts to hold the Nigerian government accountable for infringements upon the right to health based on its obligations under this Act. Although the author identifies imperfections in the decision, the case stands as a landmark of a judge's willingness not to revert to legal technicalities, but to deal head-on with the substantive issue of injustice.

Three contributions focus on issues of contemporary interest on the South African legal landscape. One of these, by Hall and Lukey, discusses public participation as an essential requirement of South Africa's approach to environmental rule of law policy and practice. Two further articles draw attention to aspects of African customary law and traditional leadership. Nkosi's contribution deals with traditional leadership in South Africa. His historical exposition provides a valuable background to current debates and decisions, such as the 2014 Constitutional Court's decision in *BaPedi Marota Mamone v Commission on Traditional Disputes and Claims & Others*. Nkosi concludes that changes are required but should be gradual and adaptive, and should not be hastily imposed on the affected communities so as to avoid a paradoxical situation of dysfunctional constitutional compliance.

Kruuse and Mwambene place the focus on a series of decisions by the South African Supreme Court of Appeal. These decisions (*Mbungel & Another v Mkabi & Others,* and *Tsambo v Sengadi*)

concern the 'requirement' under customary law that the wife had to be integrated into the husband's family. Although it recognised the importance of bringing together two families, the Court held that the requirement was not mandatory, and could be waived. Countering the views of some critics of this decision, and relying on historical-sociological theorist Ramose's 'social acceptance' thesis, the authors support the Court's approach of affirming the flexibility of customary rules generally, even though it views as regrettable the Court's reliance on or use of the term 'waiver'.

This edition also contains two case discussions in the 'Recent developments and case discussions' section. Both deal with the rights of transgender persons.

Magashula and Ngwena draw the attention of *AHRLJ* readers to *Nathanson v Mteliso & Others*, a 2019 decision by the Zimbabwe High Court at Bulawayo. In this matter the Court found unlawful the arrest and detention of a transgender woman on the charge that she was a man who had entered a women's toilet. Although the authors point out why in their view the decision does not comprehensively engage with the intersection between gender diversity and fundamental rights, by unequivocally recognising that transgender persons are entitled to the rights guaranteed in the Zimbabwean Constitution and international human rights law, it represents a progressive step forward in the domain of sexual and gender minority rights in Africa.

Baird considers the South African Alteration of Sex Description and Sex Status Act and Marriage Act against the background of the 2017 South African Western Cape High Court decision in *KOS v Minister of Home Affairs*. In this matter three applicants, born biologically male, were married to three applicants, born biologically female but who transitioned to male. The parties were effectively told that they could not remain in a marriage in terms of the Marriage Act and had to go ahead with divorce proceedings and then 're-marry' under the Civil Union Act. None of the parties wished to do so. The Court held that the treatment by the government (Department of Home Affairs) was inconsistent with the Constitution in that its conduct violated their right to administrative justice and human dignity. However, the decision did not change the underlying confusion and discrepancies in the South African legislation.

The contributions in this issue provide hopeful signs of a progressive development pertaining to human rights in Africa, especially around themes that have seen much contestation and 'push-back' globally and on the continent. However, the contributions also highlight that this trend rides on the back of the judiciaries in these countries: the

Nigerian High Court (in *SERAP v Attorney-General Lagos State*); the South African Supreme Court (on customary marriages in *Mbungela & Another v Mkabi & Others* and *Tsambo v Sengadi*) and High Court (in *KOS v Minister of Home Affairs*) and the Zimbabwean High Court (in *Nathanson v Mteliso & Others*).

The editors would once again like to thank all the reviewers who devoted their time and expertise to ensuring the quality of the Journal.

Editors
December 2023

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The right to development in Francophone Africa: Post-colonial agreements, sovereign authority and control over natural resources

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Summary: *This article critiques the decolonisation process of erstwhile colonised Francophone African states, during which France failed to effectively guarantee these states at independence the kind of sovereignty that empowered them to design their own political, educational and development policies. Consequently, the right to development in Francophone Africa remains a mere aspiration given that decolonisation failed to result in the attainment of self-reliance by the states that assumed independence. Instead, on the eve of independence, France secretly concluded cooperation agreements with the governments poised to ascend to independence and concluded others immediately after independence. Some of the secret agreements contained clauses that prioritised France to buy any natural resources of their choice in these Francophone states. Worse still, through cultural and educational assimilation, the French have colonised the minds of Francophone Africans to the extent that they defend French interests at the expense of theirs. The secret agreements have compromised the ability of the so-called independent states to implement and execute*

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national development plans, and the AU Agenda 2063 on development in these states. Consequently, recommendations have been suggested to enable these states to recover from French exploitation and regain their total sovereignty.

Keywords: *post-colonial agreements; Francophone Africa; Agenda 2063; neo-colonialism; decoloniality; sovereignty; control over natural resources*

1 Introduction

Decolonisation could be properly interpreted, among other definitions, as the rejection of the domination exercised by the colonial power over subjugated peoples and the imposition of the personality and authority of the new state in all fields.[1] Even though the noble concept of the right to development is captured in international[2] and regional instruments[3] as well as national constitutions, including those of most Francophone African states,[4] the reality remains that the sovereignty of these states and, by extension, the right over their natural wealth and resources remains under the control of France, the former coloniser. Independence suggested that the decolonised peoples of Africa would have their sovereignty restored and they would exercise complete control over their natural resources and reserve the right to exclusively decide how to dispense of the natural resources without external influence.

Unfortunately, on the eve of independence, France covertly recolonised its former colonial territories through the medium of some 'cooperation agreements' (*accords de coopération*) with the governments that were poised to assume independence.[5] In terms of these agreements, sovereign control over all the valued natural resources of the former colonial territories in terms of their

1 PF Gonidec *African politics* (1981) 81.
2 Paras 6-7 of the Preamble and art 1(2) of the UN General Assembly Declaration on the Right to Development A/RES/41/128 1986.
3 Preamble to and art 22 of the African Charter on Human and Peoples' Rights adopted in Nairobi on 27 June 1981. Art 19 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted in Maputo, Mozambique on 11 July 2003.
4 Art 58 Constitution of the Democratic Republic of Congo 1996; arts 7 & 9 Constitution of Burkina Faso of 1991; Constitution of the Democratic Republic of Benin, 1990; and art 65 and Preamble to Constitution of Cameroon, 1972.
5 V le Vine 'Leadership and regime changes in perspective' in M Schatzburg & W Zartman (eds) *The political economy of Cameroon* (1986) 23.

most strategic functions were transferred to France.[6] By virtue of these agreements, even though statehood was attributed to these countries, the control over currency, military and natural resources has hitherto been in the hands of the French. As a result, despite the political reforms for independence, the essential goal was to preserve French post-colonial domination.[7] I contend that if natural resources are required for the realisation of the right to development, and yet the states lack sovereign control over those resources, and the people are not consulted to self-determine their interests, the realisation of the right to development would be a herculean task. The conclusion of Franco-Francophone Africa agreements that attributed the right of priority to exploit the natural resources of these states to France means that there can be no meaningfulness attached to the right to development in the legal instruments in Africa.[8]

It is important to demonstrate the nexus between decolonisation, sovereign authority over natural resources in a post-colonial context and the realisation of the right to development. Colonisation legitimised the exploitation of the colonised peoples' resources for the exportation and satisfaction of European purposes at the expense of the colonised. As will be demonstrated later, the manner in which France conducted the decolonisation and independence of its former colonies provided it with a foothold over the control of continued colonial policy towards these territories, extending into the post-colonial period.[9] I, therefore, problematise both the process of decolonisation of these territories and the outcome of the process in respect of the right to development, which still leaves these territories dependent on France.

Thus, what are these Franco-Francophone Africa *accords de coopération* and how do they contradict the basic tenets of the right to development*?* As will be observed in the subsequent paragraphs, *Les Accords de Coopération* were secret agreements signed between France and its former colonies. Some were signed on the eve of their independence in 1959[10] and others were concluded in 1961 after independence.[11] These agreements were aimed at maintaining the

6 N Samba 'Money on the left: Confronting monetary imperialism in Francophone Africa' (2019), https://mronline.org/2019/05/26/money-on-the-left-confronting-monetary-imperialism-in-francophone-africa/ (accessed 12 August 2021); K Mamadou *Les servitude du pacte coloniale* (2005) 128.

7 R Joseph 'National politics in post-war Cameroun: The difficult birth of the UPC' (1975) 2 *Journal of African Studies* 202.

8 Among others countries, the Constitution of Burkina Faso in its art 14 attributes the ownership of their natural wealth and resources to the people.

9 T Chafer 'French African policy: Towards change' (1992) 91 *African Affairs* 38.

10 N Rubin *Cameroon: An Africa federation* (1971) 17-18, 101.

11 Mamadou (n 6) 128.

ties that continued Francophone Africa's domination by France for political, economic and diplomatic reasons.[12] These factors enabled France to emerge as an important power in world politics, acquiring exclusive rights over certain natural resources in these African states, which boosted its economy and made it recognised as a key player in the international field with favourable voting rights at the United Nations (UN) with regard to its proposals.[13]

These secret cooperation agreements that preserved France's influence over Francophone Africa have come at a huge cost, given that by dint of these agreements, France has influenced these states to adopt policies that favour French interests, such as compelling these Francophone states to sell their natural resources to French companies at lower market value, resulting in loss of billions of dollars for these countries.[14] The conduct of France reflects the overarching conduct of the countries of the north, which by virtue of their control of international structures have rigged rules of the system to disfavour developing countries, disregarded the right to self-determination in these countries, and failed to enforce the effective sovereignty of these countries over their natural resources due to the aggressive interventionist policies of the north,[15] including France.

Given that this article is based on sovereignty over natural resources, it would be helpful to examine one of the agreements related to natural resources between France and Côte d'Ivoire, Niger and Dahomey (Benin) in 1961.[16] Article 4 states that Côte d'Ivoire, Niger and Dahomey (Benin) shall facilitate the acquisition of natural resources and strategic raw materials for the French army and shall limit or shall place a ban on the exportation of any of such products without the approval of France. Article 5(2) goes further to state that France shall reserve the right of priority to buy any natural resources from Côte d'Ivoire, Dahomey (Benin) and Niger.[17]

12 INSAMER 'La "Françafrique": The special relationship between France and its former colonies in Africa' (2019), https://en.insamer.com/la-francafrique-the-special-relationship-between-france-and-its-former-colonies-in-africa_2307.html (accessed 10 April 2023).

13 IE University 'A post-colonial examination of the CFA franc' (2019), https://ipr.blogs.ie.edu/2019/07/02/a-post-colonial-examination-of-the-cfa-franc/ (accessed 11 April 2023).

14 I Taylor 'France à fric: CFA zone in Africa and neocolonialism' (2019) 40 *Third World Quarterly* 1070-1072.

15 K Arts & A Tamo 'The right to development in international law: New momentum Thirty years down the line?' (2016) 63 *Netherlands International Law Review* 224.

16 These agreements, though very rare to find these days, have been captured by Mamadou (n 6) 128.

17 As above.

An assessment of the general agreements suggests that the defence or military and monetary cooperation agreements only enable France to further strengthen its grip on the agreement on natural resources and the strategic raw materials, which have served as the breeding ground for the neo-colonisation of Francophone Africa. For instance, France uses its military forces under the guise of fighting terrorism in a bid to protect its interests when they are threatened in that state. This was the case with the 'operation Seval' in Mali from 2013 to 2014. During this operation, the French military prioritised the security of the cities of Gao and Kidal that are both zones of potential natural resource exploitation such as uranium.[18]

The initial cooperation agreements are still classified. However, over the years both the terms of these monetary and defence cooperation have been slightly reviewed. The French presidential speech at La Baule in 1990 was a precursor to the revision of France's cooperation with Africa.[19] In 1997 a socialist administration came to power in France and started making arrangements to review defence agreements to cancel articles that empowered French troops to intervene in the internal affairs of Africa.[20] Be that as it may, as the French saying goes, *plus ça change, plus c'est la même chose* (the more it changes, the more it is the same thing). France still occasionally intervenes in these states to protect its interests. This was the case in 2011 when the French forces intervened in Côte d'Ivoire to overthrow Laurent Gbagbo, albeit with the approval of the UN.[21] As regards the review of the monetary agreement, the common currency for these states, *Franc des Colonies Françaises d'Afrique (CFA),* was revised *to Franc de la Communauté Financière d'Afrique.* The national reserve percentage of the 14 states usually deposited into the French treasury was reviewed from 85 to 65 per cent, then ultimately to 50 per cent.[22]

A proper analysis of these cooperation agreements evinces that they work against the fundamental tenets of the right to development. First, most of the agreements were secret and concluded without proper consultation with the people. Second, there is a failure to consult with the people to determine their interest in the agreements. The French culture, education, military interventions, monetary policies

18 INSAMER (n 12).
19 T Chafer 'Franco-African relations: No longer so exceptional?' (2002) 101 *African Affairs* 356.
20 R Marchal 'France and Africa: The emergence of essential reforms?' (1998) 74 *International Affairs* 365.
21 D Howden 'UN moves to stop another blood bath in Ivory Coast' (2011), https://www.independent.co.uk/news/world/africa/un-moves-to-stop-another-bloodbath-in-ivory-coast-2262427.html (accessed 5 October 2022).
22 Taylor (n 14) 1073-1074.

and the exploitation of their natural resources were forced upon the states by France through the ruling elites. As a result, their right to self-determination over their natural resources was not respected.[23] Agreements concluded under such circumstances cannot guarantee the right to development.

As examined above, Franco-Francophone Africa international cooperation in terms of *Les Accords de Coopération* creates an asymmetrical economic relation and defeats the ends of decolonisation, which had as objective to create an enabling environment for the right to development to be achieved. In a nutshell, my task is to attempt to establish that the disconnection of the sovereignty of the so-called decolonised/independent francophone African states over the control of their natural resources will pose an insurmountable challenge, and will negatively impact the realisation of the right to development in terms of Africa's Agenda 2063, and national development plans in Francophone Africa. In doing so, I further emphasise that through the imposition of the French culture and strategic educational policies that have colonised the minds of the Francophone Africans to believing that their interests are common, France has established its foothold over their natural wealth and resources.

The article is divided into two substantive parts. The second part discusses Francophone Africa and the right to development. This part is divided into subsets for the purpose of properly addressing concepts and theories related to the right to development in Francophone Africa. The third and last part delves into the post-colonial agreements, sovereign authority and control over natural resources in Francophone Africa and their effect on the AU Agenda 2063 and national development plans of the Francophone states.

2 Deep-rooted obstacles to realising the right to development in Francophone Africa

In order to understand the right to development in Francophone Africa, it is important to differentiate economic development from the right to development. While the former[24] requires the use of the country's resources to improve the environment and the lives

23 These principles were captured in the case of *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case). Francophone Africans were never/are still not allowed to actively and meaningfully participate in the conclusion of the cooperation agreements.

24 R Joseph 'The Gaullist legacy in Franco-African relation' in R Joseph (ed) *Gaullist Africa: Cameroon under Ahmadou Ahidjo* (1978) 4.

of its citizens, the latter goes a bit further, being more holistic and encapsulating economic development as well. The right to development requires a sovereign state or peoples to determine their development priorities without foreign interference. For instance, France disrupted the reinstatement of Cameroon's sovereignty at independence by simply reinforcing French-Cameroonian ties, achieved by maintaining the power of those Cameroonian elites exclusively endorsed by the French to inherit legal sovereignty. In this way, Cameroon gained formal independence but practically France still controls sovereignty by controlling the ruling elites. As a result, France and the ruling elites in Cameroon indirectly reserve the right to undertake any developmental plans, which may not necessarily reflect the people's interests. Consequently, while economic growth could be experienced, the people hardly participated in decision making to self-determine their interests, resulting in their right to development being curtailed.

More so, the colonial state was essentially exploitative. Much of the massive exploitation of natural resources was utilised towards the socio-economic benefit of the colonial powers.[25] The colonial economy prevented Africans from being self-sufficient but rather made them dependent on the economy. As a matter of fact, the economy was designed to facilitate the further impoverishment of Africans. Unfortunately, in the post-independence era, instead of recalibrating the economy towards empowering Africans, the ruling elite in Francophone Africa rather facilitated the preservation of this legacy to continuously benefit the ex-colonialists and themselves.[26] Yet, independence and, by extension, the right to development were intended to ensure a radical break with exploitation and to embrace the transformation of the system, so that proceeds from the exploitation of Africa's natural resources benefited and empowered the colonised rather than the colonisers.

France retained the most radical political, social, economic and cultural ties post-independence with its former colonies, reminiscent of neo-colonialism,[27] which is defined later. This relationship has been termed *le village franco-africain* or *la Françafrique*, a personalised network that guarantees free access to natural resources and markets in Africa for French interests.[28] The terms of some of the secret agreements guaranteed France a right of priority to buy any natural

25 C Mbazira 'Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples' Rights: Twenty years of redundancy, progression and significant strides' (2006) 6 *African Human Rights Law Journal* 336.
26 As above.
27 Taylor (n 14) 1065.
28 As above.

resources found on the territory of the 14 Francophone African states.[29] It must, however, be noted that France does not in fact buy the resources as outlined in the agreements.

What happens is that the national reserve of 50 per cent of the Francophone states held by the French treasury can only be borrowed at commercial interest rates whenever these states need it.[30] As a result, France does not pay for the natural resources but rather compensates on the anticipated deposits of these states into the French treasury.[31] French companies completely depend on the *Françafrique* countries for imports of manganese, chromium and phosphate, minerals essential in the production of French aeronautics and weaponry.[32] This kind of cooperation or relationship essentially is anti-human rights to development in that development is envisaged from the context of a human rights approach to unconditionally result in the improvement of human well-being.[33] These 14 states operate under a monetary policy that allows the money common to them – to be pegged to the euro. As earlier examined, in terms of such a monetary transaction, it would mean that the natural resources of these countries are taken almost for free, given that France most often only compensates them indirectly through the mandatory deposits into the French reserve. The right to development in Francophone Africa, therefore, can be understood more clearly in terms of decolonisation and neo-colonialism in these states.

2.1 Decolonisation and the transition to independence in Francophone Africa

A brief narrative of colonialism is indispensable in understanding why decolonisation was inevitable prior to the transition to independence. The colonial tradition was authoritarian in nature, where the sanction of force, emergency powers, imprisonment for political offences and censorship were quite common.[34] The colonial state deprived subjugated peoples of representative institutions and the constitutional powers to take the colonial administration to

29 G Spagnol 'Is France still exploiting Africa?' 2 March 2019, http://www.ieri.be (accessed 10 April 2023).
30 As above.
31 Taylor (n 14) 1067.
32 As above.
33 A Sengupta 'On the theory and practice of the right to development' (2002) 2 *Human rights Quarterly* 837.
34 R Rathbone 'The legacy of empire' in M Cornell (ed) *Europe and Africa: Issues in post-colonial relations* (1981) 16.

task.[35] Colonisation perpetrated by Western democracies as an act of state violence was inhumane.[36] The rule of these democracies rested on coercive practices that violated their own values.[37] The colonised peoples were subjects, not citizens, and were imposed with duties but only allocated limited rights. The French had shrewdly assimilated the colonised with the hope that once the people were imbued with their culture, not even a 'decolonial epistemic perspective'[38] would succeed in completely disassociating them from the imperialist grip. The French colonial administration believed that if the natives practised the French culture and spoke the French language, then 'French influence will permeate the masses, penetrate and envelop them like a thin web of new loyalties'.[39] Such a strategy would render decolonisation of no effect as the people would still be attached to France regardless of the achievement of territorial sovereignty. For France to achieve this goal, it had to embark on the civilisation and liberation rhetoric to gain support from its parliament and other democracies.[40]

The persistence of this irrational and dehumanising system instilled a spirit of rebellion among the people subjected to colonial authority, which inspired in them the zeal to fight for decolonisation on the basis of the right to self-determination, eventually justifying a claim for the right to development that constitutes an alternative to the *mission civilisatrice*[41] that informed colonial domination in Africa.[42] As a matter of fact, the French hypocritically disguised their exploitation of Francophone Africa as a process of civilising the indigenes.[43] The

35 K Prempeh 'Presidential power in a comparative perspective: The puzzling persistence of imperial presidency in post-authoritarian Africa' (2008) 35 *Hastings Constitutional Law Quarterly* 803.

36 A Mbembe *On private direct government* (2000) 6-8.

37 A Conklin 'Colonialism and human rights, a contradiction in terms? The case of France and West Africa, 1895-1914' (1998) 103 *American Historical Review* 419.

38 Decolonial epistemic perspective identifies 'hetararchies' that are various, vertical and horizontal forms of domination and exploitation. These consist, among others, of race, class, gender, sexuality, religious, ethnic, politico-military, epistemic and linguistic forms. Decolonial epistemic perspective's mission is therefore to enforce new categories of thought, construction of new subjectivities and creation of new modes of being and becoming as a means of unmasking the dark side of modernity which preserves and enables colonial continuity. N Dastile & S Ndlovu-Gatsheni 'Power, knowledge and being: Decolonial combative discourse as a survival kit for pan-Africanists in the 21st century' (2013) 20 *Alternation* 107-109.

39 Conklin (n 37) 429.

40 Conklin (n 37) 433.

41 *Mission civilisatrice* – A mission to civilise Africa was the pretext used by Europe to invade Africa with the excuse that Africa needed development. With the uncovering of this deception, the RTD could become a reliable alternative to achieve the much-needed development in Africa.

42 J Wanki & C Ngang 'Unsettling colonial paradigms: Right to development governance as framework model for African constitutionalism' (2019) 18 *African Studies Quarterly* 71.

43 Conklin (n 37) 421.

non-existence of a viable mechanism to empower the people in the post-colonial era left the decolonised states with 'classic attributes of statehood' and 'judicial sovereignty' but lacked the economic potential to uplift their people out of poverty and deprivation.[44]

Thus, independence rather freed France from the inconveniences that came with continued direct control over the colony while ensuring that the independent states were tied to France as sub-systems, economically, politically and strategically.[45] France provided a framework for granting independence to its former colonies based on a cooperation policy that only permitted the former colonies to attain independence prior to concluding the agreements with France.[46] Decolonisation resulted in the cooperation policy reinforcement that, as an ideology of the *Francophonie*, simply reinforced the chains with which France tied the Francophone African states to perpetual dependence.[47]

This scenario could be identified with the reflections of Mogobe Ramose, who points out that the process of decolonisation does not end with eliminating despotism and authoritarianism and guaranteeing civil rights.[48] Here, he refers to the elimination of apartheid in South Africa in 1994. In his opinion, decolonisation means to 'become sovereign' or longing for true national liberation.[49] As a matter of fact, Francophone Africa had inadvertently transitioned into independence without untying the ropes and shackles of colonialism to guarantee genuine liberation. The failure to properly decolonise informs the reason why Francophone Africa remains in acute poverty and least developed of all erstwhile colonies in Africa.[50] Given this reality, it is evident that decolonisation did not take root in the 14 Francophone African states and what remains is a neo-colonial order.

2.2 Independence and the emergence of neo-colonialism in Francophone Africa

The emergence of neo-colonialism is an indication that decolonisation was a myth. More so, the situation in Francophone Africa suggests

44 Wanki & Ngang (n 42) 71.
45 B Olatunji 'Francophonie and subordinate state system in the African region' (1981) 68 *Revue francaise d'histoire d'outre-mer* 197-198.
46 Olatunji (n 45) 199.
47 Olatunji 200.
48 S Motha '"Begging to be black": Liminality and critique in post-apartheid South Africa' (2010) 27 *Theory, Culture and Society* 295.
49 As above.
50 C Ngang & S Kamga 'Poverty eradication through global partnerships and the question of the right to development under international law' (2017) 47 *Africa Insight* 45.

that aspirations for genuine freedoms and self-determination are a mere illusion. Neo-colonialism is defined as a novel approach to colonial rule masterminded by the colonial powers to give the former colonies a false impression of freedom.[51] In essence, in a neo-colonial context, the peripheral states simply operate as satellites of the dominant nation. In the case of Francophone Africa, France is the dominant state of which the capitalist economy is supplied and sustained through exploitation of the natural resources of its satellite African states.[52] Consequently, while France continues to advance as a First World industrialised country, its satellite states only experience widespread underdevelopment.[53]

The myth of decolonisation was meant to obscure the in-depth continuities between the colonial past and current global hierarchies.[54] The essence of neo-colonialism was for France and Francophone Africa an occasion to seal shady bilateral agreements to preserve French domination as it had been under colonial rule.[55] France indeed, in spite of its undertaking within the framework of the UN to end colonialism, had anticipated continued dominion over its colonial territories in Africa and, thus, laid the foundation for neo-colonialism through an assimilation policy that required the peoples in its territories in Africa to reject their own languages and cultures and to speak French and practise French culture.[56]

The strategy gave France a firm grip over its colonial territories and has continued to work in France's favour even in the post-colonial/independence era.[57] This neo-colonialism relationship of power asymmetry is enforced not necessarily by the rules of formal colonialism, but by the fact that France only nominally withdrew its effective presence in the colonies but retained sovereign control over almost every domain of the decolonised states that emerged from French colonial rule. For instance, French troops are still stationed in these territories and have been used to secure monopolies in foreign investments by French corporations, which are principally involved

51 S Ebaye 'Neo-colonialism and the question of national autonomy' (2010) 4 *African Research Review* 191.
52 Ebaye (n 51) 193.
53 As above.
54 S Ndlovu-Gatsheni *Coloniality of power in postcolonial Africa: Myths of decolonisation* (2013) 51.
55 B Mahamoud 'The impact of the colonial legacy on civil-military relations in Africa: Chad and the Sudan as comparative case studies' unpublished Master' dissertation, Naval Postgraduate School Monterey, CA, 1997 26.
56 Mahamoud (n 55) 27.
57 As above. For France to continuously have puppet leaders in these states who will be loyal to do their bidding of sustaining the secret agreements and transferring natural resources to them, France had to assimilate them to believing that they were French people. In this manner, the leaders of these states themselves implemented the execution of the agreements for France.

in the extraction of natural resources.[58] Where French economic interests have been threatened, the troops have been deployed to orchestrate *coups d'état* against Francophone African regimes that have failed or not demonstrated sufficient zeal in protecting French interests.[59] In some instances, they have endorsed constitutional *coups d'état* by indirectly supporting constitutional amendments to eliminate term limits so that their acolytes can hold onto power to protect their interests, while in others they have attempted military *coups* to oust Francophone Africa leaders whose interests are irreconcilable with theirs.

Staniland explains France's post-colonial policy in the Francophone African countries as intended to establish a sphere of influence in which France could hardly be challenged by superpowers[60] that, indeed, has accorded to France the right of entry into the club of world powers and a claim to global status.[61] This is further explained by Foucault's theory of 'governmentality' or *raison d'état* – in the interest of the state, in respect of which any means or action employed to preserve sovereignty or national (including political, economic, military and cultural) interest is considered justified.[62] Thus, France's processes of colonial governmentality simply continued after the nominal independence granted to its African colonies, albeit in transmuted form.[63] It was a transition from French domination to hegemony.

It is based on these glaring facts that point to the reality that in the Franco-African relationship the interests of the African people play second fiddle to those of France, that the right to development in Francophone Africa is still a far cry amidst evidence of some degree of economic development.

58 Ebaye (n 51) 194.
59 As above.
60 M Staniland 'Francophone Africa: The enduring French connection' (1987) 489 *The Annals of the American Academy of International Affairs in Africa* 56.
61 As above.
62 J Mehmeti '"*Raison d'etat*" the changing doctrine of French diplomacy' (2015), https://jonianmehmeti.wordpress.com/2015/10/08/raison-detat-the-changing-doctrine-of-french-diplomacy/ (accessed 1 August 2021).
63 M Shipway 'Afterword: Achilles and the tortoise: The tortoise's view of late colonialism and decolonisation' in AWM Smith & C Jeppesen (eds) *Britain, France and the decolonization of Africa: Future imperfect?* (2007) 185.

2.3 A decolonisation and neo-colonialism critique of Francophone Africa: In search of a genuine *mission civilisatrice* or a mere exercise of coloniality of power?

In this part I employ the concepts of coloniality and decoloniality to deconstruct the myth of decolonisation effected in Francophone Africa, which since independence has yielded no benefits to the peoples in those states apart from the elites, but only further entrenched the 'colonial matrix of power' in the post-colonies. It is worth mentioning that only the proper employment of 'decolonial epistemic perspective' can neutralise the 'colonial matrix of power' in Francophone Africa.[64]

In post-colonial Francophone Africa, the coloniality of power that ignores structural constraints is masked as a form of modernisation that will bring about development.[65] Thorbecke has demonstrated that for this to happen, techniques such as concentration on innovation of methodological approaches have been given more attention and importance than any doctrine or theory of development.[66] When structural constraints of development in the post-colonial era are evaluated against the indispensability of development as formulated at the Bandung Conference of 1955, it is argued that given the continuous subjugation of France, the right to development cannot genuinely be expected to be realised in the Francophone African states. This is because the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development; in which all human rights and fundamental freedoms can fully be realised.[67] Development, perceived from a decolonial point of view as Ndlovu-Gatsheni points out, was defined at the Bandung conference as intended to eliminate obstacles standing in the way of the human aspiration to attain freedom from political, economic, ideological, epistemological, and social domination resulting from colonialism and coloniality.[68] By critiquing decolonisation and neo-colonisation,

64 Colonial matrix of power has been described as the control of authority in four different areas: control of economy (natural resources); control of institutions such as the army; control of gender and sexuality; and control of subjectivity and knowledge. M Mignolo 'Coloniality of power and decolonial thinking' (2007) *Cultural Studies* 156.

65 S Ndlovu-Gatsheni 'Coloniality of power in development studies and the impact of global imperial designs on Africa' inaugural lecture delivered at the University of South Africa, 16 October 2012, 8-9.

66 E Thorbecke 'The evolution of development doctrine, 1950-2005' in G Mavrotas & A Shorrocks (eds) *Advancing development UK* (2007) 3.

67 Art 1 of the Declaration on the Right to Development, adopted by UN General Assembly Resolution 41/128 of December 1986.

68 Ndlovu-Gatsheni (n 54) 2.

I seek to unmask the beast of coloniality that has taken diverse forms and wearing different masks in an attempt to disguise itself and misdirect development thinking.[69]

Coloniality refers to long-standing patterns of power asymmetries that resulted from colonialism, which define culture, labour, inter-subjective relations and knowledge production far beyond the strict limits of colonial administrations.[70] The multiple global structures put in place over a period of 450 years were not eliminated with the juridical-political decolonisation of the periphery over the last 50 years.[71] Most of Africa still lives under the same 'colonial power matrix' as if independence never occurred. We only moved from the period of 'global colonialism' to a period of 'global coloniality'.[72] Coloniality embodies a continuity of colonial forms of domination beyond the departure of the colonial administrations, reproduced by colonial cultures and structures in the modern/colonial capitalist world-system.[73] The decolonisation process, therefore, covertly transformed itself to a process of 'coloniality of power',[74] which has become a major component of world systems approach and a critical concept that informs the emergence of decolonial epistemic viewpoints intended to place the spotlight on the darker sight of modernity that has been the cause of underdevelopment in Africa.[75]

Therefore, it is disingenuous to talk of decolonisation of Francophone African states since that process only served to obscure the continuities between the colonial past and current global colonial hierarchies that significantly contribute to the invisibility of coloniality today.[76] Ngugi wa Thiongo has argued that this so-called decolonisation process could only be a subterfuge because decolonisation struggles of the twentieth century failed to genuinely 'move the centre', disempower the colonialist, to effectively 're-member' Africa, and to genuinely return Africa's sovereignty after over 500 years of 'dismemberment'.[77] Moving the 'centre' was necessary because Africa, in general, and Francophone Africa, in

69 Ndlovu-Gatsheni (n 54) 3.
70 N Maldonado-Torres 'On the coloniality of being: Contributions to the development of a concept' (2007) 21 *Cultural Studies* 243.
71 R Grosfoguel 'Decolonizing post-colonial studies and paradigms of political-economy: Transmodernity, decolonial thinking, and global coloniality' (2011) 1 *Transmodernity: Journal of Peripheral Cultural Production of the Luso-Hispanic World* 1.
72 As above.
73 As above.
74 It is an element of the global model of capitalist order that continues to underpin global coloniality after the end of direct colonialism.
75 Maldonado-Torres (n 70) 243.
76 Grosfoguel (n 71) 9.
77 S Ndlovu-Gatsheni 'Decoloniality as the future of Africa' (2015) 13 *History Compass* 486.

particular, was incorporated into an intense Euro-North American-centric world of international law.

This manner of decolonisation could only be a charade without any genuine intention[78] of allowing Africa as a whole and especially Francophone African states – by France – to have the liberty to independently make political, social, economic and ideological policies. Consequently, the right to development in Francophone Africa has remained a mere aspiration because decolonisation required the achievement of specific thresholds to enable independent countries attain self-reliance. The transition to independence failed to achieve this.

Quijano observes that coloniality could be unmasked by identifying four key levers in a so-called decolonised sovereign state, namely, control of the economy; authority; control of gender and sexuality; and control of knowledge and subjectivity. The other three are relevant to the situation in Francophone Africa to the exception of control of gender and sexuality, which is correct but irrelevant in the context of the discussion in this article. As concerns the first premise of control of economy, Bamikole, in agreeing with Sen's understanding of development as freedom, adds that the process of development must be seen in the context of an entire social system moving away from a condition of life largely perceived to be exploitative towards a condition considered as materially, morally and spiritually progressive.[79] This implies that the narrow received view of development in economic terms,[80] measurable statistically, currently is obsolete and, therefore, cannot guarantee freedom.[81] The African Union (AU) Agenda 2063 specifies that development should be people driven, unleashing the potential of its women and youth.[82] This is of essence as it emphasises the idea of inclusive participation in the processes for development.

In the context of the Francophone African states, France implements all the three key levers that have been identified with

78 S Munshi 'Comparative law and decolonizing critique' (2017) 65 *American Journal of Comparative Law* 208.

79 L Bamikole 'Nkrumah and the triple heritage thesis and development in Africana societies' (2012) 2 *International Journal of Business, Humanities and Technology* 70.

80 A top-down approach. It is believed that with empowered few individuals and companies, the wealth will then trickle down to everyone. However, this has been seen to be incorrect where the fastest growing economies are in Africa, yet the poorest of the poor are still found in those same economies.

81 Bamikole (n 79) 69.

82 Aspiration 6 of Agenda 2063: The Africa we want, third edition, January 2015, popular version.

coloniality above. France controls the economy, the sovereignty,[83] and the knowledge and subjectivity or culture of all its satellite states in Africa.[84] This observation draws one to the conclusion that Francophone Africa is still under the 'colonial power matrix' of France and decolonisation was a ploy merely intended for the purpose of fulfilling the formalities of international law.[85] This qualifies decolonisation – a disguise of coloniality – as an 'embedded logic that enforces control, domination, and exploitation disguised in the language of salvation, progress, modernisation, and being good for everyone'.[86] Coloniality survives colonialism and is sustained in books, in the criteria for academic performance, in the self-image of individuals, in common sense, in cultural designs and in aspirations of self.[87]

To sum up, the decolonisation process in Francophone Africa did not yield to what Fanon termed 'the birth of a new humanity'.[88] It rather resulted in what Mbembe has termed the 'post-colony',[89] where elites took over but the structures sustaining imperialism and dictatorship were maintained, facilitating patrimonialism and clientelism in these states.[90] In critiquing this process, I aim to depict the fact that decolonisation, which has been framed as an ongoing project, in itself has only facilitated anti-colonialism, spearheaded by African elites in which these elites simply mobilised peasants and workers as facilitators in a struggle to replace colonial administrators with those of African descent.[91] This resulted in neo-colonialism as no shift was experienced in the structures laid down for exploitation by the erstwhile colonisers.

Decolonisation for Francophone Africa was basically only framed on the achievement of political independence and immediate withdrawal of colonial administrations.[92] To reverse the tide requires the 'decolonial epistemic perspective', which is a process of making visible the invisible and rupturing the continuous perpetration of colonialism in all Francophone African states.[93]

83 Taylor (n 14) 1066.
84 M Bechir 'The impact of the colonial legacy on civil-military relations in Africa: Chad and Sudan as comparative case studies' MA dissertation, Naval Postgraduate School, Monterey CA, 1997 17 27.
85 A Anghie 'The evolution of international law: Colonial and postcolonial realities' (2006) 26 *Third World Quarterly* 747.
86 Ndlovu-Gatsheni (n 77) 487.
87 Maldonado-Torres (n 70) 243.
88 Ndlovu-Gatsheni (n 77) 488.
89 Read generally A Mbembe *On the postcolony* (2001) 1-65.
90 B Muna *Cameroon and the challenges of the 21st century Cameroon* (1993) v vi.
91 Ndlovu-Gatsheni (n 77) 488.
92 R Grosforguel 'The epistemic decolonial turn: Beyond political-economy paradigms' (2007) 21 *Cultural Studies* 219.
93 Dastile & Ndlovu-Gatsheni (n 38) 110-113.

3 Post-colonial agreements, sovereign authority and control over natural resources in Francophone Africa

Again, the underlying thesis this article brings to the fore is that if sovereign authority over natural resources is required to achieve the right to development in Francophone Africa, the realisation of this right might be far-fetched given that decolonisation in those states has been a charade in the sense that the networks that facilitate the control of their resources are still existent and manipulated by the erstwhile colonial master – France. This reality constitutes for the Francophone African states an obstacle to the implementation of national development plans, the AU Agenda 2063 and ultimately the right to development in terms of article 22 of the African Charter on Human and Peoples' Rights (African Charter). In the subsequent lines, I examine these eventualities with respect to the right to development.

3.1 Post-colonial agreements in Francophone Africa

While cooperation agreements only entered into force in the post-colonial period in Francophone Africa, the process of getting into the agreements properly commenced on the eve of their independence.[94] As earlier highlighted, negotiations on the terms of independence for French colonies in Africa informed the signing of the secret cooperation agreements, which were of two types. The first type, which is of interest to this article, offered France exclusive access to the raw materials of the Francophone African states and markets.[95] The other agreement was concerned with the military protection of the new regimes. The countries that signed these agreements were Benin, Burkina Faso, Guinea-Bissau, Côte d'Ivoire, Mali, Niger, Senegal, Togo, Cameroon, Central African Republic, Chad, Congo-Brazzaville, Equatorial Guinea and Gabon.[96]

These 14 states, with the exception of Guinea Bissau and Equatorial Guinea which were former Portuguese and Spanish colonies respectively, were granted independence in the early 1960s, more

94 N Rubin *Cameroon*: *An African federation* (1971) 101; M Ligot *Les Accords de coopération entre la France et les* états *Africains et Malgache d'expression Française* (1972) 56.

95 E Lavallée & J Lochard 'The empire strikes back: French-African trade after independence' (2019) 27 *Revue Internationale Economique* 392.

96 M Koutonin 'France/Afrique: 14 African countries forced by France to pay colonial tax for the benefits of slavery and colonization' (2014), http://www.siliconafrica.com/author/admin (accessed 20 April 2023).

as a result of French goodwill and magnanimity and not necessarily as a result of pressure from nationalist movements as it is popularly believed.[97] The transition from colonisation to 'cooperation' was predisposed to the perpetuation of a colonial type of domination under a transmuted legal cover.[98] In a nutshell, the cooperation more resembled the 'pursuit of colonisation by other means'.[99] Through the signing of the cooperation agreements, France succeeded to institutionalise its political, economic, monetary and cultural authority over the 14 states, which have remained almost totally dependent on France.[100] In 2008 a former French President, Jacques Chirac, stated: 'Without Africa, France will slide down into the rank of a third [world] power.'[101] His predecessor, Francois Mitterrand, had equally prophesied in 1957 that '[w]ithout Africa, France will have no history in the 21st century'.[102] These observations point to the fact that France needs these Francophone African states to remain relevant globally as a superpower. The manner in which France seeks to maintain this position, however, is problematic to the realisation of the right to development in the Francophone states, given that national development plans and the AU Agenda 2063 for development can only be fulfilled where sovereign authority of the states over their natural resources and raw materials and participation of the people of these states in development projects is prioritised.

As earlier observed, while the defence and monetary agreements, among others, have been revisited in the recent past, and some of the states, such as Burkina Faso, the Central African Republic (CAR) and Mali, have diversified their cooperation partners and are on the path to irreconcilably rupturing relations with France, not much has really changed in terms of economic development or citizenry participation in development projects, and 11 out of these 14 states are considered 'least developed' by the UN and remain at the bottom of the Human Development Index.[103] In 2022 the CAR was ranked 188 out of 191 countries by the Human and

97 G Martin 'The historical, economic, and political bases of France's Africa policy' (1985) 23 *Journal of Modern African Studies* 191.
98 As above.
99 As above.
100 As above.
101 E Adja 'Without Africa, France will slide down into the rank of a third [world] power' *Voice of Africa* (2017), http://www.voiceofafrica.tv/en/jacques-chirac-without-africa-france-will-slide-down-into-the-rank-of-a-third-world-power-d129 (accessed 25 August 2021).
102 As above.
103 'True sovereignty? The CFA Franc and French influence in West and Central Africa' (2022) *Harvard International Review*, https://hir.harvard.edu/true-sovereignty-the-cfa-franc-and-french-influence-in-west-and-central-africa/ (accessed 20 April 2023).

Capital Development indices.[104] This poor performance could be attributed to the fact that the cooperation agreements instituted a system of servitude that has made the Francophone African states subordinate to France. Thus, while some of these states have engaged other cooperation partners such as China, Russia, Turkey, and India, the strong bond of control and networks that France established through the ruling elites – *Francafrique* system – will take a while to be undone. It may be suggested at this juncture that apart from corruption, misappropriation and mismanagement of public funds and unaccountability by the ruling elites, the synergy between decolonisation of the Francophone African states and self-determination, which would result in the sovereign authority of those states over their natural resources, is ruptured by the cooperation agreements that were signed with France prior to and post-independence.

Given how instrumental the sustenance of the cooperation agreements are to the global influence of France, the latter is ready to ruthlessly deal with any African nationalist leaders who attempt to confront its policies or question them.[105] Nathan has observed that out of 15 *coups* that have occurred between 2000 and 2016 in Africa, 12[106] actually occurred in Francophone Africa.[107] Seven other military *coups* occurred between 2017 and 2023, in Sudan and six in Francophone Africa – Burkina Faso, Chad, Guinea Conakry (albeit its exclusion from the countries that concluded the cooperation agreements, it nevertheless is an ex-French colony), Gabon, Mali, Niger and the political unrest in the CAR. It is worth noting that these *coups* have always occurred at moments when French economic, political and strategic interests were threatened.[108] This is an indication that the right to development in these states will be met with numerous challenges because whenever any nationalist leader rises to power and attempts to break with the cooperation agreements in an attempt to serve the interests of its people and uplift their living standards, France feels threatened and the outcome is the elimination of such a leader. The assassinations of Sylvanus

104 World Bank 'The World Bank In Central African Republic' (2023), https://www.worldbank.org/en/country/centralafricanrepublic/overview (accessed 20 April 2023).
105 Martin (n 97) 194.
106 L Nathan 'Trends in mediating African *coups*, 2000-2015' paper presented at the International Studies Association Annual Convention 4 (2016) https://www.researchgate.net/publication/299605192 (accessed 10 March 2023). Nathan actually refers to eleven *coups*, since he classifies Egypt as part of Anglophone Africa.
107 As above.
108 Martin (n 97) 194.

Olympio of Togo[109] and Thomas Sankara of Burkina Faso[110] are quintessential. This conduct of France has really not changed; they have only changed the tactics. As a matter of fact, Idriss Deby Itno, the former President of Chad, who had been an ardent defender of French interests, made a dissenting statement during the 55th independence anniversary of Chad: 'It is time to cut a string that is preventing Africa from developing.'[111] He was referring to France's exploitation of Francophone Africa. In 2017 Deby stated: 'A revision of the terms of cooperation is absolutely necessary and unavoidable.'[112] A few years after these remarks he was killed in very questionable circumstances. Worse still, France influenced the process of replacing him with his son who demonstrated the potential to protect France's interests. President Macron travelled to Chad to personally supervise the installation of Mahamat Idriss Deby, disregarding the Chadian Constitution,[113] in its article 76 that appoints the Speaker of the National Assembly or his first assistant to replace the President in a situation of sudden disappearance. This situation demonstrates France's commitment to continuously subordinate the Francophone African states for its own benefits. Additionally, it must be mentioned that the *coups* in Burkina Faso and Mali were orchestrated by revolutionary leaders with the intent of breaking away from the French imperial order and not against the people's interests, as has been the culture with previous *coups* instigated by France.

France's global hegemony is gradually waning, and Francophone Africa is the only region where it still commands strong influence in terms of the right of priority over the acquisition of their natural resources and raw materials. For this reason, France is willing to go the extra mile to preserve the asymmetrical relationship it enjoys with its Francophone African former colonies. Two decades after independence, France imported 100 per cent of uranium from Gabon and Niger and 70 per cent oil extraction from deposits in other Francophone Africa countries.[114] Areva (now Orano), a French mining multi-national corporation, has been exploiting uranium in

109 B Posthumus 'Who was behind Africa's first *coup*?' (2018), https://www.ozy.com/flashback/who-was-behind-africas-first-coup/87681 (accessed 25 August 2019). Jacques Foccart, a former adviser on African policy to the French government, is reported to have stated that 'Olympio was never our friend'.

110 D Champion 'Why was Thomas Sankara killed?' (2016), https://www.quora.com/Why-was-Thomas-Sankara-killed (accessed 29 August 2019).

111 'Your own hands sold you: Voluntary servitude in the Franceafrique' *Chimurenga* (2020), https://chimurengachronic.co.za/your-own-hand-sold-you-voluntary-servitude-in-the-francafrique/ (accessed 15 April 2023).

112 As above.

113 Revised Constitution of Chad of 31 March 1996.

114 I Benneyworth 'The ongoing relationship between France and its former African colonies' (2011), https://www.e-ir.info/2011/06/11/the-ongoing-relationship-between-france-and-its-former-african-colonies (accessed 29 August 2019).

Niger over the past 50 years.[115] Niger produces a vast majority of the uranium that France uses for military purposes and its nuclear energy, which accounts for 17 per cent of Niger's mines. From this, France exports a total value of €3 billion to other countries each year.[116]

Despite international law's guarantee of the right of states to self-determination and the exercise of sovereignty over their natural wealth and resources, the signing of the *Accords de Coopération* between France and its African satellite states outrightly ceded to France an unencumbered right to the natural resources of these states.[117] This model of decolonisation adopted by France with the Francophone states in Africa, which rather transfers rights over natural resources to France, inhibits the realisation of the right to development in those states.[118] Moreover, the nature of the cooperation with France contradicts the 1962 General Assembly Resolution on Permanent Sovereignty over Natural Resources, which guarantees that the right of states to control their natural resources is part of customary international law.

4 Sovereign authority and control over natural resources in Francophone Africa

Sovereignty over natural wealth and resources refers to governmental control in a bid to exercise its right of self-determination.[119] The phrase 'permanent sovereignty over natural wealth and resources' was brought into the human rights lexicon by Chile in 1952 during the course of a debate on human rights, as a right in the self-determination article of the draft human rights covenants.[120] Numerous treaties and declarations to which most of the Francophone states are signatories have entrenched the right to development and the sovereignty of states over their natural resources. The Declaration on the Right to Development, for example, stipulates:[121]

> The human right to development also implies the full realisation of the right of peoples to self-determination, which includes, subject to the

115 I Dekker 'How much money does France make in French-speaking Africa? (2020), https://inemariedekker.medium.com/how-much-money-does-france-make-in-french-speaking-africa-bc146b5ce4bf (accessed 20 April 2023).
116 As above.
117 Ngang & Kamga (n 50) 46.
118 Wanki & Ngang (n 42) 73.
119 EL Daes lecture 'Indigenous peoples permanent sovereignty over natural resources' (2004), https://www.humanrights.gov.au/about/news/speeches/indigenous-peoples-permanent-sovereignty-over-natural-resources (accessed 12 April 2022).
120 UN Doc. E/C.4/L.24, 16 April 1952.
121 Art 1(2) Declaration on the Right to Development.

> relevant provisions of both international covenants on human rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

In two cases decided by the African Commission on Human and Peoples' Rights (African Commission) it was held that the exploitation of natural resources from an area could not exclude the people of that region or community from enjoying its proceeds.[122] This case exemplifies Francophone Africa where France reserves the right of priority over the acquisition of their natural resources, has equally imposed a treaty that harmonises business law in Africa (OHADA) in the whole of Francophone Africa so that French companies operating in these countries should be at the advantage, and has imposed the (CFA) franc which is pegged to the euro so that France's interests are immune from common currency depreciation, while their convertibility and free transfer principles facilitate the repatriation of the profits of the French companies to France.[123] These legal and monetary cooperations have reinforced the cooperation agreements on mineral resources and made it difficult for Francophone African people to benefit from the resources in their territories.

The role played by foreign governments through their multinational corporations most often ignores sovereign authority over natural resources. This is the case with especially Francophone African states, that permit French companies, such as Total-ELF Oil, Mobile Oil, Perenco and so many others, to exploit oil and gas in communities in these states without commensurate[124] developmental benefits to the communities and protection of their environment. This is usually done with the complicity of the Francophone African state governments that are proxies of the French government and receive orders from Paris to employ repressive tactics on the people where they are met with opposition.[125] These orders are carried out in defiance of article 21 of the African Charter. Article 21(4) provides that '[s]tate parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their natural resources'.[126] This provision guarantees that the peoples of Africa, including especially those in Francophone African countries, must

122 *Endorois* case (n 23) paras 120-124. *Social and Economic Rights Action Centre (SERAC) & Anoher v Nigeria* (2001) AHRLR 60 (ACHPR 2001) paras 55-59 (*SERAC*).
123 Taylor (n 14) 1065-1066.
124 ELF-Total corruption scandal in Gabon; *Endorois* case (n 23).
125 A Promskaya 'France still robbing its former colonies' (2015), https://www.pambazuka.org/governance/france-still-robbing-its-former-african-colonies (accessed 10 April 2023).
126 African Charter on Human and Peoples' Rights.

be the primary beneficiaries, rather than France that continues to gratuitously exploit the resources based on the secret cooperation agreements.

While some Francophone African governments still collude with foreign powers to give them access to Africa's natural resources at the expense of the well-being of their peoples who have suffered years of dispossession, they seem to ignore the reason why article 21 was enshrined in the African Charter. It was a response against the continent's painful history of colonial exploitation that left African peoples without resources to develop themselves and their communities.[127] This informs, among other reasons Kéba M'baye of Senegal's push for recognition of the idea of development as a human right and not as the result of assistance or good will from the West.[128] Such circumstances can only lead to the conclusion that the same manner of exploitation that was acceptable under the colonial regime is still permitted in this generation since France is still covertly extorting the natural wealth of Francophone Africa. This is orchestrated in violation of articles 21(1) and 21(2) of the African Charter, which guarantees the right to sovereign ownership over their natural wealth and resources as an essential component of the right to development.

Self-determination creates an environment for the right to development to be actualised.[129] The International Court of Justice (ICJ) confirmed the principle of permanent sovereignty over natural resources in its judgment of 19 December 2005 in the case of *Democratic Republic of Congo v Uganda*.[130] While this case refers to a context of military occupation, in many ways it is similar to Francophone Africa that is under French military occupation in respect of the terms of the defence and military policy of the cooperation agreements.

Sovereignty over natural resources, as previously observed, is indispensable in this era of aggressive interventionist policies of powerful Western states, and the existence of structural conditions that push back Third World states from performing a more robust function in economic policy formulation, coordination and

127 *SERAC* (n 122) para 56.
128 R Barsh 'The right to development as a human right: Results of the global consultation' (1991) 13 *Human Rights Quarterly* 324; K Rahman 'Linkages between right to development and rights-based approach: An overview' (2010) 1 *Northern University Journal of Law* 97-98.
129 Wanki & Ngang (n 42) 69.
130 *Armed Activities on the Territory of the Congo*, Judgment, ICJ Reports 2005 paras 243-246.

implementation.[131] Developed countries are also required to change their imperialistic policies, which render sovereign authority over natural resources and the realisation of the right to development in the face of globalisation difficult, given that domestic policies in most of these countries are regulated by external factors.[132] Experts have advised that African states that are rich in natural resources should establish sovereign wealth funds (SWFs) to enable them achieve micro-economic purposes.[133] The developmental nature of numerous African economies informs the necessity for SWFs,[134] which will be used by governments to sponsor the realisation of the right to development in Francophone African countries without external influences such as is currently the case with French domination.

5 Post-colonial agreements and sovereign authority over natural resources in terms of national development plans and Agenda 2063 in Francophone Africa

5.1 National development plans and sovereign authority over natural resources

National development plans usually aim at eradicating poverty or ameliorating social conditions and economic transformation. The purpose of these plans is to enable governments to set achievable targets and to meet specific thresholds particularly in terms of the provision of quality education, public health care, basic services and safe communities.[135] It is difficult to conceive how these goals could be achieved in Francophone African states in ensuring sustainable development. For instance, Cameroon, being one of these states, in 2003 established an Agenda for development planning intended as a strategy for poverty reduction.[136] This plan sets out Vision 2035 that expresses the aspiration of Cameroonians to enjoy democracy, peace and security, among others. These aspirations in themselves already seem to be unachievable within the time frame, given that

131 Arts & Tamo (n 15) 224-225.
132 Ngang & Kamga (n 50) 51.
133 R Tafotie 'Sovereign wealth funds: Mere fad or value-added tool for African states' 2018-001 University of Luxemburg Law Working Paper 3.
134 Tafotie (n 133) 2.
135 R Mahlaka 'National development plan 2.0: Ramaphosa implored to focus on fewer socio-economic issues' *Business Maverick* (2019), https://www.dailymaverick.co.za/article/2019-08-12-national-development-plan-2-0-ramaphosa-implored-to-focus-on-fewer-socio-economic-issues/ (accessed 15 September 2021).
136 National Development Plan of Cameroon – Working Paper, February 2009, www.commonwealthgovernance.org/countries/africa/cameroon/national-development-plan/ (accessed 20 March 2021).

in 2016 the government of Cameroon launched an armed reprisal against the English-speaking regions of that country with the excuse that they are seceding from the country.[137] This part of the country has since been razed down completely by security forces and would require reconstruction at the end of the conflict. Such a project would certainly hamper the realisation of Vision 2035. Even so, the signing of the *Accords de Coopération* already limits the country's ability to satisfactorily respond to this Vision. More so, most Francophone states have not yet recovered from the stress of civil wars, of which the causes are linked to the existence of natural resources and wealth in their territories.[138] This kind of crisis can destabilise the implementation of national development plans.

Furthermore, with the emergence of protracted civil wars, sovereign authority over natural resources is eroded as war creates an environment of anarchy. Most of the Western powers that orchestrate conflicts take advantage of the chaos created to gratuitously exploit the natural resources of the countries concerned.[139] For instance, from 1975 to1998 Morocco and the Democratic Republic of the Congo (DRC) (also Francophone states, even though not amongst signatories of the *Accords de Coopération*) and the Republic of Congo experienced civil wars that broke out as a result of the discovery of mineral oil, copper, coltan, diamonds, gold, cobalt and phosphates in those countries.[140]

One of the prerequisites for the realisation of the right to development under international law is for the state to formulate appropriate national development policies to ensure an improvement in the well-being of its citizens.[141] This guarantee presents the right to development as a policy-making tool sanctioned by the obligation to satisfy human well-being.[142] The formulation and implementation of such national development plans pose a challenge in Francophone Africa.

137 S O'Grady 'Divided by language: Cameroon's crackdown on its English-speaking minority is fueling support for a secessionist movement' (2019), https://www.washingtonpost.com/graphics/2019/world/cameroon-anglophone-crisis/ (accessed 25 March 2021).

138 Tana High-Level Forum on Security in Africa 'Background paper on natural resource governance in Africa: Conflict, politics and power' 4, tana-2017-background-paper-on-natural-resource-governance-in-africa-conflict-politics-and-power.pdf (tralac.org) (accessed 10 March 2023).

139 I Eberechi 'Armed conflicts in Africa and Western complicity: A disincentive for African Union's cooperation with the ICC' (2009) 3 *African Journal of Legal Studies* 68-71.

140 Tana High-Level Forum (n 138) 4.

141 C Ngang 'Towards a right to development governance in Africa' (2018) 17 *Journal of Human Rights* 114.

142 Ngang & Kamga (n 50) 51.

5.2 Agenda 2063 and sovereign authority over natural resources

Agenda 2063 outlines a roadmap and a vision for a new Africa grounded in pan-Africanism and African cultural renaissance.[143] Given that most of Africa was previously beleaguered by colonialism, its administrative and economic structures have not been properly developed to be able to sustain and advance the economy of these countries. As a result, the majority of African countries that are endowed with natural resources largely depend on the resources to achieve the right to development, as envisaged by Agenda 2063. This vision certainly is not achievable in Francophone Africa where sovereign authority over their natural resources has been ceded to France. The principle of permanent sovereignty over natural resources has its roots in two concerns of the UN, namely, economic development of developing countries and self-determination of colonised peoples.[144]

6 Conclusion

I have argued that sovereign authority over natural wealth and resources by states constitutes a fundamental component for the realisation of the right to development. Contrary to the manner in which French policies and continuous colonial engagement with its African satellite states are portrayed as advancing stability and development, this has been discounted to clearly be factors of instability, dependency and domination instead.[145] Nonetheless, some of these Francophone African countries, such as Burkina Faso, Central African Republic and Mali, now seek to indefinitely rupture relations with France.

While the absence of genuine decolonisation for Africa resulted in neo-colonialism, the situation is more precarious among Francophone African states, which not only failed to achieve full independence but by their own free consent agreed to be recolonised by France, on the eve of their independence in 1959. This, among other factors, has negatively impacted the realisation of the right to development in these states as they have been dispossessed of their natural resources, which constitute a means of social transformation and development.

143 Art 41 Aspiration 5 of Agenda 2063.
144 N Schrijver 'Self-determination of peoples and sovereignty over natural wealth and resources' in N Schrijver (ed) *Realising the right to development: Essays in commemoration of 25 years of the United Nations Declaration on the Right to Development* (2014) 95.
145 Spagnol (n 29).

Consequently, Francophone Africa has remained the least developed in the whole of Africa. It explains the fact that colonial acolytes who posed as nationalists only instituted anti-colonial struggles, which failed to overhaul the colonial system but only resulted in the replacement of white colonial masters with black masters who have been subcontracted with the same pillaging of resources.

I have further argued that what is needed to eradicate (neo)colonialism, and to neutralise the French 'colonial matrix of power' is a 'decolonial epistemic perspective', which is a process of making visible the invisible and rupturing the continuous perpetration of colonialism. This is because anti-colonial struggles failed to bring total liberation to the French colonies in Africa. This failure has then given rise to coloniality that is a more aggressive type of colonialism, albeit being masked to appear as the promotion of modernism. Coloniality is a more sophisticated approach to colonialism, which operates through systems controlled entirely by the erstwhile colonial masters and designed to continue with the deprivation of the former colonies of sovereign authority over their natural resources.

By the very nature of the *Accords de Coopération*, there can be no consultation or participation of the people in development projects. The inability of the people to self-determine their interests negates the right to development. I therefore propose a few recommendations to facilitate the realisation of the right to development in these states:

The major recommendation is that the *Accords de Coopération* that were signed between France and the 14 Francophone African states should be rescinded as a means to restore the full political and economic sovereignty of the states in question. The most effective means to rupture the *Accords de Coopération* is to invest in the decolonisation of the peoples' minds in these states. Thus, if the mindset of the people in these states is decolonised, they will see these agreements as a scheme to rip off their wealth and natural resources, and the populations would rise in revolt demanding the rupture of the agreements. It would be challenging for France to eliminate the populations of the 14 states as they did to nationalists such as Sylvanus Olympio and Thomas Sankara. The move, however, requires the renewal of the political class, and to start investing in patriotic young politicians whose mindsets are shrouded in the desire to break with the colonial and neo-colonial ideology.

States should create SWFs to hold proceeds from the exploitation of their natural resources. These funds will help in stabilising the economies of those countries, and ensure effective capacity building

and governance. France would have to be constrained to pay reparations to the Francophone African states in question, given the long period of exploitation of their natural wealth. Article 21(2) of African Charter guarantees that in the event of 'spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation'.

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Interrogating the evolution of a constitutionally-legitimised 'Big Man' political culture and its influence on political participation by Kenyan youth

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Summary: *This article critically analyses the evolution of Kenya's constitutionally-legitimised 'Big Man' political culture and its influence on youth political participation. The core thesis of the article is that Kenya's constitutionally-legitimised 'Big Man' political culture restricts youth political participation, beyond voting, while making them susceptible to manipulation by politicians. In exploring this thesis, the article's guiding research question is: Beyond voting, how has the Kenyan government enhanced or restricted direct youth political participation as a right provided for under article 25 of International Covenant on Civil and Political Rights (ICCPR) and subsequently domesticated under the Kenyan Constitution? The modes of political participation examined in this context are forming a political party and running for public office. Contextually, the article interrogates the political regimes of Kenyatta, Moi, Kibaki and Uhuru and their use of constitutional amendments to crystallise power in the executive for critical analysis of the evolution of Kenya's 'Big Man' political culture pertaining to youth political participation. It then applies the lessons learned from past and current regimes to inform recommendations on how the state can*

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facilitate the Kenyan youth to enjoy the right of political participation fully, effectively and equally as provided for under article 25 of ICCPR as domesticated under the Kenyan Constitution.

Key words: *political rights; political participation; 'Big Man' political culture; constitutional reforms; electoral reforms*

1 Introduction

Political participation is loosely defined as citizens' activities affecting politics.[1] However, the nature and scope of these participatory activities continuously evolve in line with the growing importance of politics in daily life, increasing competencies and resources of citizens, increasing availability of political information, and the blurring of distinctions between private and public spheres.[2] Nonetheless, the right to political participation is a fundamental right and is globally established under article 25 of the International Covenant on Civil and Political Rights (ICCPR) which provides that every citizen has the right to take part in the conduct of public affairs either directly or through freely chosen representatives; the right to vote and to be elected at genuine periodic elections by universal and equal suffrage; and to have access, on general terms of equality, to public service.[3] This constitutes the human rights framework for political participation globally. States that are party to the Covenant are subsequently obligated to implement positive mechanisms to ensure 'the full, effective, and equal enjoyment of the rights to participate in political and public affairs'.[4]

Kenya ratified ICCPR on 23 March 1976[5] and therefore is obligated to protect the civil and political rights of its citizens, including the right to political participation. Kenya has domesticated the provisions of ICCPR in its Constitutions, which also specifically provide for how a

1 JW van Deth 'What is political participation' (2016) *Oxford Research Encyclopedia of Politics*, https://doi.org/10.1093/acrefore/9780190228637.013.68 (accessed 31 August 2023).
2 Van Deth (n 1) 2.
3 International Covenant on Civil and Political Rights (ICCPR) UN Treaty Series, Vol 999, I-14668, 179, 19 December 1966.
4 United Nations General Assembly (UNGA) 'Factors that impede equal participation and steps to overcome those challenges: Report of the Office of the United Nations High Commissioner for Human Rights' UN A/HRC/27/29, 30 June 2014, https://digitallibrary.un.org/record/777756?ln=en (accessed 11 April 2022).
5 'List of Kenya's Ratification of International Human Rights Treaties', https://lib.ohchr.org/HRBodies/UPR/Documents/Session8/KE/KSC_UPR_KEN_S08_2010_KenyaStakeholdersCoalitionforUPR_Annex3.pdf (accessed 11 April 2022).

citizen qualifies for direct political participation either as an electoral candidate or a voter. The old Constitution[6] only contained provisions for qualifications and disqualifications for election under sections 34 and 35 respectively, as well as qualifications and disqualifications for registration as a voter under section 43. By contrast, the 2010 Constitution[7] specifically recognises and protects political rights under article 38 in the manner and tone espoused under article 25 of ICCPR, in addition to qualifications for registration as a voter under article 83, eligibility to stand as an independent candidate under article 85, qualifications and disqualifications for election as a member of parliament under article 99, and qualifications and disqualifications for election as a member of county assembly under article 193.

However, despite the inclusion of these provisions in both the old and 2010 Constitutions, there is a discernible trend in the subversion of a citizen's right to political participation as encompassed under article 25 of ICCPR. This often occurs as part of an overall move towards concentration of power in the executive facilitated by constitutional amendments, a trend that began immediately after independence in 1963. Ghai and McAuslan[8] chronicle the gradual concentration of powers in the executive, more specifically the presidency, as beginning immediately after independence with the first constitutional amendment law (The Constitution of Kenya (Amendment) Act 28 of 1964)[9] which declared Kenya a republic and combined the powers of the head of state with those of the head of government, vesting both in the presidency. The end result was the transformation of the Constitution into an instrument of highly-concentrated and authoritarian executive power by the President,[10] resulting in political participation being subject to the undue control and influence of the President.

A political structure[11] dominated by the executive in this manner is inherently exclusionary to the extent that the President determines

6 The previous post-independence Constitution that was repealed and replaced with the 2010 Constitution. Constitution of Kenya, Revised edition 2008 (2001), http://kenyalaw.org/kl/index.php?id=398 (accessed 4 September 2023).

7 Constitution of Kenya, 2010, http://kenyalaw.org/kl/index.php?id=398 (accessed 4 September 2023). Referred to as such as it was promulgated on 27 August 2010 after a referendum that saw it endorsed by 68,85% Kenyans. See AM Wanga *The Kenyan constitutional referendum of 4th August 2010: A case study* (2011) 2.

8 YP Ghai & JPWB McAuslan *Public law and political change in Kenya* (1970).

9 http://kenyalaw.org/kl/index.php?id=9631 (accessed 4 September 2023).

10 P Anyang Nyongó 'State and society in Kenya: The disintegration of the nationalist coalitions and the rise of presidential authoritarianism 1963-78' (1989) 88 *African Affairs* 229.

11 Refers to the arrangement of political institutions (executive, legislature, judiciary) and the nature of their interactions, independence and inter-dependence.

who can participate in the available political spaces, as well as when and how they can do so. Such a political structure actively imposes limits on the extent to which citizens can exercise the full, effective and equal enjoyment of their rights of political participation. This results in the exclusion of certain segments of society, such as the youth,[12] from participating in the democratic process. This article interrogates whether, when and how the alteration of Kenya's political structure, using constitutional amendments to centralise power in the executive, has affected youth political participation. It does so with a focus on two direct forms of participation: forming a political party and being a candidate for public office in Kenya.

In the Kenyan socio-political context, the term 'youth' refers to all individuals between the ages of 18 and 35 years.[13] The youth are adults within the meaning of article 260 of the 2010 Constitution[14] by virtue of attaining the age of 18 years and, therefore, they also qualify to register as voters under article 83 which holds that one needs to be an adult citizen of sound mind that has not been convicted of an election offence in the preceding five years.[15] There has been a steady increase in Kenya's youth population since 1969[16] and, as per the last census held in 2019, they constitute 75 per cent of the total population.[17] Correspondingly, there has also been a steady increase in the numbers of youth registered as voters,[18] which constituted 51 per cent of the total number of registered voters in the 2017 general elections.[19] However, a distinction must be made between those who are registered to vote and those who actually vote, and the number of youths that have actually vote since 2007[20] reached a peak of 76,8 per cent in the 2013 elections, the first under

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See: S Graben & E Biber 'Presidents, parliaments, and legal change: Quantifying the effect of political systems in comparative environmental law' (2017) 35 *Virginia Environmental Law Journal* 357.

12 Other segments include women, persons with disabilities, indigenous people, ethnic minorities, lesbian, gay, bisexual, transgender and intersex (LGBTI) persons and other marginalised groups. In the Kenyan context, art 260 of the Constitution of Kenya (2010) defines marginalised groups as 'a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4)'.

13 Art 260 Constitution of Kenya (2010).

14 http://kenyalaw.org/kl/index.php?id=398 (accessed 4 September 2023).

15 This is the minimum qualification for one to be registered as a voter in Kenya under art 83(1)(a) of the Constitution of Kenya (2010).

16 K Sivi-Njonjo *Youth fact book: Infinite possibility or definite disaster?* (2010) 4.

17 Kenya National Bureau of Statistics '2019 Kenya population and housing census: volume III, distribution of population by age and sex' (2019) 11.

18 With reference to the maiden elections held under the 2010 Constitution, with the first in 2013 and the subsequently in 2017.

19 Data Science Ltd 'Demographics of the Kenyan voter', https://www.datascience.co.ke/demographics-of-the-kenyan-voter/ (accessed 11 April 2022).

20 In 2007 68% of the registered youth voters reported that they voted. Mandela Institute for Development Studies (MINDS) 2016*:* 'Youth participation in elections in Africa, an eight-country study', https://minds-africa.org/Downloads/

the 2010 Constitution.[21] Thereafter, there is a discernible decline in youth voter turnout with the lowest turnout being witnessed in the 2022 elections where only 39,84 per cent of total registered voters were youths, a decline of 5,17 per cent from the 2017 elections.[22]

There is a similar paucity of youth political participation and representation in the formation and running of political parties in Kenya, as well as those who stand for election. Under section 6(2)(f) of the Political Parties Act[23] an application for registration of a political party must be accompanied by the prescribed fee. As of 3 September 2023,[24] the fees prescribed by the office of the Registrar of Political Parties[25] is Kshs 100 000 for provisional registration and Kshs 500 000 for full registration.[26] These costs are prohibitive in a country of which the overall employment to population ratio stood at 63,4 per cent and had an unemployment rate of 4,9 per cent as at December 2022.[27] Moreover, the percentage of youths (15-34) that were not in the education system and were not working or being trained for work during this period were recorded at 19 per cent.[28] Similarly, even the other option of being a candidate for public office is also cost prohibitive since it entails payment of party nomination fees ranging from Kshs 20 000 to 1 000 000[29] depending on the seat, and thereafter, vast sums of money for campaigns. For instance, in 2017 political aspirants spent between Kshs15 and 25 million in the race to secure party nomination slots to contest in the general

MINDS%202016%20Youth%20Program%20Research%20Publication.pdf (accessed 11 April 2022).

21 MINDS (n 20).

22 Kofi Anan Foundation 'Roundtable: Kenya post-election 2022 review', https://www.kofiannanfoundation.org/supporting-democracy-and-elections-with-integrity/kenya-post-election-roundtable-2022/ (accessed 4 September 2023).

23 Act11of2011,http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2011%20of%202011 (accessed 4 September 2023).

24 Office of the Registrar of Political Parties (ORPP) 'What are the charges in various stages of registering a political party?' https://www.orpp.or.ke/index.php/2-uncategorised/21-frequently-asked-questions (accessed 4 September 2023).

25 Sec 34(a) of the Political Parties Act (11 of 2011) bestows upon the Registrar of Political Parties the mandate to register, regulate, monitor, investigate and supervise political parties to ensure compliance with this Act.

26 'How do I register a political party?' https://www.orpp.or.ke/index.php/2-uncategorised/21-frequently-asked-questions (accessed 4 September 2023).

27 Kenya National Bureau of Statistics (KNBS) *Quarterly Labour Force Report 2022* (2022) 3, https://www.knbs.or.ke/download/quarterly-labour-force-report-2022_quarter_4/ (accessed 4 September 2023).

28 KNBS (n 27) 8.

29 The sums further vary among different political parties. Eg, in 2017 the Jubilee Party charged Kshs 20 000 for the Member of County Assembly (MCA) while the Orange Democratic Movement (ODM) charged Kshs 25 000. ODM charged Kshs 500 000 for the governor's seat while the Jubilee Party charged Kshs 400 000. See J Ngetich 'Political parties collect Sh2 billion in nomination fees' *The Standard* 8 April 2017, https://www.standardmedia.co.ke/politics/article/2001235499/political-parties-collect-sh2-billion-in-nomination-fees (accessed 11 April 2022).

elections for parliamentary seats,[30] and these costs[31] rose even higher in the subsequent campaigns.[32]

However, despite the monetary challenges locking them out of running for public office, Kenyan youths have an ever-increasing attractiveness as potential voters for politicians. Unfortunately, their economic deficiencies make them susceptible to the manipulations inherent in 'Big Man' politics. Lederman traces the anthropological antecedents of the term 'Big Man' to early Melanesian society where it referred to male leaders that achieved political influence through public oratory, informal persuasion, and clever control of both private and public wealth exchange.[33] Salafia observes that 'Bigmanism' or 'Big Man syndrome' is broadly applied, first, to describe African post-colonial presidential systems of government and thereafter as a lens through which to interrogate African democracies.[34] In the Kenyan context it is characterised by the usurpation of power by the executive in general and the presidency in particular and follows the precedent set by President Jomo Kenyatta in its legitimisation through constitutional amendments.[35] This singular insulation of governmental power is subsequently extended to the President's inner circle who invariably are drawn from his own ethnic group.[36] This is in keeping with the Melanesian 'Big Man' antecedent, as

30 T Mboya *The cost of parliamentary politics in Kenya* (2020) 6, https://www.wfd.org/wp-content/uploads/2020/10/Cost-of-Parliamentary-Politics-in-Kenya.pdf (accessed12 April 2022).

31 The costs of a political campaign include party nomination fees; branded merchandise; media and advertising fees; campaign team salaries; mobilisation costs; and legal fees. See Mboya (n 30) 7.

32 Current estimates are that it costs a minimum of Kshs 20 million to run an effective campaign from the party nomination phase all the way to the actual elections. See Mboya (n 30) 9.

33 R Lederman 'The anthropology of the Big Man' in N Smelser & U Hanners (eds) *International encyclopedia of the social and behavioural sciences* (2000) 1162.

34 S Salafia 'The "Bigmanism" or the "Big Man syndrome" as an optical lens to understand African "democracies" – A "case study" in Zimbabwe' (2014), https://www.academia.edu/6025327/The_Bigmanism_or_the_Big_Man_Syndrome_As_an_Optical_Lens_to_Understand_African_Democracies_A_Case_Study_in_Zimbabwe_ (accessed 12 April 2022).

35 Immediately after independence in 1964 the Constitution of Kenya (Amendment) Act (28 of 1964) declared Kenya a republic and combined the powers and functions of the head of state with those of the head of government, vesting both in the presidency. Thereafter, The Constitution of Kenya (Amendment) (No 2) Act 38 of 1964 and the Constitution of Kenya (Amendment) Act 14 of 1965 removed all powers and functions from the regional assemblies and transferred them to parliament. Moreover, they repealed the provisions relating to regional taxation thereby starving the regional assemblies of local sources of revenue. See D Juma 'The normative foundations of constitution making in Kenya: The judiciary past, present and future' in C Murungi (ed) *Judiciary watch report, vol IX: Constitutional change, democratic transition and the role of the judiciary in government reform: Questions and lessons for Kenya* (2010) 220.

36 Jomo Kenyatta appointed his own relatives to cabinet positions, Daniel Moi's cabinet opened up to the wider Kalenjin community whereas Mwai Kibaki was insulated by the 'Mt Kenya Mafia'. See B Bwire 'How far is too far? The separation of powers doctrine and judicial review of legislative action in Kenya' unpublished PhD thesis, University of Nairobi, 2020 81, 88, 102.

observed by Lederman, where political organisation is further based on patrilineal descent.[37]

Based on the foregoing, the core thesis of this article is that Kenya's constitutionally-legitimised 'Big Man' political culture restricts youth political participation, beyond voting, while making them susceptible to manipulation by politicians. In exploring this thesis, the article's guiding research question is the following: Beyond voting, how has the Kenyan government enhanced or restricted direct youth political participation as a right provided for under article 25 of ICCPR and subsequently domesticated under the Kenyan Constitution? The modes of political participation examined in this context are forming a political party and running for public office. Contextually, the article interrogates the political regimes of Kenyatta, Moi, Kibaki and Uhuru and their use of constitutional amendments to crystallise power in the executive for critical analysis of the evolution of Kenya's 'Big Man' political culture in relation to youth political participation. It then applies the lessons learned from past and current regimes to inform recommendations on how the state can facilitate Kenyan youths to enjoy the right of political participation fully, effectively and equally as provided for under article 25 of ICCPR as domesticated under the Kenyan Constitution.

2 Conceptual framework

Financial resources are at the heart of political participation. This is in keeping with the socio-economic theory of political participation that basically holds that people with higher levels of education and income are more likely to directly participate in politics.[38] This is mainly due to the fact that a socio-economically disadvantaged citizen faces both social and financial obstacles hindering him or her as compared to a socio-economically advantaged citizen.[39] Moreover, direct forms of political participation often demand higher knowledge, time and resources.[40]

37 Patrilineal descent in this context refers to tracing kin exclusively through men. See L Ugyel 'How "place" shapes the public servant: Papua New Guinea's public administration within the contexts of "Big Man" and "Wantok" systems' in H Sullivan, H Dickinson & H Henderson (eds) *The Palgrave handbook of the public servant* (2020) 381.

38 S Verba, K Schlozman& H Brady *Voice and equality: Civic voluntarism in American politics* (1995).

39 Verba and others (n 38) 10.

40 D Stolle & M Hooghe 'Shifting inequalities: Patterns of exclusion and inclusion in emerging forms of political participation' (2011) 13 *European Societies* 119.

Barsegyan and others[41] in their 2023 study investigating the link between social origin and political participation found that the political advantage of having higher occupational status parents is stronger for higher educated children, hence reinforcing the political participation gap between children from different socio-economic backgrounds.[42] Barsegyan and others further postulate that parents with a high socio-economic status may be more convinced that direct political participation is a tool for societal change as well as for protecting their privileged position, and they tend to transfer these beliefs to their children. They contrast this with children of parents with a low socio-economic background whose less educated parents may lack political knowledge and interest.[43] Consequently, given that the focus of this article is on youth political participation, the socio-economic theory of political participation forms the first limb of its conceptual framework.

This conceptual framework also incorporates the political socialisation theory. Neundorf and Smets describe it as 'the process by which citizens crystallise political identities, values and behaviour that remain relatively persistent throughout later life'.[44] Political socialisation is what begets a country's political culture, which Pye defines as the sum of societal attitudes, beliefs and sentiments that form the underlying assumptions and rules governing behaviour in political systems.[45] Cho holds that 'socio-economic status variables merely provide the skills necessary for political activity in a suitable political context. Socialisation determines how these skills will be manifested.'[46] Therefore, whereas the socio-economic theory of political participation explains the key tools required, namely, education and income, it is the political socialisation theory that explains how these tools are utilised within any political context.

41 V Barsegyan, A Knigge & I Maas 'Social origin and political participation: Does education compensate for or reinforce family advantages and disadvantages?' (2023) *Acta Politica* 1.
42 As above.
43 As above.
44 A Neundorf & K Smets 'Political socialisation and the making of citizens' *Oxford handbooks online: Political science, political behaviour*, https://www.oxfordhandbooks.com/view/ 10.1093/oxfordhb/9780199935307.001.0001/oxfordhb-9780199935307-e-98 (accessed 12 April 2022).
45 L Morlino, D Berg-Schlosser & B Badie *Political science: A global perspective* (2017) 64-74.
46 WK Tam Cho 'Naturalisation, socialisation, participation: Immigrants, and (non-) voting' (1999) 61 *Journal of Politics* 1140-1155.

Family plays a key role in political socialisation and there tends to be a considerable overlap between parents' and children's political orientations.[47] Consequently, parents are crucial socialising agents for the development of adolescents' political preferences and behaviour and retain an enduring influence until later in life.[48] Van Ditmars, in her 2022 study investigating the intergenerational transmission of left/right ideological positions in two European multi-party systems,[49] Germany and Switzerland, found that when both parents have similar ideological leanings, their offspring usually identify with the same ideological block.[50] This is in contrast to parents that are of different ideological leaning, in which case intergenerational transmission becomes less obvious as their offspring are exposed to conflicting political cues and are more likely to be impacted by political socialisation forces outside the parental home.[51] Therefore, family plays a key role in the political socialisation of the youth and forms the basis for their political self-identification and the way in which they choose to engage in political participation. It is on this basis that the political socialisation theory forms the second limb of this article's conceptual framework.

Based on the foregoing, the article proposes a conceptual framework that embraces the notion that socio-economic background and political socialisation play a key role in the evolution and development of a country's political culture, which then determines when and how the youth access political spaces. Moreover, political culture as developed based on a youth's socio-economic background and political socialisation, influences that youth's political knowledge, interest and efficacy. Political efficacy refers to their perceptions on whether the youth's individual political actions can have an impact on the political process.[52] Ultimately, this conceptual framework holds that these three factors of political knowledge, interest and efficacy in turn determine the nature and extent of youth political participation in the context of their specific political culture. Subsequently, the article uses this conceptual framework to critically analyse the evolution of Kenya's constitutionally-legitimised 'Big Man' political culture in relation to youth political participation.

47 MM van Ditmars 'Political socialisation, political gender gaps and the intergenerational transmission of left-right ideology' (2023) 62 *European Journal of Political Research* 3.
48 As above.
49 As above.
50 Van Ditmars (n 47) 19.
51 Van Ditmars (n 47) 20.
52 A Campbell, G Gurin & W Miller *The voter decides* (1954) 187.

3 Evolution of Kenya's constitutionally-legitimised 'Big Man' political culture in relation to youth political participation

Kenya's journey towards creating an imperial presidency[53] commenced in 1964 with the first in what eventually became a series of constitutional amendments of which the primary objective was to eliminate institutional checks on the executive so as to strengthen it and centralise politics while nullifying human rights.[54] This first amendment,[55] by combining the powers of the head of state with those of the head of government and vesting both in the President, facilitated the gradual erosion of proper checks and balances between the three arms of government, resulting in the eventual distortion of the political structure to the point where both Parliament and the judiciary were subservient to the executive.[56] This ultimately created an imperial presidency, a term used to describe a presidency that is uncontrollable and has exceeded its constitutional limits.[57] A President in this mould qualifies to be classified as a 'Big Man' in the context of Bigmanism as earlier expounded in this article.[58] President Jomo Kenyatta thus became post-independence Kenya's first 'Big Man', and his use of constitutional amendments to consolidate power in the presidency laid the foundation for the evolution of Kenya's constitutionally-legitimised 'Big Man' political culture. Subsequent constitutional amendments under his government removed all powers and functions from the regional assemblies,[59] marking their end and the centralisation of power around the executive,[60] and the regression of the Kenyan state from a multi-party devolved system of government in 1963 to a *de facto* single party state by 1978 when he died.[61]

53 A term used to describe a presidency that is uncontrollable and has exceeded its constitutional limits. See A Schlessinger *The imperial presidency* (1973).
54 HWO Okoth-Ogendo 'Constitutions without constitutionalism: Reflections on an African paradox' in I Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991).
55 n 9.
56 M Akech 'Abuse of power and corruption in Kenya: Will the new Constitution enhance government accountability?' (2011) *Indiana Journal of Global Legal Studies* 378.
57 Schlessinger (n 53).
58 Salafia (n 34).
59 The second and third amendments; The Constitution of Kenya (Amendment) (No 2) Act 38 of 1964 and The Constitution of Kenya (Amendment) Act 14 of 1965.
60 Juma (n 35) 220.
61 G Murunga, D Okello & A Sjörgen 'Towards a new constitutional order in Kenya: An introduction' in G Murunga, D Okello & A Sjörgen (eds) *Kenya: The struggle for a new constitutional order* (2014) 4.

Additionally, Kenya's political socialisation under President Jomo Kenyatta was one of ethnicised Bigmanism that promoted ethnicity as a key factor in political mobilisation and sensitisation of voters.[62] As a consequence, Kenyatta's political appointments were similarly inclined to first reward his own Kikuyu ethnic elite.[63] As early as 1965, only two years after independence, Kenyatta was surrounded by an inner circle of predominantly Kikuyu political leaders and senior officers in the armed forces.[64] This was accompanied by acts of patronage that saw Kikuyus and their ethnic kin, the Meru and Embu communities, favoured in public appointments,[65] resulting in increasing discontent over what was perceived as Kikuyu privilege under Kenyatta.[66] Consequently, Kenyans were exposed to exclusionary ethnic-based narratives in their political and civic education, which then informed their political socialisation.

Moreover, direct political participation at this time was only possible through the President's party, the Kenya African National Union (KANU), which rose to dominance as the sole political party following the disbandment of the Kenya African Democratic Union (KADU) and the proscription of the Kenya People's Union (KPU) shortly after independence.[67] This resulted in limited opportunities for direct youth political participation in terms of either forming a political party or contesting for a parliamentary seat. Nyong'o[68] in his analysis of this period notes that the rigid presidential authoritarian system narrowed the avenues of political participation and encouraged political intrigues and plots among the ruling class.[69] On the other hand, legal recourse was curtailed given that the political structure was such that the courts were subverted and used to silence political dissent through detention without trial under two restrictive colonial era laws: the Public Order Act[70] and the Preservation of Public

62 H Fjelde & K Hoglund 'Ethnic politics and elite competition: The roots of electoral violence in Kenya' in M Kovacs & J Bjarnesen (eds) *Violence in African elections: Between democracy and Big Man politics* (2018) 28.
63 K Kanyinga 'Governance institutions and inequality' in Society for International Development (SID) *Readings on inequality in Kenya* (2007) 373.
64 D Branch *Kenya: Between hope and despair, 1963-2011* (2011) 46.
65 Such positions were in the armed forces, provincial administration, government ministries, departments, and agencies. See A Auma-Osolo *Why leaders fail and plunge the innocent into a sea of agonies: The danger of abnormal politics Vol 1* (2013) 167 168.
66 Branch (n 64) 76.
67 SD Mueller 'Government and opposition in Kenya: 1966-1969' (1984) 22 *Journal of Modern African Studies* 399.
68 P Anyang Nyongó 'State and society in Kenya: The disintegration of the nationalist coalitions and the rise of presidential authoritarianism 1963-78' (1986) 11 *Africa Development* 175.
69 Anyang Nyongó (n 68) 212.
70 Ch 56 of the Laws of Kenya. It came into force on 13 June 1950 and the government used it to prohibit public meetings and processions of a political nature as well as issue curfew orders.

Security Act.[71] The political detainees of this era included former parliamentarians and university lecturers, namely, among others, Professor Ngugi wa Thiongo, Koigi wa Wamwere, Martin Shikuku, Chelagat Mutai, and Wasonga Sijeyo who was the longest serving having been detained in 1969 and released in 1978 after Kenyatta's death.[72]

Upon President Jomo Kenyatta's death, his Vice President, Daniel arap Moi, succeeded him as President[73] after a succession crisis that began prior to Kenyatta's death, pitting Moi against ethnic loyalists under the umbrella of the Gikuyu, Embu and Meru Association (GEMA) who preferred Kenyatta's successor to be Kikuyu.[74] President Moi followed in the late President Jomo Kenyatta's footsteps and embraced a similar ethos of ethnicised Bigmanism while utilising constitutional amendments to further consolidate power. The first was to transform Kenya from a *de facto* to a *de jure* one-party state through the Constitution of Kenya (Amendment) Act 7 of 1982,[75] establishing KANU as the only political party in Kenya. Moreover, similar to President Jomo Kenyatta, Moi also had ethnic elite from his Kalenjin community dominate cabinet positions.[76] Moi further utilised constitutional amendments to weaken the judiciary in 1988 when Parliament passed amendments to sections 61, 62, 69, 72 and 106 of the old Constitution, which then vested the power of firing judges solely with the President, thereby removing their constitutional security of tenure.[77] This greatly undermined the judiciary's independence and made it subservient to the President. Hence, it could neither effectively check the excesses of the executive and legislative branches of government, nor defend the integrity of the old Constitution.[78]

In this context, just as during President Jomo Kenyatta's tenure and for similar reasons, there existed limited opportunities for direct youth political participation in terms of either forming a political party or contesting for a parliamentary seat. Nevertheless, the youth

71 Ch 57 of the Laws of Kenya. It came into force on 11 January 1960 and the government used it for 'the prevention and suppression of rebellion, mutiny, violence, intimidation, disorder and crime, and unlawful attempts and conspiracies to overthrow the government or the Constitution'.
72 MT Kaufman 'Kenya's political detainees freed' *The New York Times* 13 December 1978, https://www.nytimes.com/1978/12/13/archives/kenyas-political-detainees-freed.html (accessed 6 September 2023).
73 DPS Ahluwalia 'Political succession in Kenya: The transition from Kenyatta to Moi' (1985) 12 *The African Review: A Journal of African Politics* 1.
74 As above.
75 http://kenyalaw.org/kl/index.php?id=9631 (accessed 11 September 2023).
76 Branch (n 64) 373.
77 The Constitution of Kenya (Amendment) Act 4 of 1988, http://kenyalaw.org/kl/index.php?id=9631 (accessed 11 September 2023).
78 Bwire (n 36) 81, 88, 102.

formed a key contingent of those Kenyans who stood up to confront and call out the excesses of the Moi regime. Key among these were the seven radical youthful parliamentarians who were elected in the fourth Parliament of 1979 to 1983: Abuya Abuya Onyango Midika, Mwashengu Mwachofi, James Orengo, Lawrence Sifuna, Chibule wa Tsuma and Koigi wa Wamwere.[79] Their ascension to Parliament was largely built on the support of the student bodies of public universities led by the then powerful Student Organisation of Nairobi University (SONU) and the University Academic Staff Union (UASU).[80] In the absence of viable alternatives to KANU, both SONU and UASU became the vehicle of choice for youth political participation albeit in opposition to President Moi's government. Consequently, most of the youthful leaders who came up through SONU and UASU ended up being detained without trial, or exiled at best, or tortured and killed at worst.[81]

4 A new dawn: Moving towards dismantling Kenya's constitutionally-legitimised 'Big Man' political culture and facilitating youth political participation

By 1992 President Moi had all key institutions, Parliament, the judiciary, security services, public services and provincial administration, firmly under his control to the extent that they were reduced to instruments of authoritarian domination.[82] However, the dawn of the 1990s also witnessed the winds of change in terms of the introduction of multi-party democracy on the African continent, and Kenya was no exception.[83] Consequently, President Moi repealed section 2A of the Constitution, through the Constitution of Kenya (Amendment) Act 12 of 1991, thereby converting Kenya to a multi-party state.[84] However, President Moi would still go on to win both the subsequent 1992 and 1997 elections, hence serving the maximum two terms as President provided for under section 9(2) of the old Constitution.[85] Both elections are also notable for being the

79 C Osanya 'Time Orengo and Njonjo traded insults in parliament', https://www.kenyans.co.ke/news/44762-time-orengo-and-njonjo-traded-insults-parliament (accessed 11 September 2023).
80 JM Klopp & JR Orina 'University crisis, student activism, and the contemporary struggle for democracy in Kenya' (2002) 45 *African Studies Review* 43-76.
81 Friedrich Ebert Stiftung *We lived to tell: The Nyayo house story* (2003), https://books.google.nl/books/about/We_Lived_to_Tell_the_Nyayo_House_Story.html?id=5DAFAQAAIAAJ&redir_esc=y (accessed 11 September 2023).
82 Anyang Nyongó (n 68) 174.
83 PO Nyingúro 'The external sources of Kenya's democratisation process' (1997) 25 *Journal of Political Science* 5.
84 http://kenyalaw.org/kl/index.php?id=9631 (accessed 11 September 2023).
85 http://kenyalaw.org/kl/index.php?id=398 (accessed 11 September 2023).

first time the old Constitution[86] allowed the results of a presidential election to be challenged in Kenyan courts. This was done through *Kenneth Stanley Njindo Matiba v Daniel Toroitich arap Moi*[87] in 1992 and *Kibaki v Moi & 2 Others (No 2)* in 1997.[88]

In 2002 Kibaki replaced Moi and effected a regime change when the National Alliance of Rainbow Coalition (NARC)[89] beat KANU and ascended to power on a promise of democratisation and constitutional change.[90] NARC comprised two main political parties, both of which were conglomerations of smaller parties.[91] However, underlying these parties was the concept of ethnic-based political mobilisation of supporters, which persisted despite the change in political socialisation in Kenya from authoritarianism to democratisation. Nying'uro in his analysis of Kenya's transition towards democracy in 1992 notes that despite democratisation, the Kenyan opposition parties continued to be polarised along ethnic and personality lines.[92] Consequently, the NARC coalition, thereafter, gradually disintegrated owing to disagreements among partners on how to share power based on a pre-election memorandum of understanding.[93] Similarly, the promise of constitutional change in 100 days of assuming office did not materialise, and Kibaki continued to rule under the old Constitution that he inherited from the previous regimes, which concentrated power in the presidency.[94] Subsequently, Kibaki and his inner circle, some of whom were part of the Kenyatta era Kikuyu elite,[95] christened 'the Mt Kenya Mafia', reconstituted political power and privilege within the executive in

86 Sec 10, http://kenyalaw.org/kl/index.php?id=398 (accessed 11 September 2023).
87 (1994) eKLR.
88 (2008) KLR (EP) 308.
89 It comprised two main political parties both of which were conglomerations of smaller parties, the National Alliance Party of Kenya (NAK) and the Rainbow Coalition led by Raila Odinga's Liberal Democratic Party of Kenya (LDP). See D Kadima & F Owuor 'The National Rainbow Coalition: Achievements and challenges of building and sustaining a broad-based political party coalition in Kenya', https://www.eisa.org/pdf/kadima2006coalitions6.pdf (accessed 12 April 2022).
90 Murunga and others (n 61) 1.
91 NARC (n 89).
92 Nyingúro (n 83) 29.
93 The pre-election agreement was that they would share power on a 50:50 basis. Kibaki ignored it and since it did not have a constitutional or legislative anchor, it was easily discarded leading to a fall-out between the constituent NARC partners led by Raila Odinga. See S Kwatemba, 'Everything is possible without Moi': Kenya's 2002 abortive transition and 2007 post-election violence', https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2205849 (accessed 12 April 2022).
94 E Njoki Wamai, ''Mediating Kenya's post-election violence: From a peace-making to a constitutional moment' in Murunga and others (n 61) 69.
95 These included Njenga Karume, George Muhoho, Charles Njonjo, Matere Keriri, Joe Wanjui, Peter Kanyago, SK Macharia, Nat Kang'ethe, and Francis Muthaura amongst others. See: G Murunga & S Nasong'o 'Bent on self-destruction: the Kibaki regime in Kenya' (2006) 24, 1 *Journal of Contemporary African Studies* 8.

much the same way Kenyatta and Moi had.[96] Godwin Murunga notes that once Kibaki was sworn into office, the old Kikuyu political elite regrouped around him and vocally supported the Kikuyu's right to power[97] while procrastinating constitutional reform since it was in their best interests to retain the Moi era power structure.[98]

However, despite its shortcomings, the Kibaki regime will be remembered for nursing the birth of Kenya's new Constitution that, among other things, sought to provide for and safeguard youth political participation. The new Constitution is commonly referred to as the 2010 Constitution[99] as it was promulgated on 27 August 2010 after a referendum that saw it endorsed by 68,85 per cent of Kenyans.[100] The youth are recognised as a vulnerable group under article 21(3) of the 2010 Constitution,[101] for whom all state organs and all public officers have a duty to address their needs; whereas article 27(4) recognises age as a basis on which discrimination is prohibited. Moreover, article 55(b) specifically provides that 'the state shall take measures, including affirmative action programmes, to ensure that the youth have opportunities to associate, be represented and participate in political, social, economic and other spheres of life'. In addition, article 98(1)(c) holds that the composition of the senate must include 'two members, being one man and one woman, representing the youth'. This is the foundation of the constitutional and legal framework facilitating youth political participation under the 2010 Constitution.

5 A new dawn delayed: Challenges in implementation of the 2010 Constitution and elimination of Bigmanism that hinders increased direct youth political participation in Kenya

Despite the constitutional and legal framework facilitating youth political participation under the 2010 Constitution, Kenyan youths

96 G Murunga 'Elite compromises and the content of the 2010 Constitution' in Murunga and others (n 61) 156.

97 Safina Party leader Paul Muite who had campaigned against NARC did so at a public rally in Kiambu after he had reconciled with Kibaki's inner circle and was subsequently appointed chairman of the parliamentary select committee. See GR Murunga & SW Nasong'o *Kenya: The struggle for democracy* (2007), https://journals.openedition.org/etudesafricaines/14073 (accessed 11 September 2023).

98 G Murunga 'Elite compromises and the content of the 2010 Constitution' in Murunga and others (n 61) 157.

99 Constitution of Kenya, 2010 (n 7).

100 As above.

101 As above. Other vulnerable groups recognised under article 21(3) are women, older members of society, persons with disabilities, children, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.

continue to face serious socio-economic and cultural challenges that hinder their full participation. A 2018 study by the Carter Centre found that government bodies mandated with ensuring full compliance with these progressive constitutional obligations to protect and advance youth and women's political participation, including Parliament and regulatory bodies, had failed to ensure that these were fully achieved.[102] Moreover, respondents in the study identified the lack of sufficient financial resources and the capital intensive nature of elections[103] as a major barrier 'in a context where youth and women suffer from high unemployment and often lack property ownership to secure loans'.[104] Furthermore, Kenya's political socialisation continues to be one of ethnicised political mobilisation and the parties are polarised along ethnic and personality lines,[105] which invariably results in the youth having very limited roles in political party leadership structures, and consequently lack the necessary institutional support critical to success when running as candidates in the elections.[106]

Affirmative action policies such as quotas are a viable means of redressing the historical exclusion of Kenyan youth from opportunities to independently either form political parties or run for public office as seen above. However, although the 2010 Constitution recognises the use of affirmative action to redress the historical exclusion of individuals and groups, including the youth,[107] its utilisation to enhance youth political participation is restricted to their nomination to Parliament and the county assemblies.[108] Nomination remains a challenge for most Kenyan youths that do not have the socio-economic status linking them to the requisite political networks.[109] Moreover, it does not solve the problem of the prohibitive costs of registering a political party or campaigning for public office. Also, there is the real danger of nominees becoming proxies due to perceived indebtedness to their nominators.[110]

102 The Carter Centre 'Youth and women's consultations on political participation in Kenya: Findings and recommendations' (2018), https://www.cartercenter.org/news/pr/kenya-113018.html (accessed 11 September 2023).
103 The Carter Centre (n 102) 11. Some of the expenses identified by study respondents include funds to pay party membership fees, secure their party's nomination, and pay IEBC nomination fees. Other expenses include funds for campaign logistics including transport, advertisements, organisation of rallies, payment of campaign staff and party agents, as well as funds to file election petitions.
104 The Carter Centre (n 102) 11.
105 Nyingúro (n 83) 29.
106 The Carter Centre (n 102) 12.
107 Art 27(6) Constitution of Kenya (2010).
108 See arts 97(1)(c), 98(1)(c) and 177(1)(c).
109 One need already be on the radar of the political party Big Men.
110 S Owino and I Oruko 'Kenya: Why it's no walk in the park for nominated MPs' *All Africa* 10 September 2020, https://allafrica.com/stories/202009110054.html

Additionally, ethnicised Bigmanism persists despite the promulgation of the 2010 Constitution, albeit allowing for the sharing of power within the executive between the President and his deputy since under article 130(1) the executive is composed of the President, the Deputy-President and the rest of the cabinet.[111] Furthermore, unlike the old Constitution where the President appointed the Vice-President from among the ministers who in turn were elected members of the National Assembly,[112] the 2010 Constitution provides that they run for election on a joint ticket and, therefore, under article 148(1) each presidential candidate is required to nominate a person who is also qualified for election as President, as a candidate for Deputy-President.[113] With ethnicity being a key factor in political mobilisation and sensitisation of voters,[114] the joint ticket tends to be one that unites the dominant ethnic communities in Kenya. This was witnessed during the 2013 elections, the first to be held under the 2010 Constitution, when President Uhuru Kenyatta (Kikuyu) and his running mate, William Ruto (Kalenjin), won the presidential elections on the strength of majority votes from their Kikuyu and Kalenjin communities.[115]

Their 2013 candidacy came on the back of their facing charges for crimes against humanity at the International Criminal Court (ICC) for their alleged roles in the 2007 post-election violence.[116] Their indictments were a centrepiece of the political campaigns. This was the common bond that forged the alliance between two historically-antagonistic majority ethnic groups.[117] However, this alliance experienced fractures in the aftermath of the disputed 2017 elections in which UhuRuto[118] was declared the winner with 54,3 per

(accessed 13 April 2022); M Juniour 'Jubilee expels six nominated senators' *The Standard* 8 February 2021, https://www.standardmedia.co.ke/politics/article/2001402742/jubilee-expels-six-nominated-senators (accessed 13 April 2022).

111 http://kenyalaw.org/kl/index.php?id=398 (accessed 12 September 2023).

112 Sec15(2) Constitution of Kenya, 2010 (n 7).

113 http://kenyalaw.org/kl/index.php?id=398 (accessed 12 September 2023).

114 Fjelde & Hoglund (n 62).

115 Their joint ticket fronted Uhuru Kenyatta as President and William Ruto as his deputy and were able to secure 50,03% of the vote, narrowly beating Raila Odinga's Orange Democratic Movement (ODM) by 4 099 votes. See G Lynch 'Electing the alliance of the accused: The success of the Jubilee Alliance in Kenya's Rift Valley' (2014) 8 *Journal of Eastern African Studies* 93-114.

116 Their candidature was challenged in court on this ground, but the court held, among others, that both Kenyatta and Ruto were yet to be found guilty of a criminal offence by any court of competent jurisdiction and that therefore they enjoyed the presumption of innocence provided to every Kenyan citizen under art 50(2)(a) of the Constitution, hence barring them from contesting in the elections would be a violation of their political rights under art 38. See *International Centre for Policy and Conflict & 5 Others v The Hon Attorney General & 4 Others* (2013) eKLR.

117 Lynch (n 115) 93-114.

118 A mash-up of their names, Uhuru and Ruto, which was deployed as a very effective campaign slogan. See D Waweru 'Kenya: The rise of the "Uhuruto"'

cent of the vote against Raila Odinga (Luo) and Kalonzo Musyoka's (Kamba)'s 44,7 per cent.[119] Raila and Kalonzo subsequently challenged the results by filing a petition in the Supreme Court as provided for under article 140(1) of the 2010 Constitution.[120] In the petition, *Presidential Election Petition 1 of 2017*,[121] the Supreme Court declared the presidential election invalid, null and void on the grounds of a number of identified irregularities and illegalities, which was notable for being the first time in Africa that a court nullified the election of an incumbent president.[122] The Supreme Court subsequently ordered the Independent Electoral and Boundaries Commission (IEBC) to conduct a fresh election within 60 days as provided for under article 140(3).[123] However, Odinga withdrew from the rerun citing a lack of real electoral reform and level playing field, and calling for his supporters to boycott the polls. As a result Uhuru won with 98,27 per cent of the vote.[124]

Uhuru and Ruto had a major falling-out in the wake of their 2017 re-election when Uhuru entered into a 'handshake' alliance[125] with their former rival, Raila Odinga, thereby introducing a third, although informal, centre of power within the executive. Uhuru and Raila's handshake alliance subsequently made an unsuccessful attempt to rally Kenyans to agree to constitutional amendments proposed under the Building Bridges Initiative (BBI) that would, among other things, 'do away with the "winner takes all" model of presidency and establish a more inclusive political system'.[126] Departing from prior practice since independence, this would have seen the Constitution being used to dismantle Kenya's 'Big Man' political culture as opposed to legitimising it. Nevertheless, the BBI suffered a slow but resounding defeat when Ruto fiercely opposed it on the grounds, among others, that expansion of the executive was not a solution

African Arguments 5 December 2012, https://africanarguments.org/2012/12/kenya-the-rise-of-the-uhuruto-by-daniel-waweru/ (accessed 11 April 2022).

119 International Foundation for Electoral Systems (IFES) 'Elections in Kenya: 2017 rerun presidential elections', https://www.ifes.org/tools-resources/faqs/elections-kenya-2017-rerun-presidential-elections (accessed 12 September 2023).

120 http://kenyalaw.org/kl/index.php?id=398 (accessed 12 September 2023).

121 (2017) eKLR, http://kenyalaw.org/caselaw/cases/view/140716/ (accessed 12 September 2023).

122 IFES (n 119).

123 http://kenyalaw.org/kl/index.php?id=398 (accessed 12 September 2023).

124 The Carter Centre 'Kenya 2017 general and presidential elections: Final report' (2018), https://www.cartercenter.org/news/pr/kenya-030718.html (accessed 12 September 2023).

125 *BBC News* 'Letter from Africa: The handshake that left millions of Kenyans confused', https://www.bbc.com/news/world-africa-43656971 (accessed 11 April 2022).

126 The Building Bridges Taskforce 'Highlights of the report of the building bridges initiative taskforce', https://dc.sourceafrica.net/documents/120776-Highlights-of-the-Report-of-the-Building-Bridges.html (accessed 12 September 2023).

to the 'winner takes all' problem since appointees to the proposed offices of the prime minister and two deputes would all be appointed by the President.[127]

Ruto subsequently made his opposition to the BBI one of the key focus areas of his campaign for President in the run-up to the 2022 elections, and he chose Rigathi Gachagua (Kikuyu) as his running mate in a move to consolidate and seek to retain control of the critical Kikuyu and Kalenjin voting blocs while seeking to establish alliances with other ethnic groups across Kenya.[128] As earlier noted, ethnicised Bigmanism persists despite the promulgation of the 2010 Constitution, with the slight difference that we now have 'Big Man' alliances based on ethnic groups uniting to share executive power. On this note, Ruto and Rigathi's Kenya Kwanza Alliance won the 2022 presidential elections with 50,5 per cent of the vote against Raila Odinga (Luo) and Martha Karua's (Kikuyu) Azimio la Umoja-One Kenya Alliance which garnered 48,8 per cent. It should be noted that Kikuyu candidates appeared as running mates in both alliances in these elections, partly because the incumbent President Uhuru Kenyatta (Kikuyu) chose to back Raila Odinga, his partner in the 'handshake alliance' that pushed for the BBI, at the expense of his Deputy, William Ruto.[129]

6 What now? Current status of direct youth political participation in Kenya and possible ways forward

Currently, the average Kenyan youth who does not have the socio-economic status to access vast financial resources still cannot afford to either independently form a political party or run a comprehensive political campaign that is essential when vying for public office.[130] The role of money in Kenyan politics cannot be gainsaid, and it is known to have a direct bearing on two key elements of electoral

127 J Otieno 'DP Ruto: My case against BBI report' *The Star* 27 October 2020, https://www.the-star.co.ke/news/2020-10-27-dp-ruto-my-case-against-bbi-report/ (accessed 12 September 2023).

128 Recently when Uhuru perceived that Ruto was making inroads into his Kikuyu strongholds in opposing the Building Bridges Initiative (BBI) being backed by him and Raila, he went on the offensive and addressed them to reassure them and reassert his control on vernacular radio. See O Mathenge 'Uhuru rallies Kikuyu nation behind BBI, dismisses critics', https://www.the-star.co.ke/news/2021-01-18-uhuru-rallies-kikuyu-nation-behind-bbi-dismisses-critics/ (accessed 11 April 2022).

129 O K'Onyango 'How Uhuru Kenyatta ditched buddy William Ruto and turned to "enemy" Raila Odinga' *The East African* 30 July 2022, https://www.theeastafrican.co.ke/tea/news/east-africa/how-uhuru-kenyatta-ditched-buddy-william-ruto-and-turned-to-enemy-raila-odinga-3897204 (accessed 12 September 2023).

130 See earlier discussions on the costs of registering a political party in Kenya and running a successful campaign from the nomination phase up to the actual general elections.

democracy, namely, popular participation and fair contestation.[131] Without money, Kenyan youths cannot easily run for public office in a field skewed in favour of those who have a bigger purse since they are better able to sponsor and manage their election campaigns. As Fawole rightly observes, a lack of finances hinders the survival of political parties whereas those with power and money can dictate terms.[132]

A good example is the 2013 general election which went down as the most expensive in Kenya's history,[133] with the Jubilee Alliance being the biggest spender and throwing down approximately Kshs 40,66 million on media alone, as compared to its closest rival, CORD, which spent Kshs 23,29 million.[134] Jubilee won. In this context, the only way in which the average Kenyan youth can participate is through the backing of generous financial sponsors, in which case they would be indebted to them and, therefore, susceptible to ending up as a proxy. Youthful mavericks that attempt to do so independently, such as Boniface Mwangi,[135] only succeed in exciting the masses initially. However, this excitement soon fizzles out as the campaigns gain momentum and voters get sucked in by the 'Big Men' leaving the likes of Mwangi without a win at the ballot.[136] In Mwangi's case he lost to an equally youthful Charles Njagua[137] who was in the Jubilee behemoth.

Political parties are the primary vehicles for political mobilisation and organisation.[138] Therefore, they must be prodded to actively recruit and involve the youth in party affairs as well as promote their candidatures and provide the necessary financial resources required

131 L Shulika, W Muna & S Mutula 'Monetary clout and electoral politics in Kenya: The 1992 to 2013 presidential elections in focus' (2014) 13 *Journal of African Elections* 197, https://www.eisa.org/pdf/JAE13.2Shulika.pdf (accessed 13 April 2022).

132 A Fawole 'Voting without choosing: Interrogating the crisis of electoral democracy in Nigeria' in T Lumumba-Kasongo (ed) *Liberal democracy and its critics in Africa: Political dysfunction and the struggle for social progress* (2005) 160.

133 Shulika and others (n 131) 211.

134 As above.

135 A youthful activist who has consistently campaigned against the Jubilee regime on an anti-corruption platform. In 2017 he formed the Ukweli Party on which he vied for the Starehe constituency seat in Nairobi County. He lost to Jubilee's Charles Njagua. See C Gaffey 'The most popular activist in Kenya has conceded defeat in the election, and people are mourning' *Newsweek* 8 September 2017, https://www.newsweek.com/kenya-elections-corruption-kenya-boniface-mwangi-648382 (accessed 13 April 2022).

136 Gaffey (n 135).

137 He had made a career as a popular Kenyan hip hop musician. See 'Kenyan musician Jaguar wins Starehe parliamentary seat' *All Africa*, https://allafrica.com/view/group/main/main/id/00054432.html (accessed 13 April 2022).

138 D Omondi 'The role of political parties in promoting women's political participation' in J Biegon (ed) *Gender equality and political processes in Kenya* (2016) 119.

to run for public office. This will help the average Kenyan youth overcome the obstacle of the high cost of politics that otherwise locks them out of running political parties and vying for public office. This is best achieved through a combination of legislated and voluntary quotas. In the instances where political parties have actively recruited and involved youth in party affairs and given them the institutional, structural and financial support to vie for seats in the elections, the beneficiaries have done quite well. Key examples include Johnson Sakaja and Edwin Sifuna. In 2013 Johnson Sakaja was appointed Chairperson of the National Alliance Party (TNA) at the age of 26. He was subsequently nominated to Parliament at the age of 27 and thereafter he vied for and was elected senator of Nairobi county in the 2017 elections at the age of 32.[139] Building on this momentum of successes, he vied for the position of governor of Nairobi county in the 2022 elections and won.[140] Similarly, in 2018, Edwin Sifuna was appointed secretary-general of the leading opposition party, the Orange Democratic Movement (ODM), at the age of 32.[141] He subsequently vied for the position of senator of Nairobi county in the 2022 elections and won.[142]

Article 100(c) of the 2010 Constitution[143] allows Parliament to enact legislation to enhance youth representation in Parliament. Hence, Parliament should enact legislated quotas prescribing that a minimum number of slots be reserved for the youth in various governance bodies at the village, division, district, ward, sub-county, county and national levels. The government can then implement these legislative quotas by law in the administrative units, whereas political parties can implement voluntary quotas to ensure youth representation at all these levels within their party structures. The aim is substantive representation and, hence, political parties should facilitate their full and active participation in the party's decision making and activities. This would consequently enable them to ascend to top party leadership positions, and subsequently to public office.

139 http://sakaja.co.ke/sakaja-johnson-about/ (accessed 13 April 2022).
140 M Kinyanjui 'Sakaja declared winner in Nairobi Governor race' *The Star* 14 August 2022, https://www.the-star.co.ke/news/realtime/2022-08-14-sakaja-declared-winner-in-nairobi-governor-race/ (accessed 12 September 2023).
141 A Odenyo 'ODM picks lawyer Sifuna as secretary general, replaces Ababu Namwamba' *The Standard*, https://www.standardmedia.co.ke/article/2001270886/lawyer-sifuna-is-new-odm-secretary-general (accessed 12 September 2023).
142 D Musau 'Edwin Sifuna floors Bishop Wanjiru to win Nairobi senator seat', https://www.citizen.digital/news/edwin-sifuna-is-nairobi-senator-elect-n303889 (accessed 12 September 2023).
143 http://kenyalaw.org/kl/index.php?id=398 (accessed 12 September 2023).

Moreover, the government bodies mandated with ensuring full compliance with the 2010 Constitution's progressive obligations to protect and advance youth political participation, including Parliament and regulatory bodies, should be allocated sufficient resources to fulfil their obligations. These include the office of the Registrar of Political Parties whose mandate it is to monitor, regulate and enforce compliance with the Political Parties Act provisions related to youth political participation; the relevant independent commissions responsible for electoral civic education and public awareness and sensitisation such as the Independent Electoral and Boundaries Commission; the National Gender and Equality Commission; the Kenya National Commission on Human Rights; and all the civil society organisations working on electoral and voter rights in Kenya.

The youth must also be factored into any and all solutions being considered to resolve the 'winner take all' problem that is a result of Kenya's 'Big Man' political culture. Similar to the quota for youth representation in the composition of the senate under the 2010 Constitution, the same quota ought to be established for representation in the executive, particularly the cabinet. This will in some way ensure that the youth perspective is tabled by youths on behalf of the youth. It would also help in terms of providing role models for other youths that they too can compete for the highest elective and appointive positions in Kenya regardless of their socio-economic background.

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The prospects of litigation to secure maternal health in Nigeria: Does *SERAP v Attorney-General Lagos* have any value?

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Summary: *Blood transfusions play a crucial role in addressing obstetric complications such as post-partum haemorrhage and anaemia that contribute to maternal deaths. The right to health guaranteed by numerous international human rights instruments, national constitutions and legislation obligates governments to ensure that women have access to interventions to prevent maternal mortality. In 2020 a health policy in Lagos State, Nigeria, providing that, in the event that patients are likely to need a blood transfusion, such as pregnant women, spouses and relatives are required to donate blood as a condition for accessing maternity and health services in government-run health facilities, was the subject of a High Court ruling. The judgment declared the policy to be a breach of some human rights guaranteed by the Nigerian Constitution, legislation and international instruments that the country had ratified. Additionally, the judge noted that the policy contributed to maternal deaths. Consequent to the above, this article explores the contribution of human rights litigation and the ensuing verdicts to the protection of maternal health globally, and in light of these evaluates the value of the judgment in particular. A few national and international cases involving other countries that depict the strides that have been made*

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in the use of human rights litigation to protect maternal health are presented to enable an appreciation of the extent to which human rights litigation has been used to support maternal mortality reduction efforts. A critical appraisal of the Lagos State court's decision with a view to determining its potential to contribute to maternal mortality reduction efforts in Nigeria and elsewhere is then embarked upon. The finding is that despite certain flaws identified in the judgment, it makes a valuable contribution to the protection of maternal health and, by extension, the reduction of maternal mortality in Nigeria.

Key words: *maternal health; Nigeria; compulsory blood donation; human rights litigation*

1 Introduction

The description of maternal mortality as a challenge for the twenty-first century[1] is not due to its novelty but is based on the consensus that the problem has lasted for too long. Despite significant progress having been made in the last decade,[2] the present figures nonetheless are daunting. In 2017 the maternal death figure was estimated as being between 279 000 and 340 000, besides thousands of unrecorded maternal deaths.[3] Eighty-six per cent of those deaths occurred in Southern Asia and sub-Saharan Africa. In the countries' lead is Nigeria, the focus of this article, which contributed 23 per cent of the global maternal death numbers.[4] The fact that an estimated 67 000 of these deaths took place in only one country[5] at a time when insignificant numbers are being recorded in developed countries is perplexing. This also means that hundreds of women are being lost daily due to an ostensibly avoidable cause.

1 WHO 'Reducing maternal mortality: A challenge for the 21st century' 9 March 2000, Microsoft Word - RC50.TD1E Reducing maternal mortality.doc (who.int) (accessed 15 August 2022).

2 There was a 44% reduction between 1992 and 2015. See WHO 'Trends in maternal mortality 1990 – 2015' Estimates by WHO, UNICEF, UNFPA, World Bank Group and the United Nations Population Division, 9789241565141_eng (1).pdf (who.int) (accessed 15 August 2022).

3 It is common knowledge that MM ratios are far from accurate. Reasons for this include countries with inefficient record taking, deliberate measures by families and communities to hide deaths occurring due to certain causes, and so forth. See JR Bale, BJ Stoll & AO Lucas 'Introduction' in JR Bale, BJ Stoll & AO Lucas (eds) *Improving birth outcomes: Meeting the challenge in the developing world* (2003) 27, https://www.nap.edu/download/10841 (accessed 15 August 2022).

4 UNFPA 'Trends in maternal mortality: 2000 to 2017 Estimates by WHO, UNICEF, UNFPA, World Bank Group and the United Nations Population Division' 32, Trends in Maternal Mortality: 2000 to 2017 | UNFPA - United Nations Population Fund (accessed 15 August 2022).

5 As above.

Maternal mortality[6] refers to 'the death of a woman while pregnant or within 42 days of termination of pregnancy, irrespective of the duration and site of the pregnancy, from any cause related to or aggravated by the pregnancy or its management but not from unintentional or incidental causes'.[7] Alongside this definition provided by the World Health Organisation (WHO), two categories of causes – direct and indirect – were also identified. The direct causes are medical complications whilst non-direct causes predispose or increase the chances of a woman dying from a maternal cause.[8] An obvious understanding of the definition indicates that pregnancy must be a direct or contributing cause of death. However, it also states that the cause must be intentional and non-secondary. While what is meant by 'unintentional' is not clear, the idea of excluding secondary causes may be contentious and the classification fuels that contention by only providing for medical complications as both direct and indirect causes. It is argued that socio-economic factors and other determinants such as illiteracy, inadequate nutrition, child marriage, teenage pregnancy, and a lack of access to safe abortion services are indirect causes.[9] These lead to death by placing a woman in a position where she can develop complications or by actively preventing her from receiving the necessary maternal health care to prevent death arising from complications.[10] Indirect causes are demonstrated by evidence that establishes that the woman would not have died (or would not have had the medical complication) 'but for' those factors. In criminal law 'but for' is a principle used to determine culpability in homicide cases and it asks the following

6 In respect of maternal health, another problem, more common and often discussed alongside MM, is maternal morbidity that refers to varying degrees of ill-health ranging from anaemia to debilitating conditions such as fistulas that result from complications of pregnancy or childbirth. WHO 'Maternal mortality' 19 September 2019, https://www.who.int/news-room/fact-sheets/detail/maternal-mortality (accessed 15 August 2022).

7 UNFPA (n 4) 8.

8 As above.

9 See also V Fillipi and others 'Levels and causes of maternal mortality and morbidity' in RE Black and others (eds) *Reproductive maternal, newborn and child health: Disease control priorities* (2016), Levels and Causes of Maternal Mortality and Morbidity - Reproductive, Maternal, Newborn, and Child Health - NCBI Bookshelf (nih.gov) (accessed 15 August 2022). Policies that prevent access to health facilities such as the Lagos State government's policy (discussed below), which is the subject of the decision discussed in this article, can also be described as some of the indirect factors.

10 According to Ronsmans and Graham, emerging evidence is leading to considerations to class the deaths of pregnant women or women within 42 days of delivery that were due to accidents, murders or suicides, and usually categorised as incidental to the pregnancy state, as maternal deaths. The evidence is that murders, for instance, through domestic violence may be a consequence of the pregnancy. C Ronsmans & WJ Graham 'Maternal mortality: Who, when, where and how?' (2006) 368 *The Lancet* 1195.

question: 'But for the defendant's action, would the death have occurred?'[11]

Post-partum haemorrhage, eclampsia and pre-eclampsia, obstructed labour, sepsis and unsafe abortion are the five leading medical causes of maternal mortality globally[12] and in Nigeria as well.[13] In Nigeria, however, the level of contribution of each factor varies from one geopolitical region to another. Nevertheless, haemorrhage or excessive loss of blood has been identified as a major cause of maternal mortality in all parts of the country.[14] According to the WHO, access to timely and high-quality health care during pregnancy, in childbirth and after childbirth, which is the right to health, is vital to reducing maternal mortality.[15] It also recommends delivery by skilled birth attendants and both essential and comprehensive emergency obstetric care that can address all five causes of maternal mortality above.[16] Comprehensive emergency obstetric care includes two additional services, namely, surgery (including administering anaesthetic) and blood transfusion.[17] The availability of safe blood and access to blood transfusions to save women from death arising from excessive blood loss, however, can be hampered by non-medical factors such as inadequate knowledge of blood donation.[18] Therefore, the WHO tasks countries with high maternal mortality ratios to embark on enlightenment campaigns to encourage voluntary donation of safe blood and blood products.[19] Adhering to strict rules with respect to choosing donors and better donor care are some strategies recommended to ensure the availability of safe blood.[20]

11 In support of this argument, it is trite that to determine culpability in homicide cases, a cause of death need not be direct. *R v Mitchell* (1983) 76 Cr App R 293 CA. The principle is also employed in the law of torts.
12 L Say 'Global causes of maternal deaths: A WHO systematic analysis' (2014) 2 *The Lancet* e323.
13 C Meh and others 'Levels and causes of maternal mortality in Northern and Southern Nigeria' (2019) 19 *BioMedCentral Pregnancy and Childbirth* 417, Levels and determinants of maternal mortality in northern and southern Nigeria (biomedcentral.com) (accessed 15 August 2022).
14 As above.
15 WHO (n 6).
16 AM Gulmezouglu and others 'Interventions to reduce maternal and child morbidity and mortality' in Black and others (n 9) 20, http://www.dcp-3.org/sites/default/files/chapters/V2C7Gulmezoglu_01.13.15.pdf (accessed 15 August 2022).
17 As above.
18 Y Dei Adomakoh and others 'Safe blood supply in sub-Saharan Africa: Challenges and opportunities' (2021) 8) *The Lancet Haematology* e770-776.
19 See WHO Media Centre 'Safe blood can save the lives of 800 mothers everyday' where the WHO regional director decried the practice of relying on families, https://www.who.int/mediacentre/news/releases/2014/world-blood-donor-day/en/ (accessed 15 August 2022).
20 Dei Adomakoh and others (n 18).

Many of the interventions to prevent maternal mortality resonate with maternal health obligations that governments either enshrined in national laws or constitutions or that are in ratified international instruments. Additionally, it has been observed that all countries have agreed to obligations on the right to health in one form or another.[21] This article focuses on the right to health because it includes the guarantee of sexual and reproductive health and rights (SRHR). Other relevant rights, such as the rights to equality and non-discrimination, are discussed in the context of, and as integral parts of the right to health.[22]

The right to health comprises entitlements and freedoms.[23] It also encompasses health care and the underlying determinants of health such as sanitation, nutrition, health information, and so forth.[24] The availability of functional facilities and personnel, financial and physical accessibility, acceptable care to ensure culture and medical ethics, and good quality health care and the underlying determinants are elements present in the guarantee of the right to health in all its forms.[25] As a component of the right to health, SRHR necessarily possesses the features of the right to health.[26] As a result, giving effect to SRHR in the context of maternal health[27] may be interpreted as the enjoyment of sexual and reproductive health freedoms and entitlements essential for women to have a safe pregnancy and/or childbirth. These entitlements that states have an obligation to provide include access to maternal health goods, services, facilities, information, adequate health facilities, skilled birth attendants, antenatal, birthing and post-birth services, access to essential drugs and blood products that are acceptable and of good quality.[28]

21 P Hunt 'Interpreting the international right to health in a rights-based approach to health' (2016) 18 *Health and Human Rights Journal* 109-130.

22 UN Committee on Economic, Social and Cultural Rights (ESCR Committee) General Comment 14, The Right to Highest Attainable Standard of Physical and Mental Health (article 12) of the Covenant 11 August 2000 E/C.12/2000/4 paras 18 & 19.

23 General Comment 14 (n 22) para 8.

24 General Comment 14 para 11.

25 General Comment 14 para 12. The realisation of the right to health is also dependent on other rights such as the right to equality, non-discrimination, education, access to information, food, privacy, life, human dignity, and so forth. General Comment 14 para 3.

26 See ESCR Committee General Comment 22 on the Right to Sexual and Reproductive Health (2016) E/C.12/GC/22 paras 5, 7, 12-21 (elements), 9, 10.

27 Maternal health, that is, the health of women during pregnancy, childbirth and post-childbirth, is a subset of sexual and reproductive health. WHO 'Maternal health overview', Maternal Health | WHO | Regional Office for Africa (accessed 15 August 2022).

28 See generally Committee on the Elimination of Discrimination Against Women General Recommendation 24 of the Convention (Women and Health), 1999 A/54/38/Rev.1 ch 1.

In 2020 a judgment was given by a High Court in Lagos State, Nigeria in respect of *SERAP v Attorney-General Lagos State,* a case that bordered largely on maternal health. The assessment of the value of that case to the protection of maternal health and or prevention of maternal mortality in Nigeria and possibly elsewhere is the objective of this article. This first part lays a foundation for the significance of the right to health in the prevention of maternal mortality. The second part discusses the legal basis for the enforcement of the right to health in Nigeria and cites some examples of attempts to enforce the right against the Nigerian government through litigation. The potential of litigation for the enforcement of the right to maternal health and its challenges as a human rights enforcement mechanism are discussed in the third part. This is followed by a discussion of the facts and the court's decision in the Lagos case. Against the background of the potential of litigation to protect the right to maternal health, the fifth part attempts a critical analysis of the judgment highlighting its strengths with respect to the realisation of the right to maternal health. The article concludes that the contribution of the decision to the protection of maternal health and, by extension, the reduction of maternal mortality in Nigeria, albeit affected by some shortcomings, nonetheless are of great value.

2 Basis for the enforcement of the right to health in Nigeria

In Nigeria, socio-economic rights do not enjoy a justiciable status in the Constitution.[29] These rights were enshrined as aspirational objectives, and issues related to their non-implementation are also precluded from being entertained by the courts.[30] However, it has been argued that this no longer is fatal to enforcing the obligation of the nation to provide adequate medical and healthcare facilities,[31] and that the enactment of the 2014 National Health Act[32] could make the full spectrum of the right to health available to Nigerians.[33] This is premised on the decision of the Supreme Court in *Attorney-General Ondo v Attorney-General Federation* where the application

29 The Constitution of the Federal Republic of Nigeria 1999, Cap C38, LFN 2004.

30 They are precluded by sec 6(6)(c) which provides that 'the judicial powers … shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or judicial decision is in conformity with fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution'.

31 As above. Sec 17(3)(d) provides for the provision of adequate medical and health facilities.

32 National Health Act 18 of 2014.

33 O Nnamuchi 'Securing the right to health in Nigeria under the framework of the National Health Act' (2018) 37 *Medicine and Law* 47.

of the Corrupt Practices and Other Related Offences Act in Ondo State was contested on the basis that it related to abolishing corrupt practices, an objective situated in the non-justiciable portion of the Constitution.[34] The Supreme Court held in that case that the otherwise non-justiciable parts of the Constitution could become justiciable if legislated upon by the National Assembly.

It, therefore, stands to reason that on the same basis, the right to the best attainable standard of physical and mental health guaranteed in the African Charter (Ratification and Enforcement) Act, Nigeria's domesticated version of the African Charter on Human and Peoples' Rights (African Charter) is justiciable.[35] This is so especially as the African Charter Act has been held by the Supreme Court as occupying a higher position than federal legislation being a domestic legislation with international flavour.[36] The African Charter Act makes it an obligation of the Nigerian government to take necessary measures to safeguard the health of its people and guarantee access to medical services when they are sick.[37] Article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol),[38] which has been ratified without reservations by Nigeria,[39] although not yet domesticated, deepens the African Charter's intention with respect to the protection of the health, and particularly the sexual and reproductive health, of women and girls. On the continental level, obligations in respect of the right to health in the Charter have been argued in various cases, including against Nigeria, before the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court). In these instances, the African Commission had always taken a broad approach, which has also been followed by the African Court.[40] The Commission recognised violations of the right to health through the denial of other human

34 *Attorney-General Ondo State v Attorney-General Federation* (2002) 9 NWLR (Pt 772) 222.
35 African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982); African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap LFN 2004, sec 16.
36 *Fawehinmi v Abacha* (2001) 51 WRN 59.
37 Arts 16(1) & (2).
38 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted by the African Union General Assembly in 2003 in Maputo CAB/LEG/66.6 (2003), entered into force 25 November 2005.
39 Ratified by Nigeria in December 2004.
40 Eg, the African Court took a broad approach in *Kwoyelo v Uganda*, by referring to the Commission's decisions in *International Pen & Others (on behalf of Saro Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) and *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998), both cases wherein the rights to medical care of prisoners were in contention but distinguishing these from *Kwoyelo*. See *Kwoyelo v Uganda* Communication 431/12, African Commission on Human and Peoples Rights 129 (2018).

rights upon which its realisation is dependent, and also confirmed violations that related to the denial of the right to access healthcare facilities and violations relating to the underlying determinants of health.[41] The African Commission has also adopted guidelines on the implementation of the economic, social and cultural rights in the African Charter,[42] and the interpretation of article 16 on the right to health in the guidelines is largely modelled after General Comment 14 of the UN Committee on Economic, Social and Cultural Rights (ESCR Committee).

Litigation in relation to government's obligation in respect of the right to health in Nigeria has been a mixed bag. In 2011 *Femi Falana v Attorney-General Fed & Others,*[43] a suit conceived on the basis of the provisions of the African Charter Act, was instituted by the applicant at the Federal High Court Lagos. It sought to enforce the right of the Nigerian populace to equal access to government resources in relation to receiving medical attention and a declaration that the government was in breach of its right to health obligations by not providing all Nigerians with adequate healthcare facilities and medical attention when sick, and also that the government breached the right to equality by covering the expenses of public officers who travel abroad for medical treatment.

The suit was thrown out on the basis of the earlier-mentioned section 6(6)(c) of the Constitution. Meanwhile, earlier in 2004, in *Festus Odafe & Others v Attorney-General Federation,*[44] the case of four awaiting trial prison inmates, who had tested HIV positive and were not provided with medical treatment, was brought before the Federal High Court sitting in Port Harcourt. It was argued by the applicants that the state's action was in breach of article 16 of the African Charter Act. Here the Court upheld the applicant's argument and ordered that the applicants, though in prison custody, be provided with the proper medical treatment commensurate to their illness. As must have been noticed, the two cases were heard by courts of equal jurisdiction, thus eliciting little effect as to precedence.

41 Durojaye describes the Commission's decisions as constituting two approaches, namely, the indivisibility approach and the underlying determinants approach. See E Durojaye 'The approaches of the African Commission to the right to health under the African Charter' (2013) 17 *Law, Democracy and Development* 393. See, eg, *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001); *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995); *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003.

42 African Commission Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the Charter, 2011 (Nairobi Principles).

43 Unreported Suit FHC/IKJ/CS/M59/10.

44 Unreported Suit FHC/PH/CS/680/2003.

In relation to maternal illnesses or death, apart from medical negligence cases, litigation to protect maternal health is not common in Nigeria. At the level of the regional African Court also, there has not been cases on maternal health, although a case alleging the violation of some reproductive rights by Mali has been brought before it.[45] However, in states around the world and at the international level, there has been litigation in respect of the right to maternal health. Some of these cases form part of the discussion below.

3 Evaluating the role of human rights litigation in the protection of maternal health

In the words of Dunn and others, human rights litigation is a specific form of litigation centred on promoting structural and systemic changes in order to bring about social transformation.[46] Herskoll's opinion that human rights litigation is a means by which the socially-disadvantaged and those who lack the forum to influence public policy can have their own say[47] corroborates that of Dunn and others. Human rights litigation also facilitates the interpretation or elaboration of the substantive content of the rights. Then, the government's actions or inactions are measured against the clarified standards of the right. This is because human rights are recognised at the international level in order to be enforced at the national level. Consequent to this, even international bodies look to states for guidance on how rights are to be interpreted because the national courts apply it to concrete cases.[48] Domestic court orders are also weightier than recommendations in the Concluding Observations issued by treaty-monitoring bodies that in their role do not pronounce

45 In the case, the African Court held that the Malian Persons and Family Code was in violation of the Protocol concerning the age of marriage of girls, forced marriage and some other traditional practices inimical to the rights of girls and women. See A*PDF & IHRDA V Rep of Mali* (046/2016) AfCHPR 15 (2018).

46 JT Dunn, K Lesyna & A Zaret 'The role of human rights litigation in improving access to reproductive health care and achieving reductions in maternal mortality' (2017) 17 *BioMedCentral Pregnancy and Childbirth.*

47 H Hershkoff 'Public interest litigation: Selected issues and examples', http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/PublicInterest Litigation per cent5B1 per cent5D.pdf cited in CC Ngang 'Socio-economic rights litigation: A potential strategy in the struggle for social justice in South Africa' LLM dissertation, University of the Free State, 2013 24 (on file with author).

48 V Leary 'The right to health in international human rights law' (1994) 1 *Health and Human Rights* 34. See also C Onyemelukwe 'Access to anti-retroviral drugs as a component of the right to health in international law: Examining the application of the right in Nigerian jurisprudence' (2007) 7 *African Human Rights Law Journal* 461. Eg, Durojaye recommended the reasonableness approach on economic, social and cultural rights, adopted by the South African Court, to the African Commission. E Durojaye 'Litigating the right to health in Africa', Litigating the Right to Health in Africa (southernafricalitigationcentre.org) (accessed 15 August 2022).

on or find state parties in violation of their obligations.[49] In summation, human rights litigation represents an opportunity for the state to be assessed in respect of the performance of the obligations they owe to their subjects, by an impartial arbiter and, where necessary, to be told what to do in order to fulfil those obligations. Achieving these objectives is made possible by a comprehensive consideration of the issues raised in the case and a recourse to the existing jurisprudence available on the issues derived from courts in the same country, other national courts, and even international human rights bodies.

These features of human rights litigation are the reasons why they are often used to secure government accountability in respect of socio-economic rights that which are not often guaranteed in legislation or constitutions or, when featured, are made non-justiciable. For these socio-economic rights issues, human rights litigation enables the creative use of civil and political rights (that almost always are justiciable) to achieve the vindication of socio-economic rights.[50] This is possible by virtue of the indivisibility, interconnectedness and interrelatedness of human rights.

In pursuing the realisation of the right to maternal health and reproductive health, litigation has proved fortuitous for attaining maternal health objectives, including the goal to protect women from preventable maternal mortality. In the human rights approach to maternal mortality, litigation can ensure the right to a remedy and is a tool for fostering accountability on duty bearers. According to Cook, it is a useful strategy for accelerating state action to reduce maternal mortality.[51] Before both national courts and international human rights bodies, litigation has been employed to hold nations liable for non-fulfilment of the right to maternal health and for preventable maternal deaths. The cases of *Josephine Majani v Attorney-General of Kenya & Others*[52] and *Laxmi Mandal Deen Dayal Harinagar Hospital & Others, Jaitun v Maternal Home MCD Jaypura & Others* (*Laxmi Mandal's* case)[53] will be briefly discussed as illustrations

49 CMV Lougarre 'Right to health using legal content through supranational monitoring' PhD thesis, University College London, 2016 100 (on file with author).

50 In *Paschim Banag,* justiciability of the right to health was derived from the right to life, and in *Mohini Jain* the Supreme Court held that the right to education flowed from the right to life; *Mohini Jain v State of Kanarkata* (1992) AIR 1858.

51 RJ Cook 'Human rights and maternal health: Exploring the effectiveness of the *Alyne* decision' (2013) 41 *Journal of Law, Medicine and Ethics* 103.

52 Petition 5 of 2014 of the High Court of Kenya sitting at Bungoma, http://kenyalaw.org/caselaw/cases/view/150953/ (accessed 15 August 2022). See also B Odallo, E Opondo & M Onyago 'Litigating to ensure access to quality maternal health care for women and girls in Kenya' (2018) 53 *Reproductive Health Matters* 123.

53 WP(C) 8853 of 2008.

of national cases. *Alyne Pimental v Brazil*[54] brought before the Committee of the Convention on Elimination of Discrimination Against Women (CEDAW Committee) will also be discussed in relation to international cases.

Although the focus is on the content and implication of the decisions, it is pertinent to give a brief background of the legal status of the right to health in the three countries in comparison to Nigeria. Brazil and Kenya have express constitutional provisions guaranteeing enforceable rights to health.[55] In contrast, but similar to Nigeria, India does not have a justiciable right to health in its Constitution, but the Indian Supreme Court blazed the trail by enforcing it through the constitutionally-justiciable right to life.[56] India is a common law jurisdiction and, therefore, relies on judicial precedent as a major source of law. Nigeria's situation is as explained above – the right is guaranteed by laws that derive their authority from the Constitution. The pivotal role of a constitution if the right to health is to be enjoyed has been emphasised by scholars[57] and the WHO,[58] but the present objective is to show that in all four countries, the right to health is legally guaranteed, although the means vary. It is also worth highlighting that the CEDAW decision involved a country where CEDAW is not domesticated. However, Brazil had ratified the Optional Protocol and did not object to the jurisdiction of the CEDAW Committee to receive communications against it.[59]

In *Josephine Majani* a pregnant woman was left to have her baby on the floor of a labour ward and was afterwards slapped and verbally abused for messing the floor up as a result of the childbirth. Her case was made available to the public via a video recording of the incident and was taken up by the Centre for Reproductive Rights, an international non-governmental organisation (NGO).[60] Through the case, the state of maternal health facilities in Kenya was revealed as

54 CEDAW/C/49/D/17/2008 (*Alyne* case).
55 Art 196 Constitution of Brazil 1988 and art 43 Constitution of the Republic of Kenya 2010 respectively.
56 *Paschim Banag Khet Samity v State of West Bengal* (1996) 4 SCC 37) (*Paschim Banag* case). Other countries have since followed. See the Bangladeshi case of *Dr Mohiuddin Farooque v Bangladesh & Others (No 1)* 48 DLR (1996).
57 R Roemer 'Right to healthcare' in HL Fuenzalida-Puelma & SS Connor (eds) *The right to health in the Americas* (1989) cited in V Leary 'The right to health in international human rights law' (1994) 1 *Health and Human Rights Journal* 34.
58 WHO *Right to health in the constitutions of member states of the World Health Organisation South East Asia regions* (2011), Right to health in the constitutions of member states.indd (who.int) (accessed 6 September 2023).
59 The situation is the same with Nigeria. Nigeria ratified CEDAW on 13 June 1985. It ratified the Protocol without a declaration on 22 November 2004. United Nations *United Nations treaty collection* 7 September 2023, UNTC (accessed 7 September 2023).
60 Centre for Reproductive Rights 'Kenya's High Court rules in favour of woman physically abused during delivery' 22 March 2018, https://reproductiverights.

there had been no spare bed in the labour room for the woman and the staff was overstretched. The abusive treatment usually meted out to maternity patients was also put on display. According to the Centre for Reproductive Rights, these lapses were not temporary failures of the system but evidence of a systemic culture of unethical practices and the government's non-fulfilment of SRHR of women and other health rights.[61] Giving judgment in favour of the woman, the judge found that the hospital, the county government and the health secretary had violated her right to health and dignity.

The consolidated Indian cases collectively referred to as *Laxmi Mandal* has reportedly encouraged the institution of many similar cases in the country. The case elicited a similar judgment as the *Majani* case, and the facts resonate with the experiences of Josephine Majani. Abusive care and denial of maternal health care and other SRHR facilities led to the death of Shanti Devi who had a pregnancy for which she received no help to prevent, and she later died following a complicated childbirth at home unattended by a skilled birth attendant. Fatema, the victim in the second case, was a sick and homeless pregnant woman who, upon being denied access to government-provided medical care, put to bed under a tree. While the unavailability of medical facilities may not be the crux of the matter here, access to the facilities was a problem. Notably, the guarantee of universal access to (maternal) healthcare facilities must not be prejudiced by any form of discrimination.[62] The Court found that the state's failure to properly implement its healthcare policies was a breach of its right to health obligations. This indicated that the right to health obligated the government to not only put health schemes and implementation mechanisms in place but to ensure that the implementation is monitored for effectiveness.

Alyne Pimental's case, also brought on behalf of the victim and her family by the Centre for Reproductive Rights and Advocacia Cidada Pelos Direitos Humanos, a Brazilian NGO, is celebrated as the first case in which a country was held to be in breach of their maternal health obligations by a treaty-monitoring body. The treaty-monitoring body, in this case, was the CEDAW Committee. In this case, a Brazilian woman of African descent, who was six months pregnant, had the delivery of her foetus induced as the baby had died in her womb. A dilation and curettage procedure was also performed. However, she

org/kenyas-high-court-rules-in-favor-of-woman-physically-abused-during-delivery/ (accessed 15 August 2022). See also Odallo and others (n 52).

61 Centre for Reproductive Rights (n 60).

62 General Recommendation 24 (n 28) para 11; General Comment 14 (n 22) paras 12(b), 18, 19, 21.

suffered complications, including haemorrhage, and needed to be transferred to a better-equipped hospital. The state hospital refused to allow the use of their ambulance. When she eventually arrived at the hospital eight hours later, she was not attended to for 21 hours, after which time she died. The CEDAW Committee found a violation of CEDAW based on the discrimination (based on her ethnicity) she suffered in accessing health facilities and health care and a violation of the right to life under the International Covenant on Civil and Political Rights (ICCPR).

The consequence of the *Majani* ruling was that she was issued a formal apology from the County Cabinet Secretary for Health, the hospital, and the nurses who perpetrated the abuse.[63] Monetary compensation of KSh 2,5 million was also awarded.[64] In the Indian cases, financial compensation was also awarded and red cards were given to the family of one of the victims to enable them to access health and nutrition services.[65] A reformation[66] of the health schemes was ordered and directions were given to stop access to health services being tied to states, to pay more attention to the volume of home child deliveries in order to inform the need for better services at the hospitals, plug gaps and clarify the provision of the schemes, to extend primary breadwinner status to include women who were responsible for family finances. *Alyne*'s case also led to the payment of reparations to her mother. A new maternal and reproductive health programme was developed in Brazil with the assistance of the technical follow-up team created to follow the implementation of the CEDAW decision. They monitored the implementation of the Country's Pact on the Reduction of Maternal Mortality and Morbidity and embarked on providing training and workshops for healthcare professionals in order to improve maternal health care service delivery.[67] As a result of the *Alyne* case, the maternal mortality ratio of Brazil was reported to have decreased (though not evenly spread

63 *Josephine Majani* case (n 52).
64 As above.
65 *Laxmi Mandal v Deen Dayal Harinagar Hospital & Others* WP(C) 8853 of 2008, ESCR-Net (accessed 15 August 2022).
66 It is instructive to note that India has the second-highest MM ratio in the world. A maternal death occurs every five minutes. The society itself is characterised by discrimination among social groups perpetuated by the caste system which, though outlawed, has continued to fuel discriminatory practices including, as in this case, access to social and economic infrastructure. *Laxmi Mandal* (n 65). Economically, India is a lower-middle-income country, meaning that it is not on the lowest rung of the ladder. There exists a vast amount of literature that describes the various efforts or initiatives the country develops to combat health inequalities and maternal mortality even in the rural areas. See Dunn and others (n 46).
67 A Yamin, B Galliz & S Valongueiro 'Implementing international human rights recommendations to improve obstetric care in Brazil' (2018) 143 *International Journal of Gynecology and Obstetrics* 114.

throughout the country) to 60 per 100 000 live births between 2010 and 2015 and by 43 per cent between 1990 and 2013.[68]

3.1 Challenges of human rights litigation

What is expected following the success of cases such as those highlighted above, especially with respect to the cases at the national courts, is compliance. However, it is alleged that in most cases, it is the persistent follow-up and agitations of civil society that bring about any positive actions from the government toward compliance with the courts' decisions. Two years after the *Laxmi Mandal* case and despite the Court going further to insist on affidavits of compliance from the state, nothing was done to comply. Also, in the *Alyne* case it took five years after that historic decision for a technical follow-up commission to be created[69] and some years after that before compliance was achieved.[70]

The reasons for non-compliance with both international and national decisions are not much different. The lack of dedicated enforcement mechanisms is a common criticism in respect of implementing international human rights law. On the domestic level,[71] there often are enforcement mechanisms attached to judicial authorities. However, as can be seen from the *Alyne* case, where external experts were needed to develop the mechanisms necessary for meeting the dictates of the CEDAW Committee's decision, it is possible for a state not to have such specialised or expert enforcement mechanisms. It may then fall on the usual policy makers and administrators who may treat such tasks as 'business as usual'. That makes enforcement a problem that is common to both. Another shared problem is political will, especially in respect of socio-economic rights. Consequently, when cases, even if decided based on civil and political rights, involve the provision of social goods and services, governments could be unwilling to comply with such decisions.[72] They often cite unavailable or limited resources that possibility were recognised by the international human rights system by providing for progressive realisation. The reality, however, is that

68 As above. See also Dunn and others (n 46).
69 Yamin and others (n 67).
70 This situation is not restricted to Africa, Asia or South America as even Europe is facing a similar situation. As of March 2018, 7 500 judgments of the European Court of Human Rights were reported as having been unenforced. See V Fikfak 'Changing state behaviour: Damages before European Court of Human Rights (2018) 29 *European Journal of International Law* 1091 1092.
71 Dunn and others (n 46).
72 See Dunn and others (n 46) generally, for an in-depth discussion of other limitations of human rights litigation.

this often-cited reason sometimes is not the case. Irresponsible, wasteful and high-handed despots parading as democratic leaders often also lack the political will to make changes. Closely related to the limited resources excuse of states is the danger posed by monetary compensation to victims. It is noted that in all the cases highlighted, monetary compensation was awarded. Pecuniary damages are a *bona fide* remedy and may need to be awarded as a matter of expediency, but it should be kept to a minimum. This is because, for countries that already claim financial incapability, complying can impact the few resources available. Another drawback of awarding compensation is that it risks commercialising the real goal of accountability or litigating human rights violations, which is not to punish states for non-fulfilment but to get them to respect and fulfil the rights.[73] Even the language of the instruments and the means of enforcement are not designed to be punitive. As Chayes argued, which was repeated by Kent Roach, 'public law litigation relief is not conceived as compensation for a past wrong … instead it is forward-looking, fashioned *ad hoc* on flexible and broadly remedial lines important for people other than the plaintiff'.[74] This underscores the importance of auditing the role of judgments in public interest or human rights cases or, even more specifically, ensuring that in social and economic rights cases, advocates do not lose sight of the goal which is to bring about structural and systemic changes and to tip the power balance more to the side of the disadvantaged.[75] In relation to litigating the right to health in Africa, some other challenges have been identified by Durojaye.[76] According to this scholar, recognition of the right to health as a legally-enforceable right in Africa remains very poor, skilled lawyers that are versed in issues relating to the right to health are not readily available, and judges are also unwilling to ruffle the feathers of the executive. Disadvantaged people often are ignorant and illiterate and the unaffordable cost of litigation makes right to health litigation difficult.

73 See B Fontana 'Damage awards for human rights violations in the European and Inter-American Court of Human Rights' (1991) 31 *Santa Clara Law Review* 1127 1158.

74 A Chayes 'The role of the judge in public law litigation' (1976) 89 *Harvard Law Review* 1281-1316 cited in Kent Roach 'The challenges of crafting remedies for violations in socio-economic rights' in M Langford (ed) *Socio-economic rights jurisprudence: Emerging trends in international and comparative law* (2008) 46-58.

75 Socio-economic rights often are the most visible evidence of the quality of life (often dealing with issues bordering on social inequality such as poverty, illiteracy, hunger, homelessness, sickness and deprivation). Yet, in many countries socio-economic rights are often unprotected by law.

76 Durojaye (n 48).

4 SERAP v Attorney-General Lagos State

On 3 August 2018 the registered trustees of Socio-Economic Rights and Accountability Project (SERAP), a human rights NGO, brought a court action against Lagos State naming the Attorney-General, the Ministry of Health and Lagos Commissioner for Health as the defendants. Their grievance was in relation to one of the health policies of Lagos State[77] that compulsorily required spouses/relatives of all patients seeking services that potentially required blood transfusions to make a blood donation before their spouse or relative could access medical services.[78] It was alleged that women seeking pre-natal and maternity services were most affected by this policy since blood transfusion is one of the emergency medical interventions in the case of obstetric complications. Attempts by the state to deny that they implemented the policy in the manner stated by the claimants were unsuccessful.[79]

The claimants formulated three issues for determination by the court: (i) whether by this policy the constitutional right of Nigerians to freedom of thought, conscience, and religion (as a result of conscientious objection) guaranteed in section 42 of the 1999 Nigerian Constitution was not being violated; (ii) whether by this policy the right to health that afforded equality of access to health facilities and to maternal, child and reproductive health services guaranteed by articles 3 and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) was not being violated; (iii) whether the policy violated the right to life guaranteed by section 33 of the Constitution and right to equal protection of the law and equality before the law guaranteed by article 3 of the African Charter, and the right to dignity of the person guaranteed under section 34(1)(a) of the Constitution. The application was supported by, among other prescribed documents, a 19-page affidavit and a written address to which the present author has no access.

The Court was implored to make declarations that all the above was the case. A consequential order restraining the defendants from continuing with the policy or requesting patients or relatives to instead pay for such blood was also requested. Lastly, the Court was requested to make any other order it saw fit to make in the

77 In Nigeria, the federal government and component states' governments concurrently provide health care in the country.
78 A similar policy is in use in all other component states of the federation.
79 The applicants provided witnesses that testified to having been subjected to that policy. In fact, two culprit major government hospitals, the Lagos State University Teaching Hospital (LASUTH) and Ifako Ijaiye General Hospital, were named in order to strengthen the credibility of the claimant's allegations.

circumstances. The judge granted all the claimant's reliefs but made no further order.

4.1 The ruling

To facilitate an objective evaluation of the ruling, the highlights are provided in this part while an analysis of the case against the background of the Brazilian, Kenyan and Indian cases discussed above follows below. In respect of the first issue for determination as to whether the rights to freedom of thought, conscience, religion and discrimination were violated by the policy, the Court had recourse to the Medical Code of Ethics and cases cited by the parties, including the Supreme Court judgment in *Okonkwo v Medical and Dental Practitioners Disciplinary Council*.[80] While the applicants relied on the case to buttress their point that the state (and their agents) had a duty to respect the right of a patient not to donate blood if his or her religion, practice or belief so forbids, the defendants relied on the same case to convince the Court that it was a medical practitioner's duty to always take measures to preserve life irrespective of his or the patient's religious views. The defendants proceeded to argue that based on the above and the code of ethics, doctors faced with the refusal of consent to life-saving measures should either terminate the contract or refer the patient to another hospital where necessary measures may be taken to preserve such life. Consequently, according to them, to consider or grant the applicant's request (and invariably force hospitals to treat objectors) would affect established standards put in place in healthcare services,[81] presumably for the purpose of preserving lives. Reacting to the above, the judge analysed *Okonkwo*'s case and distinguished the facts from the instant case. Apart from noting that the argument made with reference to the application of the Code of Ethics was not a good summary of that case, the judge also noted that, unlike the *Okonkwo* case, the instant case was not based on the act of a single doctor. She also stated clearly that the circumstances mentioned in the *Okonkwo* case, which may justify a suspension of the liberty rights of the individual, did not arise in this case. Not only was this related to access to the facilities, but it also was not a given that all the patients that potentially needed a transfusion would eventually need it.

80 (2001) 6 NWLR (Pt 711) 206 235.

81 They also contended that their actions were based on international best practices. The defendants' argument was that if doctors had the right to terminate the medical contracts of objectors, they had the right to deny them access in the first place, as well. See Certified True Copy of the Judgment 4, CTC Judgment on Health.pdf (dropbox.com) (accessed 15 August 2022).

With respect to issues 2 and 3, on which she jointly ruled, the judge noted that the compulsory demand for blood donations in order to access maternal services will be a violation of the constitutionally-guaranteed right to life, the right to equality and equal protection of the law, and the right to health guaranteed by international instruments ratified by Nigeria, namely, the Universal Declaration of Human Rights, ICESCR and the African Charter.

5 Critical comments

With due respect to the judge, a few comments will arise as to her pronouncements in respect of issues 2 and 3. The comments pertain, first, to the legal basis of the declarations granted on those issues and, second, to the adequacy of the ruling in addressing the issues. While the first ground could affect the strength of the judgment, the consequence of the second ground is the possibility that the issues have not been fully dealt with. Both undoubtedly impact the value of the decision. We next turn to the specific comments although the comments are not necessarily arranged according to either ground.

First, it is observed that in the course of preparing the judgment, the judge left too much to the imagination of the public. This is because no explanation was given for arriving at the conclusion that the defendant's policy would violate the right to life,[82] nor how it would constitute inequality before the law.[83] The omitted explanations on these rights were necessary as they would have contributed to the existing body of legal guidance on the application of these rights. For example, the right to life is a civil and political right, and until quite recently civil and political rights were considered to engender mainly the obligation to respect and protect[84] and, thus, the right to life was primarily considered a protection against arbitrary loss of life. Therefore, although the right to life is constitutionally protected in Nigeria, the extant body of knowledge on it could have benefited from a comprehensive analysis of how the effect of the compulsory blood donation on maternal mortality qualified as arbitrary loss of life associated with the right to life.[85] Such an analysis would facilitate

82 Given that the jurisprudence available in Nigerian cases on the right to life was mostly interpreted to prevent arbitrary loss of life. See *Musa v State* (1993) 2 NWLR 550; *Kalu v State* (1998) 13 NWLR 531 SC.

83 Presumably it will breed inequality since persons seeking treatment will no longer be treated in the same way, because those who agree to donate blood will be granted access while those who do not agree will be denied access.

84 General Comment 36 of ICCPR which explains that not preventing foreseeable causes of death such as maternal mortality is a breach of the right to life was adopted recently, in 2019. See Human Rights Committee (HRC) General Comment 36 on Article 6, Right to life, 3 September 2019, CCPR/C/GC/35.

85 General Comment 36 (n 84) paras 18, 21, 22.

a greater understanding of the normative standards of the right to (maternal) health and the obligations of the Nigerian state to ensure its enjoyment. This was the case in the *Laxmi Mandal* case where it was declared that the government's duty to protect the right to life and health was beyond merely making relevant policies.[86] It is notable that the right to health provision in the Indian Constitution, like that of Nigeria, is not justiciable, but has been made enforceable through its interpretation by the Supreme Court as an aspect of the constitutionally-guaranteed right to life.[87]

Second, the Universal Declaration of Human Rights (Universal Declaration), the provisions of which formed part of the basis of the finding, although a considerably influential international instrument, is non-binding and, therefore, viewed as aspirational.[88] ICESCR is a binding instrument, but Nigeria's dualist system of receiving international law requires it to be domesticated for the provisions to be available for invocation before the courts,[89] and ICESCR has not been domesticated. On the other hand, the African Charter has been domesticated by Nigeria's National Assembly with the result that its provisions on the right to health form part of Nigeria's laws. Therefore, the judge rightly posited that the defendant's policy violated that right. She also accepted the applicant's assertion that the defendant's policy contributed to child and maternal deaths, although she confirmed that no data on the maternal death rate to establish the link between the policy and maternal mortality was placed before the Court. It is also worth noting that in arriving at her decision, there was no reference to any arguments or reasoning or interpretations on the rights canvassed in issues 2 and 3 from Nigerian courts of higher jurisdiction or even international human rights bodies such as the monitoring body of ICESCR, or even the African Commission.[90] The present author has found only one human rights case in respect of violations of maternal health that had been

86 See paras 37, 40, 44 of judgment (*SERAP* case).
87 *Paschim Banga* case (n 50).
88 Some scholars opine that that the Universal Declaration has attained the status of *jus cogens* and, therefore, forms part of international customary law. See, eg, Leary (n 48). However, this remains debatable as the Law Commission's latest report on the formation of customary international law made no mention of human rights as a field that has produced customary international law. See First Report on formation and evidence of customary international law, M Wood, Special Rapporteur International Law Commission, (2013), UN Doc. A/CN.4/663 (2013).
89 Constitution of Nigeria (n 29) sec 12.
90 In the *Mandal Laxmi* case (n 65) the Court referred to the *Paschim Banga* case (n 50) in order to justify their decision.

brought before any court in Nigeria, which was *WARDC & Another v Attorney General-Nigeria*.[91] It was brought by the Women Advocate Research and Documentation Centre (WARDC), a Nigerian-based NGO, in 2015, on behalf of Folake Oduyoye, who after the birth of her child in 2014 was illegally and inhumanely detained for not paying her hospital bills. She developed complications while being detained and was denied medical treatment until she died.[92] However, the case was thrown out by the Federal High Court for procedural irregularities.[93]

Therefore, since in this instant case the judge was minded to go beyond the issue of discrimination that was canvassed in issue 1, but declared in addition that the policy violated maternal health, it is expected that she would have expatiated on the state's obligations in respect of the right to maternal health which had been breached. The judge should have set out the expected standards based on the relevant legal instruments and determined whether or not the defendant's action fell below the expected standards. It is expected that as a ground-breaking case, it ought to have been decided in a manner that would enable references to be made to it by future cases even if it would only have persuasive influence (being a High Court judgment) as was the case in *Festus Odafe*.[94] This article is emphatic of the danger such non-elucidation of human rights provisions canvassed in support of an applicant's rights portends. To say the least, it gives the impression that all litigants need to do is to wave human rights before the judges, mention sober words such as 'maternal and child mortality',[95] and the courts would give judgment in their favour. Such perceived weaknesses could also make the

91 Unreported. The assumption is made on the basis that the writer is oblivious to the existence of other cases and on the fact that if other cases exist, they would have been brought forward by either of the parties or the judge.

92 Centre for Reproductive Rights 'Supplementary information on Nigeria scheduled for review by the Committee on the Elimination of Discrimination against Women during its 67th session' (CRP, 30 May 2017), INT_CEDAW_NGO_NGA_27559_E.pdf (ohchr.org) (accessed 15 August 2022).

93 By this time, the Kenyan case of *Millicent Awuor* with facts similar to *Folake's* case had been decided. In *Millicent's* case the women were detained for having failed to pay their maternity care bills, and besides being denied further medical treatment were subjected to all kinds of ill-treatment. The Court held that the defendants' actions were discriminatory, violated the women's rights to dignity and were a breach of the Kenyan government's maternal health obligations guaranteed under the Kenyan Constitution and relevant international human rights instruments that the country had signed. See *Millicent Awuor Omuya alias Maimuna Awuor & Another v The Attorney-General & 4 Others* [2015] Petition 562 of 2012 (High Court of Kenya at Nairobi (Constitutional and Human Rights Division) (*Millicent Awuor* case).

94 *Odafe* (n 44).

95 This statement is only made to emphasise the necessity of substantiating claims or assertions made before the courts and is without prejudice to Nigeria's notorious maternal and child death ratios.

case a candidate for appeal, although in this case the Lagos state government had expressed its unwillingness to appeal the decision.

To further analyse: While the case vindicated the aspect of the right that requires the state to respect the right to health of people by not putting stumbling blocks in their way to access, it leaves unaddressed the duty of the state to 'fulfil'. Social rights, like all other human rights, cannot be realised by addressing only one aspect of their guarantee. In this case the right to health/maternal health, a socio-economic right, was in issue and, as noted by Ngwena, granting negative aspects of a right without granting the positive aspects of it will bring about little development.[96] The judgment has satisfactorily addressed the issue of 'respect' in that it declares that making mandatory donation a condition for accessing the relevant services such as maternity services, prevents patients from enjoying their right to health. However, it leaves aside the question as to who should be responsible for making the blood available. The essence of the blood donation or transfusion was not focused on by any of the parties (based on the text of the judgment) although the defendants did make averments in relation to conforming to 'international best practices'. In the judge's words, 'they submitted no evidence on what that means', but the judge's knowledge of the importance of protecting the full spectrum of the right to health ought to have necessitated the judge to ask them what 'international best practices' meant, especially in terms of how the blood ought to be made available. This would have eliminated any allegations against the judge if she had gone beyond the applicant's claims.[97] Asking that question would also have drawn attention to the fact that not only was the policy violating the right to health by denying access to patients, but it was also evidence of the government shirking its right to health responsibilities. This may have also allowed a pronouncement on the positive duties of the government in respect of human rights realisation.[98]

Therefore, rather than request the judge to make further orders as she saw fit, the applicants could have specifically applied for positive orders. The cases of *Alyne Pimental* and *Majani* both drew attention to the breach of government's positive obligations to ensure that all women had access to necessary lifesaving maternity care, going ahead to make orders that would facilitate their fulfilment. In the

96 C Ngwena 'Inscribing abortion as a human right: Significance of the Protocol on the Rights of Women in Africa' (2010) 32 *Human Rights Quarterly* 790.
97 See *Nkwocha v Ofurum* (2002) 5 NWLR (Pt 761) 506.
98 It is reminiscent of *Roe v Wade*, where a negative right was founded but no positive right to make the abortion services available. *Roe v Wade* 410 US 113 (1973).

instant case, the government the next day made a statement that the judgment would lead to higher maternal mortality ratios.[99] This is evidence that there was a *lacuna* in the judgment. Statements were also made by the commissioner for health and the chief medical director of the state's teaching hospital to the effect that Lagos state would take steps to increase their voluntary blood donation drive in order to ensure the availability of blood for transfusions, but would also still appeal to spouses and relatives to donate blood. Notably, the Lagos state blood transfusion service has since embarked on making good on that promise.[100] While these appear to be an acceptance of an obligation on the part of the government, clarification by the judge that it is the government's obligation to make safe and voluntarily-donated blood available in order to fulfil the right to health would have erased all doubt and strengthened the understanding of that right by both the populace and the government.

Further analysis may also be adduced by considering this ruling in light of the factors usually considered to be determinants of the outcome of a judicial exercise.[101] The principal determinants of the decision in a case are the issues formulated for determination by the claimants and the petitions of the aggrieved party. As the saying goes, 'the law court is not Father Christmas' and cannot give you what you have not asked for. This is to mean that the judge must remain an impartial arbiter and allow the parties to determine the parameters of their case. In this case, the applicants alleged a breach of the right to health and also referred the judge to Nigeria's obligations under the Universal Declaration and ICESCR upon which the judge based her judgment. Therefore, the judge did not *suo motu* consider both points which, had she done so, might have connoted partiality. Additionally, in line with the issues formulated for determination, the judge refrained from pronouncing on the positive duties of the government. Nevertheless, as argued above, proper elucidation of the right was wanting and the binding influence of both instruments on Nigeria is debatable. The quality of arguments canvassed and the quality of evidence adduced, which includes legal materials consulted and referred to by the counsel in order to convince the judge of the

99 A Onwuzoo 'Court order banning compulsory blood donation will lead to acute shortage in Lagos – LASUTH CMD' *Punch Newspaper* Lagos, 4 March 2020, Court order banning compulsory blood donation'll lead to acute shortage in Lagos —LASUTH CMD - Healthwise (punchng.com) (accessed 15 August 2022).

100 See D Ojerinde 'LSBTS seeks innovative strategies on voluntary blood donation' *Punch Newspaper* Lagos 14 October 2020, LSBTS seeks innovative strategies on voluntary blood donation – Punch Newspapers (punchng.com) (accessed 15 August 2022).

101 S Danziger, J Levav & L Avnaim-Pesso 'Extraneous factors in judicial decisions' (2011) *PNAS, Princeton University*, pnas201018033 6889..6892 (accessed 15 August 2022).

rightness of his party's position in a case, are also determining factors of the quality of the judgment. However, as we do not have access to the pleadings of both parties beyond the summaries contained in the decision, this will be impossible to assess. The nature of the case may also play a determining role in the holding. As the instant case borders on socio-economic rights, the conundrum of the justification of socio-economic rights may have played a role.[102] Judicial incursion in the realisation of socio-economic rights has been trailed by misgivings and is unsupported for various reasons, including the arguments that courts are unable to make decisions on issues bordering on government resources and the budget that the executive is more empowered and in a better position to make.[103] While this issue may not directly involve budgetary allocation,[104] it nonetheless requires a positive duty, which it is common knowledge that the government has been unable to fulfil.[105] As a result, to conclude that the judge may have been influenced by anti-socio-economic rights justification arguments is not far-fetched. The novelty of the case or otherwise is another important factor as this may determine the availability of jurisprudence from courts or other adjudicatory bodies on the issue(s). The earlier explanations offered in this article with respect to the antecedents of this case show a mixture of Nigerian judges' willingness and reluctance to hold the government accountable for rights to health violations. Additionally, there is no record that cases in respect of the right to maternal health have ever been decided in the country.

The last factor of which there also is no means of assessing, in this case, relates to the judge himself or herself. That is, that a judge's level of exposure, education, experience, training, access to relevant research, personal ideologies, and psychological, political and social influences also determine the nature and quality of their judgments.[106] None of these aspects of the judge's constitution is public knowledge and, therefore, are not open to discussion in this article.

102 See N Christopher 'Challenges to the judicial enforcement of socio-economic rights in Ghana and South Africa' in M Addaney & G Nyarko (eds) *Ghana @60: Governance and human rights in 21st century Africa* (2017) 151.

103 See *Soobramooney v Minister of Health KwaZulu-Natal* 1998 (1) SA 765 CC.

104 It may indirectly involve budgetary decisions, however, because the government may have to solve the problem of shortage of blood and blood products by buying them.

105 Editorial 'Safe blood: Nigeria fails to meet WHO requirements' *The Guardian* (Lagos) 13 June 2017, Safe blood: Nigeria fails to meet WHO requirements | The Guardian Nigeria News – Nigeria and World News – Opinion – The Guardian Nigeria News – Nigeria and World News (accessed 15 August 2022).

106 Danziger and others (n 101).

5.1 Value of the decision

According to Cook, the value of a judgment in a human rights case should not be compliance with the judgment, but the contribution of that case to the sphere of justice, for instance, by expatiating on the norms of the field in question.[107] It also includes its contribution to the current knowledge on the right and as it applies to the issue in question.[108]

This article concludes that this decision is valuable. This is because, as mentioned earlier, before the institution of this case and the ruling under discussion, there had been unsuccessful attempts to hold the Nigerian government accountable for infringements of the right to health based on its obligations under the African Charter Ratification Act. However, the government's duty to give effect to the right to health on the basis of this Act was argued for and upheld in this case. Thus, in spite of its imperfections this decision has not only confirmed that the human right to health is a justiciable right of the Nigerian populace but has declared its realisation necessary for reducing preventable maternal mortality in Nigeria. The enthusiastic manner in which the judge, despite not being furnished with statistics on maternal mortality caused by a denial of access to maternity services due to the compulsory blood donation policy, was willing to imagine the inevitable link also has a positive connotation. The action could be interpreted as showing the judge's willingness to overlook non-compliance with legal technicalities if it would make it possible to hold the state accountable for glaring injustices being suffered by the vulnerable in society, which the government's ineptitude or irresponsibility has encouraged.

6 Conclusion

Getting the courts to stand by the decision that Nigeria legally is unable to avoid being held in breach of its right to health obligations is long overdue. Due to this delay, the non-recognition of Nigeria's liability in right to health cases by domestic courts has been a subject of discussion in numerous legal and other scholarly works and fora. The delay has also negatively impacted the amount of jurisprudence Nigerian courts would have developed in the course of interpreting the content of the right and clarifying obligations with respect to several aspects of the right, including maternal health. The

107 Cook (n 51).
108 See the *Majani* case (n 49) where the judge elaborated on the minimum expected standard of healthcare delivery.

availability of quality jurisprudence generated on the right by courts in the country may also have meant that the circumstances that led to the instant case may have been pre-empted by the authorities and thus avoided. We also reiterate that, if the ruling in this case had been contrasted against the achievements of the featured right to health cases such as that of *Majani*, where maternal health was in issue, or the *Laxmi Mandal* cases, where maternal death was in issue, and national courts elaborated on government's obligations in respect of the right to health of these women and ordered them to take positive steps to right those wrongs, the extant judgment may not match up in value. However, if one were to consider the fact that, unlike the mentioned cases that had precedents upon which to draw,[109] this judgment to a large extent is a first of its kind in the hitherto restrictive socio-economic rights judicial climate in Nigeria, it would lead to a conclusion that the contribution of this case is of immense value.

109 In Kenya, the *Millicent Awuor* case had already been decided before the *Majani* case. In India's *Laxmi Mandal* case the Court specifically referred to the *Paschim Banga* case.

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Public participation as an essential requirement of the environmental rule of law: Reflections on South Africa's approach in policy and practice

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Summary: *The need for public participation to be embedded in environmental governance has for several decades been accepted in international law. There are many reasons for this, including the fact that public participation facilitates better informed and credible decisions that affect the environment and the people who live in it. However, while acceptance of the need for public participation is widespread, approaches to giving effect to it in practice lie on a spectrum. At one end of the spectrum lie 'weak' methods that arguably pay lip service to the principle rather than providing opportunities for meaningful engagement and change. On the other lie 'strong' methods that embrace the full underlying ethos of public participation and provide real potential for those often marginalised from the core of power to*

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influence outcomes and secure environmentally-just decisions. South Africa's approach provides an opportunity to examine both ends of the public participation spectrum. Post-democracy its approach has moved from a limited, exclusive and mechanistic one to an approach that in environmental policy and legislation in many ways exemplifies the upper rungs of Arnstein's well-known ladder of public participation. Nevertheless, a survey of judgments emphasises that legislative efforts aimed at ensuring 'strong' participation methods can become diluted where officials do not consistently embrace the full value and intended purpose of public participation in their decisions. In such instances the courts can play a valuable role in steering practice back to the intended path.

Key words: *environmental rule of law; constitutional rights; public participation; environmental policy and law reform; public interest litigation*

1 Introduction

Public participation in environmental governance is an essential component of any country's democratic architecture and of realising the environmental rule of law.[1] When conducted meaningfully it gives people an opportunity to influence government decisions and facilitates informed and credible decisions by government as the decision maker has access to a range of relevant information and inputs.[2] In this way it offers those who are often removed from the seats of power the potential to engage with discourses about the environment that may have direct consequences for them and to ensure that environmental burdens and benefits are distributed equally.[3] International acceptance of the importance of public participation is recognised in a range of instruments, including those that provide roadmaps for managing the environment such as principle 10 of the 1992 Rio Declaration on Environment and Development and, more recently, in goal 16 of the Sustainable Development Goals (SDGs) where one of the targets, goal 16.7, is to '[e]nsure responsive, inclusive, participatory and representative

1 See in this regard A du Plessis 'Public participation, good environmental governance and fulfilment of environmental rights' (2008) 2 *Potchefstroom Electronic Journal* 1; UNEP *Environmental rule of law: First global assessment report* (2019) 138.

2 ND King and others (eds) *Environmental management in South Africa* (2018) 142.

3 See S Arnstein 'A ladder of citizen participation' (1969) 35 *Journal of the American Planning Association* 216-224 who writes about public participation in a broader context.

decision making at all levels'.[4] However, practices for giving effect to public participation rights vary and lie on a spectrum ranging from the employment of weak mechanisms to those that are strong. Arnstein provides a useful and well-cited mapping of eight typologies of participation on a ladder linked to associated outcomes that range from 'empty ritual' to 'real power needed to affect outcomes'.[5]

South Africa provides an opportunity to examine both ends of Arnstein's ladder. Despite international recognition of the value of public participation in environmental governance, before South Africa's transition to democracy in 1994, the country's approach to governance generally was characterised by secrecy and exclusion. This pervasive culture extended to environmental decision making in which conservation issues were prioritised over, and often at the expense of, the environmental realities experienced by many South Africans. While there were formal opportunities for commenting on draft legislation, interactive dialogue was not common and participation in decision making was almost non-existent. In addition, the public had limited ability to challenge decisions in the courts because of significant obstacles such as the very narrow way in which legal standing (*locus standi)* was implemented.[6]

Transitioning to democracy, therefore, involved far more than extending the vote to all citizens. It required fundamental changes in policy and the way in which government interacted with the public. This article traces the emergence of public participation as part of environmental policy, law and practice in South Africa since 1994. It begins with a brief background on the context that existed before 1994 with the aim of providing some insight into the dynamics that were at play and which underpinned many of the discussions on the approach to public participation after 1994. That part is followed by a discussion on the approaches to, and outcomes of, the environmental policy processes that took place in the mid to late-1990s. The extent to which the outcome of these and other processes have been taken up in legislation is explained in the next part, after which a brief discussion of the court's adjudication of public participation in environmental disputes is provided. The discussion concludes with some tentative observations about the effectiveness of the codification of public participation.

4 The same is true of the ancillary right to information that is required to be fulfilled in order to enable meaningful participation.
5 Arnstein (n 3) 216.
6 With regard to *locus standi,* see A Rabie & C Eckard '*Locus standi*: The administration's shield and the environmentalist's shackle' (1976) 9 *CILSA* 141.

2 Setting the stage for change

As noted above, apartheid influenced all aspects of South African life, and environmental policy and legislation were no exception. The country's approach to environmental governance was informed by limited public input, which Rossouw and Wiseman describe as follows:[7]

> During the apartheid era, environmental policy-making processes were technocratically driven and broader civil society was excluded from policy deliberations. Stakeholder engagement was restricted to small groups of technical experts. Public participation, if it occurred at all, was limited to information distribution and occasional consultation with selected interest groups, such as conservation lobby organisations.

Steyn's 'Popular environmental struggles in South Africa, 1972-1992' provides a detailed analysis of the context before the transition to democracy.[8] She notes that, typical of the isolated and isolationist apartheid state that existed at the time, changing dynamics in the approach to environmental matters that led to the United Nations (UN) Conference on the Human Environment in 1972 were largely ignored by South Africans involved in the environment. In addition, their focus was not on pollution and waste and the impact of this on socio-economic circumstances or the health and well-being of the majority of South Africans, but rather on the preservation of specific species and 'natural' areas.[9] Steyn's explanation of the context is supported by many others who provide detailed analyses of the different environmental effects and consequences of the apartheid mindset. As illustrative examples, Carruthers's seminal article on the history of the Kruger Park and Cock and Fig's work on conservation areas illustrate how the prioritisation of conservation, coupled with the apartheid policy of forced removals, impacted on many people. Changing perspective, Klugman discusses the major environmental problems that were created by the apartheid forced-removals policy where the balance between natural resources and population were destroyed.[10] The environmental impacts of apartheid policies of

7 N Rossouw & K Wiseman 'South Africa - Learning from the implementation of environmental public policy instruments after the first ten years of democracy in South Africa' (2004) 22 *Impact Assessment and Project Appraisal* 131.

8 P Steyn 'Popular environmental struggles in South Africa, 1972-1992' (2002) 47 *Historia* 125.

9 Steyn (n 8) 126.

10 J Carruthers 'Dissecting the myth: Paul Kruger and the Kruger National Park' (1994) 20 *Journal of Southern African Studies* 263-283; J Cock & D Fig 'From colonial to community-based conservation: Environmental justice and the national parks of South Africa' (2000) 31 *Society in Transition* 22-35; B Klugman 'Victims or villains? Overpopulation and environmental degradation' in J Cock & E Koch (eds) *Going green: People, politics, and the environment in South Africa* (1991) 66-77.

course were not confined to rural areas as the statistics show the marked unevenness in access to basic services that was present at the time.[11]

According to Steyn, by 1974 South Africa's 20 month-old Department of Planning and the Environment spent most of its time on physical planning and 'dividing up the country's empty spaces for future mining and industrial purposes'.[12] During this time, public participation in environmental matters was largely confined to about 50 non-governmental organisations (NGOs) that were apolitical, racially exclusive and conservation-based.[13] The relationship of these organisations with government was collegial, with some even receiving government funding. Indeed, when government requested these NGOs to form a single voice to streamline engagements between civil society and government, they obliged and established the Habitat Council on 5 March 1974.[14] According to Steyn, the Habitat Council significantly weakened the policy influence of individual NGOs as government provided the Council with funding and preferential or exclusive access to and membership of various government committees, boards and commissions. Indeed, Steyn states that government's determination to only deal with the Habitat Council as the 'one voice of the public sector' regarding environmental matters encouraged more organisations to join the Council – which further reduced the diversity of participation. As the *de facto* single conduit for environmental dialogue between government and civil society, the Habitat Council's role grew from that of coordination and liaison to it being a key policy shaper. Steyn notes that the Habitat Council occupied this influential and privileged position until the beginning of 1983 when the Council for the Environment, a statutory body, was established in terms of the Environment Conservation Act 100 of 1982. The Council for Environment in turn steadily diluted the Habitat Council's influence, putting it on a path of terminal decline.[15]

Not content with its convenient and relatively comfortable relationship with the Habitat Council, government's establishment of the Council for the Environment as a statutory body further constrained and controlled public participation under a smokescreen of the good intentions of a formalised public-private engagement

11 See M Kidd 'Environmental justice: A South African perspective' in J Glazewski & G Bradfield (eds) *Environmental justice and the legal process* (1999) 142-162.
12 Steyn (n 8) 126.
13 As above. For a more detailed discussion on South African environmental NGOs at the time, see also Cock & Koch (n 10).
14 Steyn (n 8) 130.
15 Steyn (n 8) 138.

body. Section 5(1)(a) of the Act made the Council for the Environment the principal body for advising the Minister of Environmental Affairs and Tourism on the determination of environmental policy. This new Council 'captured' some of the Habitat Council's leadership as members. According to Steyn, this led to the demise of the Habitat Council's participation in government policy formulation and communication with governmental departments.[16]

Although conservation remained the key focus of mainstream public environmental interest and this interest remained a predominantly white middle-class interest, the late 1980s started seeing challenges to this situation. As Steyn puts it:[17]

> The founding of Earthlife Africa (ELA) in August 1988 marked the beginning of radical changes in the non-governmental sector of the South African environmental movement. ELA, founded upon the theoretical principles of the German Die Grünen political party and organisationally based on the Greenpeace-model, actively advocated a highly politicised environmental agenda. In their view, the environment was not only a political issue, but also a new frontier on which to fight against the injustices of the prevailing apartheid system in the country.

This new environmental movement exemplified by groups such as Earthlife Africa embarked on several campaigns aimed at opposing government and exposing government practices and weaknesses. They became an active part of the broader anti-apartheid movement and an active advocate for democracy and participatory policy making. As part of this broader movement, new alliances and partnerships around social, economic and environmental justice issues started emerging that replaced the conservation-focused narrative with one that was more akin to the progressive global sustainable development narrative and which challenged the double burden of pollution that was experienced by many of the poor.[18]

16 Steyn (n 8) 138.
17 Steyn (n 8) 147.
18 J Cock 'Going green at the grassroots – Environment as a political issue' in Cock & Koch (n 10) 10. 'Environmental justice' entered the South African discourse in 1992 at a conference convened by Earthlife Africa (cf D Hallowes (ed) *Hidden faces: Environment, development, justice: South Africa and the global context* (1993) 4). The essence of its meaning in the South African context was subsequently captured in an Environmental Justice Networking Forum newsletter as follows: 'Environmental justice is about social transformation directed towards meeting basic human needs and enhancing our quality of life – economic quality, health care, housing, human rights, environmental protection, and democracy. In linking environmental and social justice issues the environmental justice approach seeks to challenge the abuse of power which results in poor people having to suffer the effects of environmental damage caused by the greed of others. This includes workers and communities exposed to dangerous chemical pollution, and rural communities without firewood, grazing and water. In recognizing that environmental damage has the greatest impact upon poor people, EJNF seeks to ensure the right of those most affected to participate

The increased momentum created by these groups as well as the reality that apartheid was at its end stage created opportunities for dialogue and debate about future approaches to environmental policy. As one example, from 1991 to 1995 Canada's International Development Research Centre, in partnership with the recently-unbanned African National Congress (ANC), the Congress of South African Trade Unions (COSATU) and the South African National Civic Organisation, conducted a series of missions in South Africa to assist the imminent transition to democracy. One of these was the International Mission on Environmental Policy.[19]

As Rossouw and Wiseman explain:[20]

> When the process of democratisation started, the environmental policy discourse also started to change. Environmental policy debates were broadened to include democratic objectives and social and economic issues. Central to this discourse was the concept of environmental justice. As a result, the environmental policy discourse in the period leading up to, and immediately after, the 1994 elections saw citizens' rights, socio-economic issues and quality of life included in the environmental policy agenda for the first time.

3 New policies, new approaches

The appetite for placing environmental justice on the agenda and making decision making participatory arguably was most visibly demonstrated by the initiation of the Consultative National Environmental Policy Process (CONNEPP) shortly after the first

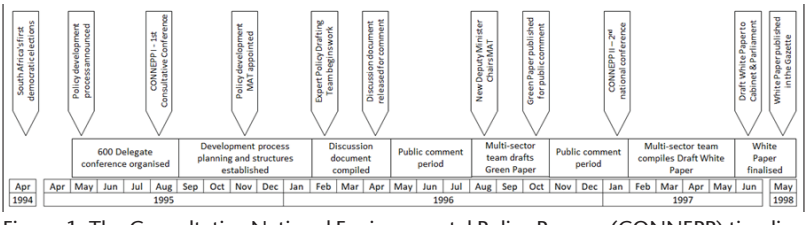

Figure 1: The Consultative National Environmental Policy Process (CONNEPP) timeline

at all levels of environmental decision-making' (*Environmental Justice Networker,* Autumn 1997).

19 The findings of this mission were published as AV Whyte *Building a new South Africa Volume 4: Environment, reconstruction and development* (1995).

20 Rossouw & Wiseman (n 7) 133.

democratic elections.[21] In 1995, after interactions with civil society, the newly-appointed Deputy Minister for Environmental Affairs and Tourism, with the support of the newly-established Committee of Ministers and Members of the Executive Councils: Environment and Nature Conservation (MINMEC), announced a National Consultative Conference to launch the policy development process. The purpose of the process was to develop an environmental policy that laid the basis for a transformative approach to environmental management that aligned with the rights-based approach set out in the interim Constitution and which was representative of all the environmental issues that the country faced.[22] What followed was a process in which public participation featured at each step and in a way that was aimed at ensuring that genuine agency was given to the different sectors of society.

The details of the policy process are explained in the White Paper that emanated from the process in 1998.[23] This started with MINMEC appointing a multi-sectoral technical study team to compile a discussion document for the conference. This document was informed by the output of the International Mission on Environmental Policy referred to above. Then, in August 1995, the first Consultative Conference on National Environmental Policy (CONNEP I) was held in Johannesburg. Six hundred delegates representing all sectors of society attended the conference that was opened by President Nelson Mandela.[24] A participatory process for the development of a new national environmental policy was agreed to, and MINMEC was mandated to appoint a multi-stakeholder Management and Advisory Team (MAT) to guide the process. The MAT was established in November 1995, and it included representatives from business and industry; community-based organisations; environmental NGOs; national government; organised labour; and provincial governments. The Deputy Minister continued to lead the process by chairing the meetings of the multi-stakeholder MAT.

A drafting team of environmental experts, nominated by the MAT, began work on a discussion document in February 1996. The drafting team was assisted by a multi-sectoral reference group, a liaison group comprised of all the national government departments, and input from several international experts. In April 1996 a discussion document titled *Towards a New Environmental Policy for South*

21 The abbreviation is 'CONNEP' when the policy is being referred to and 'CONNEPP' when the policy process is being referred to.
22 Act 200 of 1993.
23 White Paper on Environmental Management Policy for South Africa, GN 749 *GG* 18894 15 May 1998 10-12.
24 White Paper (n 23) 11.

Africa was released for public comment. According to the White Paper 'summaries of the discussion document in English and seven other official languages were also released'.[25] An indication of the extent to which there was a serious intention to make the process as inclusive as possible is illustrated by the fact that 60 000 copies of these documents were distributed. In addition, provincial multi-stakeholder steering committees were then established to oversee provincial participation processes that 'involved millions of people'. Newsletters were also distributed to keep participants abreast of developments.[26]

All the submitted comments were captured in a database and used as input to the compilation of a Green Paper. In August 1996 a new Deputy Minister took over the process leadership and a new multi-sectoral drafting team, representing the same sectors as those on the MAT, drafted the Green Paper on a New Environmental Policy for South Africa, 1996. The Green Paper was made public in October 1996 and, according to the White Paper, 40 000 copies were distributed for comment.[27] A second national conference (CONNEP II) was held in January 1997. It was attended by 265 sectoral representatives who were invited to make submissions on the Green Paper to the Ministry, provincial ministers and the National Parliamentary Portfolio Committee on Environmental Affairs and Tourism. In the interests of full transparency, 'a verbatim record of conference proceedings was distributed to delegates and others on the CONNEPP mailing list'.[28] The Department of Environmental Affairs and Tourism subsequently took responsibility for developing a White Paper, with the MAT and members of the Green Paper drafting team acting as a reference group.

The draft White Paper was published in the *Government Gazette* for comment in July 1997.[29] The revised final policy that emerged from the process was approved by cabinet and published in the *Government Gazette* in 1998.

In summary, as Wynberg and Swiderska note:[30]

25 White Paper (n 23) 11.
26 As above.
27 White Paper (n 23) 12.
28 White Paper (n 23) 11.
29 Draft White Paper on Environmental Management Policy for South Africa, July 1997 GN 1096, *GG* 18164, 28 July 1997.
30 R Wynberg & K Swiderska *Participation in access and benefit-sharing policy case study no 1: South Africa's experience in developing a policy on biodiversity and access to genetic resource*s (2001) 11.

> [T]he Consultative National Environmental Policy Process … was widely viewed as the 'mother of all policy processes' and represented an exhaustive effort to bring on board voices that had hitherto been ignored. In so doing it was intended to shift environmental perspectives and paradigms in South Africa and develop an environmental policy that was relevant and appropriate to people's needs and priorities.

Not surprisingly, the policy itself was significantly influenced by this consultative process as is evident from the numerous references to participation and participatory governance. As an example, the policy states:[31]

> [T]he Department of Environmental Affairs … undertakes to … develop a National Environmental Strategy and Action Plan (NES&AP) [which] … will focus and prioritise goals and objectives requiring action by government … includ[ing] a commitment to: … develop structures, processes and procedures and implement programmes to ensure effective and appropriate participation in environmental governance.

The concept of participation is also covered in six of the Policy's 23 'principles' as follows:[32]

> Capacity Building and Education – All people must have the opportunity to develop the understanding, skills and capacity for effective participation in achieving sustainable development and sustainable resource use …
>
> Due Process – Due process must be applied in all environmental management activities. This includes adherence to the provisions in the Constitution dealing with just administrative action and public participation in environmental governance …
>
> Environmental Justice – … Policy, legal and institutional frameworks must: … ensure equitable representation and participation of all with particular concern for marginalised groups …
>
> Open Information – To give effect to their constitutional rights, everyone must have access to information to enable them to: … participate effectively in environmental governance.
>
> Participation – Government must encourage the inclusion of all interested and affected parties in environmental governance with the aim of achieving equitable and effective participation …
>
> Good Governance – … The democratically elected government is the legitimate representative of the people. In governing it must meet its obligation to give effect to people's environmental rights in section 24 of the Constitution. This includes: … responding to public needs and encouraging public participation in environmental governance by

31 Ch 2 – Vision, Section – A new vision for environmental policy 13.
32 Ch 3 – Principles 20-24.

> providing for the mutual exchange of views and concerns between government and people.

However, it is the inclusion of 'participation in environmental governance' as one of the policy's seven strategic goals that arguably is the most significant participation policy outcome.[33] This goal – Goal 4 – requires the establishment of mechanisms and processes to ensure effective public participation in environmental governance. To this end the policy describes four supporting objectives. The first relates to participation structures, mechanisms and processes and requires (i) the establishment of multi-sectoral advisory structures in all spheres of government to enable all interested and affected parties to participate in environmental governance; (ii) the development of public participation mechanisms and processes that are fair, transparent and effective, and that promote the participation of marginalised sectors of society; and (iii) the allocation of government resources (financial and human) to build institutional capacity in national, provincial and local government spheres for the effective management of participation in environmental governance.

The second supporting objective relates to communication and participation and requires that communication strategies are put in place in all spheres of government to address public participation needs. The third relates to strategic alliances and requires that alliances between government and interested and affected parties should be encouraged in implementing the policy to ensure environmental sustainability in achieving sustainable development. The fourth and final supporting objective relates to marginalised and special interest groups and encourages and supports the involvement of special interest groups such as women, workers, the unemployed, the disabled, traditional healers, the elderly and others in all structures and programmes of environmental governance.

In culmination, the CONNEP process and its outcomes signalled a clear departure from past approaches and an intention for environmental policy processes to be based on a deeper form of meaningful public participation that resonates with the upper echelons of Arnstein's oft-cited ladder of citizen participation.[34] As Arnstein notes,

> there is a critical difference between 'going through the empty ritual of participation and having the real power needed to affect the outcome of the process … participation without the redistribution of power

33 Ch 4 – Strategic goals and objectives, Section – Strategic goals, Goal 4: Participation in environmental governance 35.
34 Arnstein (n 4) 216.

> is an empty and frustrating process for the powerless. It allows the powerholder holders to claim that all sides were considered, but makes it possible for only some sides to benefit.[35]

The CONNEP outcomes were clearly designed to enable a context where participation processes were not 'empty' by incorporating elements of the 'partnership' and 'delegated control' elements that Arnstein identifies at the upper end of her ladder. These set the tone for other policy processes that were conducted in parallel or which followed. For example, the Integrated Pollution and Waste Management Policy process was also highly participatory.[36] Some, however, were criticised because the processes took an 'expert-driven' approach. For example, in relation to the biodiversity policy Wynberg and Swiderska explain that '[w]hereas CONNEPP was about process and consulting as many people as possible to gain political support and set broad objectives, biodiversity was more about active participation in decision making about technical issues'.[37]

Although the biodiversity policy process was supported by many, civil society organisations regarded it as only 'paying lip service' to participation and as being dominated by 'old guard' conservationists.[38] Wynberg and Swiderska accordingly conclude that 'from the beginning the biodiversity policy process was tarnished, regardless of the final policy outcome'. [39] Indeed, until the release of the expert panel's report on iconic species in 2020, there appears to have been some uncertainty as to whether the biodiversity policy was ever formally finalised.[40] According to the panel's report:[41]

> There is some speculation that, as this policy was developed through a process that was separate to the highly regarded CONNEPP process, it was abandoned for fear of it being branded as being an illegitimate product of a process that did not fully reflect the democratic ethos and commitment to broad-based participatory policy development espoused by the new democratically-elected government at the time.

35 As above.
36 White Paper on Integrated Pollution and Waste Management for South Africa GN 227, *GG* 20978, 17 March 2000. A previous process had been initiated by the Department but encountered significant credibility challenges on the basis of it being driven by technical consultants. Post-CONNEP the process started *de novo*.
37 Wynberg & Swiderska (n 30) 23.
38 Wynberg & Swiderska (n 30) 22.
39 Wynberg & Swiderska (n 30) 21.
40 The High-Level Panel of Experts for the Review of Policies, Legislation and Practices on Matters of Elephant, Lion, Leopard and Rhinoceros Management, Breeding, Hunting, Trade and Handling High-Level Panel Report – for submission to the Minister of Environment, Forestry and Fisheries, 15 December 2020, https://www.dffe.gov.za/sites/default/files/reports/2020-12-22_high-levelpanel_report.pdf (accessed 11 April 2022).
41 High-Level Panel (n 40) 61.

In addition, it appears that there were concerns around signs of some dilution of government enthusiasm for having continued participation processes that were as comprehensive as CONNEPP in future policy development. As noted by Wynberg and Swiderska, in 2001 the Department of Environmental Affairs was already adopting a 'fast-track' approach to consultation.[42] However, there were some exceptions to this new approach. For example, in their research that assesses the inclusion of science in policy development, Von der Heyden and others refer to the extensive climate change response policy development process based on the CONNEPP that was initiated in 2005 and completed six years later in 2011.[43]

4 Translating policy into law – The codification of public participation

4.1 The Constitution and constitutionally-mandated legislation

At the same time that the CONNEP process was unfolding, the final Constitution was being negotiated for the country. It was finalised and adopted in the form of the Constitution of the Republic of South Africa, 1996.[44] The Constitution became the supreme source of law and all legislation and conduct must be compatible with it.[45] This is important as it means that the constitutional requirements regarding public participation are binding on all other legislation that is passed as well as all decision making by government. In this regard, there are several provisions in the Constitution indicating that the negotiators were intent on shifting the relationship between government and citizens to being one that reflects accountability, responsiveness and even partnership. As Mureinik states, describing the importance of the Constitution:[46]

> If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions; not the

42 Wynberg & Swiderska (n 30) 11.
43 S von der Heyden and others 'Science to policy – Reflections on the South African reality' (2016) *South African Journal of Science* 112.
44 The Act was initially adopted as the Constitution of the Republic of South Africa 108 of 1996. Subsequently it was felt that, because the Constitution is supreme, it should not have the status of an ordinary Act. The Citation of Constitutional Laws Act 5 of 2005 was therefore passed which requires the Constitution to be cited as indicated in the text.
45 Sec 2.
46 E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

> fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.

This shift is evident in many provisions of the Constitution. For example, the Preamble states that the Constitution is aimed at laying a foundation 'for a democratic and open society in which government is based on the will of the people and every citizen is protected equally by law', as well as the basic values and principles governing public administration that require that the '[p]ublic administration must be accountable' and that '[t]ransparency must be fostered by providing the public with timely, accessible and accurate information'.[47] While these requirements are important elements for creating a climate of public participation, the Constitution also contains more overt provisions. For example, apart from an objective of local government being to 'encourage the involvement of communities and community organisations in the matters of local government',[48] the basic values and principles of public administration also require that '[p]eople's needs must be responded to, and the public must be encouraged to participate in policy making'.[49]

Undoubtedly the most significant provision in the Constitution with respect to public participation is found in the right to administrative justice in the Bill of Rights. The right to administrative justice is contained in section 33 and provides that every person is entitled to lawful, reasonable and procedurally fair administrative action as well as written reasons for decisions that adversely affect them. When the Bill of Rights was adopted, wording was included in the Constitution that required specific legislation be passed to provide more detailed content to the right.[50] The Promotion of Administrative Justice Act 3 of 2000 (PAJA) was accordingly passed to give effect to this obligation.

In a nutshell, PAJA explains what is required to give effect to lawful, procedurally fair and reasonable decision making. With regard to public participation, PAJA deals with two types of procedural fairness situations, namely, those where an individual is involved (section 3) and those where the general public is affected (section 4). Minimum participation requirements are stipulated for both. Because PAJA is a constitutionally-mandated Act, it is a law of general application. This means that the requirements of PAJA must be followed when any 'administrative action' is taken by an environmental government

47 Secs195(1)(f) & (g).
48 Sec 152(1)(e).
49 Sec 195(1)(e).
50 Sec 33(3).

official or politician, unless there are equivalent procedures in the relevant environmental legislation.[51] PAJA, therefore, expressly sets out the minimum rules of public participation that must be complied with.

The Constitution accordingly expanded the approach to public participation. Instead of mechanistically allowing people to comment on draft legislation through a formal publication and written comment process, it reflects an understanding that participation is a critical means of ensuring democracy and that it must be enabled, or even solicited, and encouraged in a meaningful way in respect of policy, legislation and decision making. This represents a substantial change from the limited, almost token, approach that prevailed in the apartheid era.

4.2 The environmental law reform process[52]

Apart from the constitutional negotiations, the environmental policy processes identified many weaknesses with existing environmental legislation. Shortly after the Constitution had been adopted, and by 1997, government therefore began an extensive law reform process to formally overhaul the existing legislative framework. This provided an ideal opportunity to incorporate the call for enhanced public participation into legislation and to make it a legally-binding requirement, along with ancillary provisions such as rights in respect of access to information that need to be in place to create an enabling environment for participation to be meaningful. The law reform process marked the beginning of the incremental codification of public participation into environmental legislation.

The adoption of the new policies signalled the demise of the existing Environment Conservation Act 73 of 1989 (ECA) that was regarded as being too limited to address the approach envisaged by the White Paper. However, while new legislation was being drafted, ECA continued to be a significant piece of environmental legislation. It was, however, primarily framework legislation and required regulations to become fully effective. Since very few regulations had been passed by 1994, significant gaps existed in the regulatory framework. A key example was the gap in environmental impact

51 The meaning of administrative action involves understanding a complicated definition that is contained in sec 1 of the Act – a discussion of which is beyond the scope of this article. Also, in some instances PAJA permits other legislation to prescribe fair but different procedures if they are compatible with the right to administrative justice.

52 Limited portions of this part draw on Hall's PhD thesis.

regulation as a result of the failure of the Minister of Environmental Affairs to utilise the powers contained in sections 21, 22 and 26 regarding the listing of proposed activities that required authorisation, which could only be obtained after conducting an environmental impact assessment (EIA).

Together these sections provided an important environmental management mechanism as they enabled officials to assess all the environmental impacts of an activity before the activity commenced. Addressing this regulatory gap assumed a priority in the law reform process, and in 1997 the Minister published a list of activities and EIA Regulations.[53] The EIA Regulations established the process for ensuring that the potential impacts and mitigation measures of a proposed activity as well as alternatives to the activity were identified and assessed prior to a decision on an application. These were a watershed in environmental law because, unlike other environmental legislation at the time, the EIA Regulations required the public to be consulted as part of the application process. They also required the competent authority to issue a record of decision to the applicant or to any interested party on request. The requirements regarding public participation and transparency of decision making and public participation together with the Bill of Rights increased the potential for the public to both influence and challenge decisions regarding proposed projects that were listed as potentially having a significant environmental impact. In addition, any member of the public (including the applicant) was entitled to appeal the decision on the application to the minister or provincial minister (MEC), as the case may be.[54]

Once the EIA Regulations were finalised, the focus of law reform shifted to the development of overarching framework legislation. After less than a year, Parliament promulgated the National Environmental Management Act 107 of 1998 (NEMA) which repeals ECA on an incremental basis.[55] The objective of NEMA is to provide the general approach to environmental management, protection and enforcement. Although much of the Act was initially dedicated to intergovernmental coordination mechanisms,[56] it contains

53 Regulations regarding Activities Identified under Section 21(1) GNR1182, 1183 and 1184, *GG* 18261, 5 September 1997.

54 Sec 35.

55 Eg, sec 50 states that regulations and notices issued pursuant to secs 21 and 22 are repealed with effect from a date determined by the minister, provided that they have become redundant because similar regulations have been passed in terms of sec 24 of NEMA. Certain sections of ECA currently remain in effect.

56 After ten years of implementation, the institutions that were established to facilitate coordination were apparently considered to be ineffective or overly cumbersome by the Department of Environmental Affairs and the relevant

important provisions regarding the role of the public participation in the discharge of the environmental function. The first of these is the inclusion of a set of principles in chapter 1, most of which emanated from CONNEPP. These principles reflect the changes in the approach to public administration, which the public identified as being necessary to address the poor practices of the past. They were included in NEMA to address the public's concern that officials would operate in a business-as-usual manner unless the principles were made legally binding.[57] In addition to listing the principles, NEMA stipulates that the principles apply to all significant public administration activities involving the environment. Decision making on applications, enforcement, the development of policies and strategies and interpretation under any environmental legislation all fall within the scope of application of the principles.[58] The principles accordingly also provide the basis for reviewing the defensibility of officials' decisions.[59]

Public participation features prominently in the list of principles. In this regard, section 2(4)(f) states:

> The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.

The wording of the principle makes it clear that Parliament's intention not merely is to articulate a right to participation and that affording people an opportunity to participate alone is not sufficient. In order for the participation to be meaningful, people must be empowered to participate, and particular efforts must be taken to ensure that the voices of those who are often marginalised in society, that is, the vulnerable and disadvantaged, are heard. The expansion of the right to participation in this way is important in the context of South African society where there are vast differences between people's social, economic and educational circumstances. As King and others note, the principle means that public participation 'is not to be reserved for only the rich and powerful'.[60]

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provisions of the Act were repealed or amended by the National Environmental Laws Amendment Act 14 of 2009.

57 Personal knowledge of Jenny Hall as member of the Green Paper and NEMA drafting team.

58 Secs 2(1)(b), (c) & (e).

59 Reference to the principles is also made in the sectoral legislation discussed below.

60 King and others (n 3) 142.

The need to empower people to participate effectively and to ensure that participation is broad-based and reflective of all sectors of society is emphasised in other principles. For example, the need to empower people is echoed in section 4(2)(h) which states that '[c]ommunity well-being and empowerment must be promoted through environmental education, the raising of environmental awareness, the sharing of knowledge and experience and other appropriate means'. Similarly, the need to include the historically marginalised is reflected in section 2(4)(q) which states that '[t]he vital role of women and youth in environmental management and development must be recognised and their full participation therein must be promoted'.

In addition, the idea that participation should be embraced as an important component of government decision making and not merely as a formal requirement is emphasised in section 2(4)(g). This principle reminds decision makers that public participation requires decision makers to go beyond the motions of offering an opportunity to comment. It requires serious and careful consideration to be given to any inputs that are made. In this regard, the principle says that '[d]ecisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge'.

Principles such as these were supplemented by sections 3 to 6 of the Act that established a National Environmental Advisory Forum and provided for its composition and operation. The Forum was to be comprised of members from different sectors and was intended to advise the minister on environmental matters. In combination, these point to a willingness to give legislative effect to the intention expressed in the CONNEP outcomes of participation being meaningful and capable of genuine influence, that is, a formal departure from the 'empty benefits' approach to which Arnstein refers, which was characteristic of apartheid era legislation.

Apart from the principles, the need for public participation is reflected in other provisions of NEMA, most notably chapter 5 that contains the only substantive regulatory provisions in the Act. The purpose of the chapter is to promote the application of environmental management tools in order to ensure integrated environmental management. Although the scope of the chapter is broader than the EIA provisions in ECA, until recent amendments, the majority of the provisions related to the authorisation of activities on the basis of EIAs. In setting out the requirements and criteria for passing regulations to give detailed effect to the chapter, section 24(2)(d) requires that the procedures for conducting an EIA must 'ensure adequate

and appropriate opportunity for public participation in decisions that may affect the environment'. In addition, section 24(4)(a)(v) requires that every application must include 'public information and participation procedures which provide all interested and affected parties, including all organs of state in all spheres of government that may have jurisdiction over any aspect of the activity, with a reasonable opportunity to participate in those information and participation procedures'.

The EIA Regulations that were passed in terms of ECA were repealed and replaced in 2006 by a new set of regulations and notices of listed activities passed in terms of NEMA. One of the reasons for developing new regulations was the perceived need to improve the provisions regarding public participation.[61] The new regulations contained far more detail and just after they were published, government also released a guideline on conducting public participation.[62]

This continual process of refinement in the legislation illustrates that the quest for incorporating public participation into environmental decision making has not been a once-off static event. This is also evidenced by other changes. NEMA, for example, was amended in 2008 to include a new provision in section 1(5) which emphasises the relationship between the implementation of NEMA and the requirements of PAJA.[63] In this regard, section 1(5) states that '[a]ny administrative process conducted or decision taken in terms of this Act must be conducted or taken in accordance with the Promotion of Administrative Justice Act, 2000 (Act No 3 of 2000), unless otherwise provided for in this Act'.

The subsection probably is unnecessary as the requirements of PAJA are automatically applicable and in many instances the requirements, and often more, are already written into NEMA and the associated regulations. Nevertheless, it does show an ongoing awareness of the need for public participation to be clearly articulated. Unfortunately, there has also been some diminishment of the participatory provisions. Sections 3 to 6 mentioned above,

61 GNR 385, 386 and 387, 21 April 2006. Technically some of these issues did not require legislative intervention. However, they were included in the Regulations because of the inexperience of many officials and the need for certainty. Personal knowledge, drafter of the Regulations.

62 D de Waal and others DEAT, *Guideline 4: Public participation* (2005) Integrated environmental management guideline series, Department of Environmental Affairs and Tourism. The 2006 Regulations have also been amended and replaced on several occasions including in 2010 and 2014. See GNR 543, GNR 544, GNR 545 and GNR 546, *GG* 33306, 18 June 2010 and GNR 982, GNR 983, GNR 984 and GNR 985, *GG* 38282, 4 December 2014.

63 Sec 1(5) was inserted by sec 1(s) of the National Environmental Management Amendment Act 62 of 2008.

which established a National Environmental Advisory Forum and provided for its composition and operation, were repealed in 2009 and replaced with a single section 3A that grants the minister a discretion to establish participatory structures.[64]

A final point worth noting about NEMA in relation to the role of the public relates to the state of distrust between the public and government that existed prior to 1994. During CONNEPP the public raised concerns about existing compliance and enforcement practices. NEMA addresses these concerns in chapter 7 which introduced a new and expanded approach to compliance and enforcement. Of relevance to this discussion are the provisions relating to civil enforcement. Section 28 introduces a duty of care to prevent or, where authorised, minimise environmental degradation. Where a person fails to comply with the duty, government may issue a directive indicating steps that must be complied with. Section 28(12) provides a broad cause of action for public interest litigation as it empowers the public to enforce a violation of the duty of care where the state has failed to act. In addition, chapter 7 also seeks to strengthen the watch dog role that the public can play in securing compliance with environmental objectives. It expands *locus standi* and authorises the court not to award costs against a person who initiates legal proceedings with *bona fide* motives.[65]

Although NEMA provided a new framework for environmental management, it lacked sector-specific provisions. Government accordingly developed further legislation to provide for the more focused regulation of waste, air, biodiversity, protected areas and coastal management.[66] Collectively these, and a few other Acts, are known as the specific environmental management Acts or SEMAs.[67]

The SEMAs that regulate pollution and waste issues are less explicit about the need for public participation in decision-making processes. However, as the principles in NEMA apply to the SEMAs, this is not

64 National Environmental Laws Amendment Act 14 of 2009.
65 Sec 32.
66 The development of these Acts took significantly longer. The first, the National Environmental Management: Protected Areas Act, was promulgated in 2003 (Act 57 of 2003). The National Environmental Management: Biodiversity Act (Act 10 of 2004) and National Environmental Management: Air Quality Act (Act 39 of 2004) followed in 2004. In 2008 the National Environmental Management: Integrated Coastal Management Act (Act 24 of 2008) and National Environmental Management: Waste Act (Act 59 of 2008) were promulgated. Collectively these, and a few other Acts, are known as the specific environmental management Acts or SEMAs, a term that is defined in sec 1 of NEMA. These Acts also adopt a framework approach to the different sectors and accordingly require regulations and notices to become fully operationalised.
67 Sec 1 of NEMA sets out a formal definition of the SEMAs that lists the Acts that are deemed to be SEMAs.

necessarily an indication that the appetite for public participation became diluted over time so much as it was not entirely necessary. In addition, the decision-making processes are linked directly, or in practice, to the EIA provisions in NEMA.[68] Like the SEMAs that regulate pollution and waste issues, those that regulate the natural environment are also generally less explicit about the need for public participation in decision-making processes regarding applications for licences and permits. As the decision-making process in these instances often is not linked to the EIA process provided in NEMA, it may well be that these SEMAs reflect a less progressive approach. Nevertheless, the principles in NEMA will also apply to decisions made in terms of these SEMAs, as will the requirements of PAJA.

5 Transformative adjudication – The role of the courts in upholding the right to public participation

Policy and legislation lay the basis for democratic environmental governance, but that is not secured unless it is given effect to. The courts have an important role to play in realising the constitutional requirement for the transformation of society as a whole, an aspect of which includes overseeing how public participation in environmental issues is given effect to in practice. Although it is beyond the scope of this discussion to provide an exhaustive account of how the courts have adjudicated matters involving these disputes, a few preliminary observations are made.

68 One exception to this was the National Water Act 36 of 1998 (NWA), the development of which was initiated by the Department of Water Affairs and Forestry (as it was called at the time) as opposed to the National Environmental Department. In terms of the NWA, a licence is required to carry out a water usage that is listed in sec 21. The licensing procedure is set out in sec 41. As King & Reddell note, although the Preamble to the Act recognises the important role that the public can play in providing input to water-related strategies, sec 41 'failed to provide an enabling platform for robust public participation in water use licensing processes'. (See P King & C Reddell 'Public participation and water use rights' (2015) 18 *Potchefstroom Electronic Journal* 4 954). This is because sec 41 gives the licensing authority a discretion to invite comments from the public and does not make public participation in the applications mandatory. Although this weakness may arguably be surmounted by the application of PAJA to water use licence applications, the approach in the NWA clearly is not optimal as in practice there is a risk that the requirements of PAJA may be overlooked. However, as King & Reddell point out (956), the dilution of the potential for public participation in terms of the NWA to be adequate lies in recent amendments to the Act in the form of sec 41(5) which requires that the licensing process be aligned with the EIA decision-making process in NEMA. In addition, more recently-passed regulations regarding the Procedural Requirements for Licence Applications and Appeals, 2017 contain provisions regarding undertaking public participation processes in licence applications. (See GN 267, *GG* 40713, 24 March 2017. See Regs 17-19).

Not surprisingly, given the explicit requirement to involve the public in EIAs, many of the initial challenges that were brought to the courts based on the new environmental legislation related to EIA decision-making processes. What was perhaps unexpected is that, for a period of time, it frequently was the business community that sought to enforce the right to have their comments considered properly by decision makers. There was a spate of so-called 'filling station cases' in which oil companies, existing filling station owners or the filling station owner's association, attempted to overturn decisions to grant authorisation to build new filling stations.[69]

These cases arguably were an abuse of the newly-expanded public participation provisions. Although the claims may have been based on environmental ones, they in fact mostly were a thinly-veiled attempt to stop competition from entering the market. Nevertheless, in the judgments handed down by the Supreme Court of Appeal and Constitutional Court important jurisprudence emerged.[70] One aspect of this was that the courts accepted the businesses' claim that decisions had to include a consideration of their comments regarding the economic impacts of a new activity on existing facility. Despite the origins of these claims being based on narrow self-interest as opposed to environmental protection, they showed that the public participation provisions that are provided for in legislation can ultimately influence decision-making practice in that this litigation resulted in decision makers being compelled to consider all three of the pillars of sustainable development – society, economy and the environment.

Amidst the filling station litigation, the right to public participation was also considered from the perspective of NGOs in *Earthlife Africa (Cape Town) v Director General Department of Environmental Affairs and Tourism & Another.*[71] In this case Earthlife Africa (Earthlife) had

69 See, eg, *Sasol Oil (Pty) Ltd & Another v Metcalfe NO; BP Southern Africa v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (T); *All the Best Trading CC t/a Parkville Motors & Others v SN Nyagar Property Development and Construction CC & Others* 2005 (3) SA 396 (T); *Capital Park Motors CC & Another v Shell South Africa Marketing (Pty) Ltd & Others* (T) Case 3016/05 18 March 2007, unreported; *Turnstone Trading CC v Director-General Environmental Management, Department of Agriculture, Conservation and Development and Others* (T) Case 3104/04 11 March 2005, unreported; and *Fuel Retailers Association of Southern Africa (Pty) Ltd v The Director-General Environmental Management, Department of Agriculture, Conservation and Environment for Mpumalanga Province & Others* (T) Case 35064/2002 28 July 2005, unreported.

70 See *MEC for Agriculture, Conservation and Environment v Sasol Oil (Pty) Ltd & Another* 2006 (1) SA 66 (SCA); *Fuel Retailers Association of SA (Pty) Ltd v Director-General, Environmental Management, Mpumalanga & Others* 2007 (2) SA 163 (SCA) and *Fuel Retailers Association of Southern Africa (Pty) Ltd v Director-General: Environmental Management, Mpumalanga & Others* 2007 (6) SA 4 (CC).

71 2005 (3) SA 156 (C) (*Earthlife*).

participated in the EIA public process in respect of a controversial project to develop nuclear facilities. It argued that the process was flawed as it 'did not have access to crucial information and documents that were required to enable it to make full and proper representations'; it was not given the opportunity to make submissions on the final EIA documentation that was submitted by the consultants to government; and that it was limited to making submissions to the consultants as opposed to the director-general himself, that is, the decision maker.[72]

Although the Court did not address the first ground, it did consider the other two grounds in extensive detail in a judgment that has become a benchmark of the requirements of public participation and which is regularly cited by other courts. With regard to the second point, the director-general had argued that the EIA Regulations did not provide for public comment after the finalisation of the EIA documentation.[73] The Court described the director-general's approach as being 'fundamentally unsound'[74] as, and in an oversimplification, such an approach meant that Earthlife's participation would be limited to the investigation phase of the EIA and it would be excluded from influencing the actual decision-making process. It found this to be procedurally unfair as the final documentation that the consultant had submitted was very different from the draft documentation and this would result in the decision being based on substantially different and new information on which Earthlife had not had an opportunity to comment.[75] The Court also displayed a willingness to interrogate the state of mind and intention of the decision maker. It dismissed government's argument that Earthlife had access to the final documentation and so could have made comments if it had wanted to. It held that because the director-general had clearly adopted an attitude that Earthlife was not entitled to comment on the final documents, comments on the document would have been 'meaningless'.[76]

In more recent judgments, the courts have had the opportunity to engage with what 'meaningful' public participation involves in the EIA process and, by implication, government's acceptance of the processes that have been conducted. In 2021 and 2022 judgments were handed down in respect of proposed, or actual, seismic testing off the coastline of South Africa that provoked significant outrage

72 *Earthlife* (n 71) para 75.
73 *Earthlife* para 172G.
74 *Earthlife* para 172I.
75 *Earthlife* paras 172I-173B.
76 *Earthlife* para 174E.

among many. In *Sustaining the Wild Coast NPC and Six Others v Shell Exploration and Production South Africa BV and Four Others* the Court's findings resonate with the approach to public participation envisaged in CONNEP and the NEMA principles.[77] It held that Shell had a duty to ensure that the public participation process was meaningful in relation to the communities and individuals who would be affected by the seismic survey.[78] In finding that Shell's process was inadequate and 'substantially flawed', the Court was clear that the ability to participate must be facilitated and that the circumstances of affected individuals must be taken into account. It pointed to clear examples where this had not taken place. One was that newspaper notices advising the public of the project only being published in English and Afrikaans, as opposed to isiZulu or isiXhosa, which are the languages predominantly spoken in the area, excluded those who cannot read English and Afrikaans from the process – a finding that emphasises the interrelationship between the right of access to information and effective participation.[79] Another related to the location of public meetings where the Court found that holding public meetings in major centres rather than close to the community resulted in the community being excluded from the process.[80] A third was the way in which the stakeholder database and analysis had been compiled.[81] The importance that the Court attached to the requirement that public participation must not only be undertaken as part of the application process, but that it be meaningful is illustrated by its finding that the awarding of an exploration right that is based on a substantially-flawed consultation process is unlawful and invalid.[82]

A few months later another judgment was handed down in respect of seismic survey testing, this time in the Western Cape. The Court in *Adams & Others v Minister of Mineral Resources and Energy & Others* adopted a similar approach to that reflected in *Sustaining the Wild Coast*.[83] In describing the consultant's mindset as 'worrying', the Court also pointed out the inadequacies in the way that stakeholders had been identified and of not publishing advertisements in isiXhosa. It found that the approach that had been adopted meant that the 'illiterate and the poor were by design of the methodology excluded'.[84] The pro-poor approach that is reflected in these judgments is to be welcomed as it sends a clear signal that

77 Case 3491/2021 Eastern Cape Division of the High Court, 28 December 2021.
78 *Sustaining the Wild Coast* (n 77) para 33.
79 *Sustaining the Wild Coast* para 22. The right of access to information is enshrined in sec 32 specifically of the Constitution.
80 *Sustaining the Wild Coast* (n 77) para 24.
81 *Sustaining the Wild Coast* paras 28 & 29.
82 *Sustaining the Wild Coast* para 34.
83 Case 1306/22, Western Cape High Court, 1 March 2022.
84 *Adams* (n 83) paras 8 & 9.

the underlying ethos of public participation must be embraced and that mechanistic compliance with legislative requirements is not acceptable.

While these judgments provide an insight into the courts' willingness to uphold and develop the right to public participation in decisions on applications for authorisation, in cases involving challenges to legislation the courts have also shown a willingness to require public participation to be taken seriously by government and not be dealt with as a mere formality. Examples of this can be found in three judgments in respect of challenges to biodiversity-related regulations which, like the filling station cases, were initiated by persons with vested business interests. The first judgment, *SA Predator Breeders Association & Others v Minister of Environmental Affairs and Tourism*[85] dealt with the controversial issue of the hunting of lions that have been purposefully reared to be killed for hunting trophies, so-called canned lion hunting. The minister had published the Threatened or Protected Species Regulations in 2007 in terms of the Biodiversity Act together with lists of critically-endangered, endangered, vulnerable and protected species, including lions.[86] During litigation in the court *a quo* the minister amended the regulations to remove lions from the list to ensure that while the challenge in respect of including lions was being considered, the litigation did not affect other listed species. The minister had, however, made it clear that he would make further amendments to the regulations to re-include lions in the future. The appellant argued that the regulations were flawed as the minister had not considered their representations properly. The Supreme Court of Appeal agreed. Noting that the minister had only seen the comments of the Association after the regulations had been substantially finalised and had then published the regulations two weeks later, it held that the minister 'could not and did not apply his mind to the substance of their written representations'.[87]

The second case, *Kruger & Another v The Minister of Water and Environmental Affairs & Another*[88] involved a challenge to the moratorium on trading in rhino horn that the minister had imposed in response to the scourge of rhino poaching that was occurring. The challenge was brought by the biggest rhino breeder in the country, who argued that the minister should have consulted with him personally before imposing the moratorium. The High Court disagreed. However, in looking at the public participation

85 (72/10) [2010] ZASCA 151.
86 GNR152, GNR150 and GNR151, 23 February 2007.
87 *SA Predator Breeders Association* (n 85) para 21.
88 (57221/12) [2015] ZAGPPHC 1018.

requirements in sections 99 and 100 of the Biodiversity Act, it found that the minister had not complied with these because, for example, the draft moratorium had not been published in a newspaper. It also commented that it would have expected the minister to have gone 'beyond the minimum requirement' – an indication that the Court does not support lip service being paid to the public participation requirement. Furthermore, even though there had been interaction and consultation with stakeholders during the process – in a clear signal that the Court will insist on full compliance with procedural fairness provisions – it rejected the minister's argument that this constituted substantial compliance with the requirements. Both the Supreme Court of Appeal and the Constitutional Court denied the minister's request to appeal the decision.

This approach was cited with approval in late 2021 in the judgment of *The Federation of Fly Fishers v The Minister of Environmental Affairs* – a matter that involved a dispute regarding the listing of trout species as alien invasive ones in terms of the Biodiversity Act.[89] In requiring strict adherence to formal procedural requirements, however, the Court also stressed the need for public participation to be meaningful, as required by the Act and as observed in *Kruger*. It noted that sections 99 and 100 of the Biodiversity Act expressly afford a right to participate, and that '[p]articipation can only be meaningful if sufficient information is provided to enable the public to deal with the substance of the subject-matter and not only the fact that the activity of amendment is undertaken'.[90] It expanded on this by stating:[91]

> Public participation in democratic processes is not the exclusive preserve of educated members of society who can read English, or the privileged few who have access to the internet. Participative democracy is one of the foundational values of the Constitution and everyone should be encouraged and enabled to participate. Section 100 gives effect to the notion of participative democracy and should be interpreted in a manner consistent with that notion.

The lack of substantive compliance with the ethos underpinning the need for public participation clearly was a strong factor in the Court reaching the decision that the notices were invalid and demonstrate a consistency with the thinking of the courts in authorisation-related matters.[92]

89 (62486/2018) [2021] ZAGPPHC 575 (10 September 2021).
90 *Fly Fishers* (n 89 para 45.
91 *Fly Fishers* (n 89) para 66 (references omitted).
92 *Fly Fishers* (n 89 para 67.

A third aspect that the courts have been required to consider in respect of public participation is whether it is legitimate to suppress it. While it was noted above that business has been willing to utilise public participation requirements to pursue its interests, it has also been willing to attempt to thwart attempts by NGOs to do so. In this regard, during the filling station spate of litigation against government, in one case, *Petro Props (Pty) Ltd v Barlow & Another,* a business attempted to silence participation.[93] The Court resisted the attempt. In dismissing an application for an interdict to stop a public campaign against the construction of a filling station in a wetland, it accepted that the campaign's actions 'had been selfless and that their *modus operandi* had been entirely peaceful and geared towards balanced public participation' and that 'no decision-making power or process in terms of the Environment Conservation Act 73 of 1989 could be immune from public debate or the lodging of representations and that it wanted to prevent a situation that would deter people with environmental objections from stepping forward as active citizens'.[94]

Since this judgment, others from the business sector have made attempts to rely on the courts to stifle voices that are in opposition.[95] In the most recent judgment on the issue, *Mineral Sands Resources (Pty) Ltd & Another v Reddell & Others and two related cases* that subsequently was upheld by the Constitutional Court, the Western Cape High Court was required to adjudicate a matter that had all the hallmarks of a SLAPP suit.[96] 'SLAPP' is an abbreviation for a phenomenon known as 'strategic litigation against public participation' in which a corporate entity attempts to silence opposition by claiming large amounts of damages for comments made by members of the public. The Court provided a comprehensive discussion on the origins and consideration of SLAPP suits internationally. It emphasised the chilling effect that these suits can have, not only on those being sued, but also on those who consider speaking out against an action.[97] It also made several firm comments about the importance of public participation and the role that it has in the environmental rule of law. These included findings that

93 2006 (5) SA 160 (W).
94 Du Plessis (n 1) 22.
95 A number of cases that bear the characteristics of SLAPP suits have over the years been heard by the courts. See, eg, *Anglo Platinum Ltd v Spoor* 2006 JDR 0859 (T); *Wraypex (Pty) Ltd v Barnes* 2011 JDR 0084 (GNP) and *Landev (Pty) Ltd v Black Eagle Project Roodekrans In re: Black Eagle Project Roodekrans v MEC Department Agriculture Conservation and Environment Gauteng Provincial Government & Others* (6085/07) [2010] ZAGPJHC 18 (29 March 2010).
96 2021 (4) SA 268 (WCC) and *Mineral Sands Resources (Pty) Ltd & Others v Reddell & Others* 2023 (2) SA 68 (CC).
97 This is evident in the opening quotation used in the judgment as well as other paragraphs such as para 61.

> [p]ublic participation is a key component in environmental activism, and the chilling effect of SLAPP can be detrimental to the enforcement of environmental rights …The social and economic power of large trading corporations renders it critically important that they be open to public scrutiny without the inhibiting risk of crippling liability for defamation. Any legal action aimed at stifling public discourse and impairing public debates should be discouraged.[98]

In finding against the plaintiffs, it noted that '[c]orporations should not be allowed to weaponise our legal system against the ordinary citizen and activists in order to intimidate and silence them'.[99] In this type of litigation the courts, therefore, also seem to have maintained a consistent approach towards protecting the right to public participation in these circumstances.

Business attempts to stifle civil society voices being heard have also been visible in the area of public access to information. In these instances, the courts have been called on to consider the significance of public participation in disputes involving NGOs' calls for access to information in terms of the Promotion of Access to Information Act 2 of 2000 as part of their efforts to exercise their rights to public participation. These are interesting cases because a primary focus is on examining the relationship between people gaining access to information as a necessary precursor for exercising their rights to participate. In its first judgment on the issue involving an environmental dispute, *Trustees for the Time Being of the Biowatch Trust v Registrar, Genetic Resources & Others,* the Constitutional Court emphasised the importance of public participation when it held that 'the protection of environmental rights will not only depend on the diligence of public officials, but on the existence of a lively civil society willing to litigate in the public interest'.[100]

A similarly transformative approach was adopted by the Supreme Court of Appeal in 2014 in its judgment in *Company Secretary of Arcelormittal & Another v Vaal Environmental Justice Alliance*, where the Court cited the *Biowatch* judgment with approval.[101] In this instance the Court also referred to the public participation principle contained in section 2(4)(f) of NEMA, and held that

> [i]t is clear, therefore, in accordance with international trends, and constitutional values and norms, that our legislature has recognised, in the field of environmental protection, inter alia the importance of consultation and interaction with the public. After all, environmental

98 *Mineral Sands Resources* (n 96) paras 62 & 63.
99 *Mineral Sands Resources* (n 96) para 66.
100 (2009) (6) SA 232 CC para 19.
101 (69/2014) [2014] ZASCA 184 (26 November 2014).

> degradation affects us all. One might rightly speak of collaborative governance in relation to the environment.[102]

This reference to 'collaborative governance' adds to the jurisprudence that has developed over the last two decades and, perhaps, is the clearest message yet that the courts are prepared to enforce public input as a vital component of government decision making and that there is an inextricable link between access to information as a precursor to participation. It also resonates with the ethos and outputs of CONNEPP that public participation is an integral part of environmental governance and not somewhat of a tolerated 'add-on'.

6 Conclusion

It is clear that in the run-up to the democratic elections, South African society expressed its views on the importance of their role in environmental governance and continues to do so. It is also clear that the government responded by developing legislation that seeks to give deep effect to the right to public participation. Even though some critics argue that there is room for improvement and government continues to refine the legislation, the current legislative framework undoubtedly provides a strong and robust basis for meaningful public participation that has the potential to give effect to environmental justice through its incorporation of principles on participation that must guide decision making; provisions on access to information; requirements to conduct public participation as part of environmental authorisation application processes; and the ability of the public to initiate legal proceedings.[103]

Legislation alone is only one component of the environmental rule of law and does not ensure that meaningful public participation actually takes place – that requires that its importance be embraced by officials and politicians. In other areas critics have questioned government commitment to public participation in practice.[104] Although there are some indications – such as the repeal of the provisions in respect of the National Environmental Advisory Forum in NEMA – that the enthusiasm for extensive participation has been tempered, it is beyond the scope of this article to be definitive about

102 *Arcelormittal* (n 101) paras 65 & 71 (footnotes omitted).
103 See, eg, King & Reddell (n 67) and T Murombo 'Beyond public participation: The disjuncture between South Africa's environmental impact assessment (EIA) law and sustainable development' (2008) *Potchefstroom Electronic Journal* 3.
104 See, eg, M van Staden 'Have we been underemphasising public participation?' 2017 *De Rebus* 51.

the extent to which officials and politicians in the environmental arena have continued to have the political will to give substantive effect to the legislative right, as opposed to a minimalistic and formal mechanistic approach that is reminiscent of the past. Nevertheless, the brief discussion on disputes that have been brought before the courts indicates that there are clear attempts to dilute meaningful public participation approaches in practice. It therefore is to be welcomed that the courts' approach to these disputes, including recently that of the Constitutional Court, suggests a high degree of consistency in its willingness to safeguard the right for which so many fought. It perhaps is trite that the transformation project envisaged by the Constitution has not been completed. It therefore remains important for civil society to be vigilant and hold those responsible for undertaking public participation processes, or sanctioning them, accountable for doing so in a meaningful way so that any attempt to weaken the right does not take root, resulting in slippage down Arnstein's ladder.

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Traditional leadership in South Africa: From blood and might usurpation to constitutional accountability

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Summary: *Despite regional variations, traditional leadership has always been practised in the same way all across oceans and nations. It has always been an incident of birth and gender, and the rank and status of the mother of the heir-apparent in his father's homestead has often been the overriding consideration. In the past there were methods through which dynasties and bloodlines could be altered, namely, (i) the 'blood and might' usurpation of power, which is the subject of this article; and (ii) oral wills ('dying declarations') that would have been made by the deceased ruler on his deathbed. However, the 'blood and might' method now is merely of historical genealogical significance; it only helps to provide context in the event of a dispute in this regard. To that end, relying on* BaPedi Marota Mamone v Commission*, as an example, the article explains the applicable legal history, including the significance of the 'blood and might' method in pre-colonial times, and how this helps to place the recent constitutional developments and judicial pronouncements in their proper perspective. The article also demonstrates that the 'indirect rule' of traditional communities – which was the hallmark of colonialism and apartheid – continues to apply albeit under the glare of the Constitution. Although it is crucial, gender*

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transformation should be introduced cautiously into this area of the law, and the change should be gradual and 'adaptive', as reflected in section 2 of the Traditional and Khoisan Leadership Act 3 of 2019. The resources of the affected communities also should not be used to curry favour with any political party or any grouping within it. Failing that, the social fabric and moral and ethical fibre of the affected communities would be ruptured.

Key words: *Constitution; court; customary law; traditional leadership*

1 Introduction

Since the advent of constitutional democracy in South Africa, there has been considerable litigation around traditional leadership.[1] The proliferation of court cases appears to have been precipitated by competing claims and disputes with regard to traditional leadership in some traditional communities.[2] The reasons for this development are many and varied. First, there is a genuine quest, on the part of the individuals and communities concerned, to assert their constitutional right to culture as set out in sections 30 and 31 of the South African Constitution.[3] Second, there is a yearning to ensure justice for the affected communities, and to restore the dynasties and bloodlines, as far as possible, to what they were before the arrival of white people in South Africa.[4] Third, the objective is to ensure that the concepts and principles that underpin traditional leadership are ventilated and distilled for posterity. Fourth, there have always been lucrative benefits (and influence) attached to the position of traditional leadership.[5]

This article seeks to provide a context to these developments That exercise requires the examination of the pre-colonial history, as may be gleaned from literature; the effect of colonialism and apartheid on

1 In this regard, see eg *Mkhatshwa v Mkhatshwa & Another* 2002 (3) 441 (T); *Shilubana & Another v Nwamitwa* 2009 (2) SA 66 (CC); *Yende & Another v Yende & Another* [2020] ZASCA 179.

2 Even though there have always been contestations among the BaPedi, BaTsonga and the BaVenda in Limpopo, it seems to have been the developments in the Zulu royal house that have catapulted this issue onto the foreground.

3 Constitution of the Republic of South Africa, 1996.

4 From case law, it would appear as though this problem is particularly endemic in the Eastern Cape, KwaZulu-Natal and Limpopo provinces.

5 This would seem to the reason why the AmaHlubi traditional community are agitating for 'secession' from the Zulus, hoping to establish their own kingdom. See 'AmaHlubi nation adamant court will restore their kingship', http//www.sundayworld.co.za/news/amahlubi-nation-adamant-court-will-soon-restore-their-kingship (accessed 14 September 2023).

the institution of traditional leadership; the impact of constitutional democracy; and the resultant jurisprudence on that institution. The objective of this article, therefore, is to demonstrate that (i) first, the usurpation of traditional leadership by force of arms no longer is a determining factor for eligibility insofar as traditional leadership is concerned; (ii) second, under colonialism and apartheid, the institution of traditional leadership was an integral part of the politico-legal scheme of that period, which engendered segregation and exclusion; and (iii) third, even under the current constitutional dispensation, it remains part of one of the spheres of government, albeit subject to the provisions of the Constitution and the Bill of Rights ensconced in it.

The article is divided into four parts. The first part deals with the historical legal background. The second part deals with the current constitutional and statutory framework. The third part is a discussion and analysis of the relevant principles, concepts, applicable statutes and relevant case law. The fourth part presents the conclusion.

2 Historical background

Generally, all across the oceans and nations of the world,[6] succession to the position of traditional leadership (especially kingship) has largely been founded on male primogeniture, in that only males could succeed other males within their agnatic group,[7] to the exclusion of their female relatives.[8] In a sense it was based on the quirk of birth, or a touch of luck and providence.[9] Except for a few instances, ascending the throne had nothing to do with the physical stature or intellectual prowess of the individual involved. Royal pedigree was the overarching criterion.[10] Everything largely depended on the rank and status of the mother of the heir-apparent in his father's homestead.[11]

6 As to the position in Britain, see GW Pugh 'Historical approach to the doctrine of sovereign immunity' (1953) 13 *Louisiana Law Review* 476-480.

7 See JC Bekker *Seymour's customary law in Southern Africa* (1989) 273-274; TW Bennett *Customary law in South Africa* (2004) 334-335; C Himonga & T Nhlapo (eds) *African customary law in South Africa: Post-apartheid and living law perspectives* (2014) 161.

8 However, see in general *Bhe v Magistrate, Khayelitsha* 2007 (1) SA 580 (CC); see also *Mkhatshwa* (n 1); *Shilubana & Others v Nwamitwa* (n 1).

9 For the nature and peculiarity of traditional leadership, see Bennett (n 7) 101-106; see also TW Bennett *Human rights and customary law under the South African Constitution* (1995) 5.

10 C Rautenbach *Introduction to customary law in South Africa* (2021) 193-197.

11 *BaPedi Marota Mamone v Commission on Traditional Disputes and Claims & Others* [2014] ZACC 36 para 56.

Shaka is the foremost exception to this principle. He was born 'off the mat'[12] – contrary to custom – and had to use force and violence to take and maintain power.[13] Despite some discernible common features, there are distinctive regional and cultural nuances in South Africa where primogeniture is concerned. For that reason, the custom has not been (and still is not) practised uniformly in the various traditional communities in the country.[14] The process seems to have depended on one of two considerations, namely, (a) the ranking of the women in a deceased (or deposed) leader's homestead; or (b) whether the conjugal arrangement in that homestead was monogamous or polygynous.[15] In the latter instance, the chronology of the marriages did not (and still does not) count for much. What determined the person's eligibility and suitability for kingship was whether his mother was assigned to the *Indlunkulu* (main house), *iQadi* (right-hand house) or *iKhohlo* (left-hand house).[16] If there were no male children in any of the houses, affiliate houses would be created, of which the main purpose was to provide the main houses with male offspring.[17] These women were known, variously, as *seantlo* or *lefeyelo.*[18] It is this kind of arrangement that created bad blood between King Cetshwayo and his brother Mbuyazi,[19] and between Sekhukhune and his half-sibling Mampuru.[20] Mbuyazi – who is presumed to have been Shaka's own son – was the product of a kindred custom, known as *ukuvusa*.[21] This is a custom in terms of which the estate of a deceased widower is utilised to resuscitate his homestead, clan name and totems.[22] As in the case of the levirate custom, a sister or cousin of one of the deceased wives was preferred – provided she consented to that arrangement.[23]

12 During an illicit liaison between the then Prince Senzangakhona and Nandi Mhlongo. See J Laband *Eight Zulu Kings: From Shaka to Goodwill Zwelithini* (2018) 18-19. On the status of children under African customary law, see Bekker (n 7) 230-233; see also Bennett (n 7) 307-310, 337-344.

13 The was relied upon by the parties on both sides of the dispute in *BaPedi Marota Mamone* (n 11), in an attempt to support the claim that the traditional leadership of the BaPedi resorts under the house of Sekhukhune 1 and not Mampuru II; see para 32. In the case of Cetshwayo and Mbuyazi, there were white people involved, with the Boers fighting on the side of Sekhukhune I, and the British on Mampuru II's side.

14 Bekker (n 7) 273.

15 Bekker (n 7) 273-278.

16 *Sigcau & Another v President of the Republic of South Africa & Others* [2022] ZASCA 121 para 9.

17 Bekker (n 7) 286-294.

18 The levirate (*ukungena, kenela, tsenela*) custom was resorted to for this purpose. Bekker (n 7) 273-290.

19 This precipitated the Battle of Ndondakusuka *circa* 1856; see Laband (n 12) 175-176.

20 The involvement of the Boers and the British administrators of the time; see *BaPedi Marota Mamone* (n 11) paras 72-78.

21 This means to 'raise' or 'resuscitate' in Nguni languages.

22 See Bekker (n 7) 293-294; AJ Kerr *The customary law of immovable and of succession* (1991) 141-142.

23 Bekker (n 7) 175-176.

Except for *Bolobedu*,[24] in the Limpopo Province, where succession to traditional leadership has always been matrilineal, pre-colonial South African monarchs almost exclusively were males who had ascended to the throne through other males within their clan. However, in some communities he still had to have been involved in some or other military skirmish to qualify for kingship.[25] This 'blood and might'[26] method appears to have been one of the catalysts that, from time to time, were relied upon to upset the genealogical sequence and bloodlines within a particular dynasty.[27] For instance, Sekhukhune descended from a line of kings that ruled the BaPedi relatively peacefully, until Thulare usurped power, by force, from his elder brother Dikotope.[28] By custom, Thulare was supposed to be succeeded by his son Malekutu whom he had had with his *timamollo* (main) wife.[29] However, the latter was poisoned and replaced by his brother Matsebe. Matsebe, himself, was killed by his brother Phetedi.[30] Even though Sekwati – Thulare's only surviving son at the material time – is often credited with cobbling together the BaPedi into a strong community under very difficult circumstances,[31] he was merely meant to be a place holder for his nephew, Malekutu, or his sons, however they might have been procreated.[32] In other words, Sekwati also had an obligation to resuscitate (*vusa*)[33] his brother Malekutu's homestead. For that specific purpose, he married a *timamollo* wife, and from that union a son, Mampuru, was born.[34] To complicate matters even further, Sekwati had a son of his own, Sekhukhune. In the fullness of time, as with their ascendants, their natural, biogenetic connection did not seem to count for much;

24 The Modjadji dynasty has been at the helm of that community for more than two centuries. See KO Motasa & SJ Nortje 'Patriarchal usurpation of the Modjadji dynasty: A gender-critical reading of the history and reign of the Modjadji rain queens' (2021) 102 *Pharos Journal of Religions* 1-2.

25 In respect of AmaZulu, reference is often made to Shaka and his brothers Dingane, Mhlangana and Sigujana, and Cetshwayo and Mbuyazi. Among the BaPedi, the battles and skirmishes between Sekhukhune and his brother Mampuru are the result of the protracted litigation that has been ongoing between the descendants of Sekhukhune and Thulare, which in recent times has attracted attention. See *BaPedi Marota Mamone* (n 11) para 72; see also *Chief Lenchwe v Chief Pilane* 1995 (4) SA 686 (B); *Pilane v Pilane & Another* 2013 (4) BCLR 431 (CC); *Sigcau* (n 16); *Ludidi v Ludidi & Others* [2018] ZASCA 104.

26 See *BaPedi Marota Mamone* (n 11) paras 84-86, and para 107 on whether the forcible usurpation of power in this manner constituted a custom. See also Laband (n 12) 169-170.

27 The 'indirect rule', with its concomitant divide-and-rule ideological component, was another. As Bennett (n 9) 6 puts it, 'traditional rulers were specifically protected by the policy of indirect rule'.

28 See *BaPedi Marota Mamone* (n 11) para 72.

29 As above.

30 As above.

31 *BaPedi Marota Mamone* (n 11) para 73.

32 As indicated above, customs such as *ukungena* and *ukuvusa* were often resorted to in these circumstances.

33 In isiZulu.

34 *BaPedi Marota Mamone* (n 11) para 55-59.

instead, as indicated below, it precipitated an acrimonious contest for the BaPedi throne.[35] In other words, absent usurpation, only the status of their mothers, in Sekwati's homestead, could turn their royal fortunes.[36] As Jafta J stated in *BaPedi Marota Mamone*, paternity was not 'an overriding consideration in determining succession to kingship'.[37] In order to succeed, therefore, those who for some reason considered themselves disqualified resorted to spilling the blood of any of their brothers or agnates who stood in their way to the throne.

However, since the arrival of white people in South Africa – and the advent of colonialism and apartheid – this mode of transfer of power has had limited significance, if at all.[38] It now is only of evidentiary relevance, and helps to provide some historical perspective on the claims and disputes between siblings or relatives in matters of this nature. Instead, 'indirect rule'[39] (also known as the 'Shepstone system'),[40] which was the hallmark of colonial rule on the continent of Africa, dictated who became a king, queen or traditional leader at any particular time.[41] In many ways, the chosen person had to fit into the ideological and political mould of the ruling elite in order to enjoy gubernatorial support.[42] In many ways, this system was the precursor to the 'homeland system' in South Africa,[43] the main objective of which it was to deprive black South Africans of their rights to citizenship and genuine self-rule – and many other concomitant rights.[44] The consequences of this system were succinctly described

35 As above.
36 *BaPedi Marota Mamone* (n 11) para 56.
37 As above.
38 However, it is important to note that the Boers, the British and the missionaries were involved on one or another side of these royal battles. See Laband (n 12) 172-178; see also X Mangcu *Biko: A biography* (2012) 49-54.
39 Named after Sir Theophilus Shepstone who at that time was a representative of the British government in Natal. Some commentators describe the system as 'intermediary domination'. See V Chakunda & AF Chikerema 'Indigenisation of democracy: Harnessing traditional leadership in promoting democratic values in Zimbabwe' (2014) 2 *Journal of Power, Politics and Governance* 69 and authorities cited therein; see also K O'Regan 'Tradition and modernity: Adjudicating a constitutional paradox' (2017) 6 *Constitutional Court Review* 108 109.
40 However, Sir Frederick Lugard, not Shepstone, was the originator of this system. See Laband (n 12) 246.
41 *BaPedi Marota Mamone* (n 11) para 11; see Bennett (n 7) 109.
42 *BaPedi Marota Mamone* (n 11) para 9.
43 See *Tongoane v Minister of Agriculture & Another* 2010 (6) SA 214 (CC) paras 23-26; see also SF Khunou 'Traditional leadership and independent bantustans of South Africa: Some milestones of transformative constitutionalism beyond apartheid' (1999) 12 *Potchefstroom Electronic Journal* 86-105.
44 On the adverse effects of apartheid – and the homeland system – on the rights of black people to equality and dignity, and the right to freedom of movement, conscience, assembly, association and other similar rights and freedoms, see *Ex Parte Moseneke* 1979 (4) SA 884 (T); see also J Dugard *Human rights and the South African legal order* (1978) 53-201.

by the Constitutional Court, per Ngcobo J, in *Tongoane v Minister of Agriculture and Another*[45] in the following terms:[46]

> African people would, as a consequence, have no claim to any land in 'white' South Africa. African people were tolerated in 'white' South Africa only to the extent that they were needed to provide labour to run the economy. They had precarious title to the land they occupied to remind them of the impermanence of their residence in 'white' South Africa.

During that period, the Governor-General (under colonialism) – or the State President (during the apartheid era) – was the statutory 'supreme chief' of all the black people in South Africa.[47] In effect, he had very wide legislative powers where black people were concerned; a legal and constitutional paradox. Except for one insignificant procedural bump,[48] the State President ruled these communities by decree.[49] He could, therefore,[50] alter the territorial borders of black communities;[51] appoint, recognise or remove any person as chief or headman of a particular community;[52] or expel any person from a particular area. These powers were open to abuse and, indeed, were abused. The head of state could issue a banishment order (*trekpas*), forcing persons or a family that he considered rebellious or recalcitrant out of a particular area.[53]

When a traditional leader was to be chosen for a particular community, the wishes of the members of that community were often ignored.[54] The leader could only be appointed or recognised by the Governor-General or State President.[55] In the words of Jafta J in *BaPedi Marota Mamone v Commission*, this development marked the beginning of the 'de-legitimisation of traditional leadership' in South Africa, and the stunting of the customary law as a system of

45 *Tongoane* (n 43).
46 *Tongoane* (n 43) para 26; see also *BaPedi Marota Mamone* (n 11) paras 5-9.
47 See secs 1 and 25 of the Black Administration Act 38 of 1927; see also *BaPedi Marota Mamone* (n 11) paras 4-9.
48 Sec 26 of the Black Administration Act enjoined him to table the proclamations before Parliament before the regulations could be promulgated.
49 See secs 2, 5, 25 and 26 of the Black Administration Act; see also *Western Cape Provincial Government & Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government* [2000] ZACC 2; 2001 (1) SA 500 (CC) para 41.
50 *Tongoane* (n 43) paras 23-26; see also *Maxwele & Another v Premier Eastern Cape & Others* [2020] ZAECMHC para 33.
51 Sec 5(1)(a) Black Administration Act
52 Sec 5(1)(b) Black Administration Act. Cumulatively, these provisions account for much of the litigation in which many South African traditional communities have been involved for almost a century.
53 Under the current constitutional dispensation, sec 9 protects the right to equality (and not to be unfairly discriminated against); sec 10 is concerned with the right to human dignity; sec 18 protects the right to freedom of association; and sec 21(3) the right to enter, remain and reside in South Africa.
54 *BaPedi Marota Mamone* (n 11) para 22; see also Bennett (n 7) 109.
55 As above.

normative values.[56] It is for this reason that Laband made the following observation in relation to King Goodwill Zwelithini kaBhekuZululu Zulu:[57]

> Even so, it is not hard to conceive the incredulous derision with which Shaka, the formidable and all-powerful founder of the Zulu kingdom, would have viewed the present King's emasculated royal prerogatives, closely constrained as they are by the constitution of a constitutional republic. Indeed, for all the royal protocol and prestige that lap him about, [he] is essentially no more than a ceremonial figure embodying Zulu traditions and customs.

In a sense, the position of traditional leadership has now been hollowed out and eviscerated of all its traditional and cultural essence.

3 Current constitutional and statutory framework

3.1 Provisions of the Constitution

The position as stated in the previous rubric persists, albeit subject to the provisions of the Constitution of the Republic of South Africa, 1996 (Constitution) and the Bill of Rights.[58] It is important to note that it is the Constitution Act, 1993 (interim Constitution)[59] that set South Africa on this path. For instance, section 181 of the interim Constitution regulated the recognition and application of customary law in the context of constitutional democracy and the then still nascent human rights culture. Its provisions were the following:

(1) traditional authority which observes a system of indigenous law, and which is recognised by existing law, shall continue to exercise its powers and functions;

(2) subject to modification or repeal of such law by a competent authority.

In addition, section 211 of the Constitution is on all fours with section 181 of the interim Constitution. Its provisions serve to buttress the recognition of the institution of traditional leadership. Of course, the recognition was to be subject or subservient to the Constitution and applicable legislation.[60] An example of such legislation is the Traditional Leadership and Khoisan Act (TLKA).[61] The other Act is

56 *BaPedi Marota Mamone* (n 11).
57 Laband (n 12) 7.
58 Secs 30, 31 & 211 South African Constitution.
59 Act 200 of 1993.
60 Sec 211(3).
61 Act 3 of 2019. The TLKA repealed the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA).

the Reform of the Customary Law of Succession and Regulation of Related Matters Act.[62] However, the latter Act does not apply to succession to traditional leadership and the inheritance of property connected therewith.

It would seem as though the reconfiguration of the of constitutional and statutory framework was intended to ensure that traditional leaders (and their communities) are not lured into becoming members (or supporters) of a particular political party through financial or political inducements.[63] In other words, the relevant royal family should not be induced by any political party (or any of its members or a faction within it) into recommending a particular member of that family with an eye on elections or similar event, nor is the family supposed to subvert the process or suborn anyone with an eye on patronage and other similar benefits from the governing party.[64]

3.2 Requirements for identification and recognition of a traditional leader

Like its precursor, the South African Constitution – seminal though it be – it does not set out the requirements for eligibility for the position of a king, queen or any other type of traditional leader.[65] That task has been left to Parliament to set out the modalities or mechanics of it all.[66] It is for that reason that Parliament has enacted two pieces of legislation in that regard: the Traditional Leadership and Governance Framework Act (TLGFA)[67] and the TLKA. The provisions of the TLKA must also be read together with the equivalent provincial enactments in this regard.[68]

However, it is important to mention that the TLKA – which came into operation on 1 April 2021 – was recently declared unconstitutional

62 Act 11 of 2009, particularly sec 6. Its effect is not to abolish any rule of customary law of which the purpose is to regulate the disposal of any property that a deceased traditional leader held in his official capacity on behalf of his community.

63 The provisions of sec 2(4)A of the TLGFA – and sec 2(2) of the TLKA – appear to have been enacted with this malaise and mischief in mind.

64 See in general *Mamadi & Another v Premier of Limpopo Province & Others* [2022] ZACC 26 para 6.

65 See, in particular, sec 181 of the interim Constitution, and sec 211(1) of the final Constitution.

66 See secs 30, 31 & 211(3) of the Constitution.

67 Act 41 of 2005.

68 An example of this type of legislation is the KwaZulu-Natal Traditional Leadership Governance Framework Act 5 of 2005. As indicated above, these Acts are specifically intended to provide for local specifications and nuances.

and invalid by the Constitutional Court.[69] The Court came to the conclusion that Parliament had 'failed to comply with its constitutional obligation to facilitate public involvement before passing the [TLKA]'; and that, as a consequence, the TLKA was 'adopted in a manner that is inconsistent with the Constitution'.[70] However, the Constitutional Court ordered that its order be suspended for 24 months – in order to give Parliament an opportunity to consult, properly, with the members of the affected traditional communities. For that reason, where relevant, and for completeness, the provisions of the TLKA are discussed in this article together with those of the TLGFA and provincial equivalents.[71]

Section 8 sets out, albeit in broad terms, what must be done in the event of a vacancy occurring in a particular traditional community. The first requirement is for the family[72] of the deceased traditional leader to meet 'within 90 days after the need arises for the position … to be filled',[73] a reasonable time after the need for such a meeting to be held has arisen, in order to identify and recommend one among their number as the preferred successor.[74] In some traditional communities there are other structures, such as the Royal Council, that play a very important role and, therefore, must be part of such a meeting.[75] However, due to a lack of clarity and for a variety of other reasons, some people straddle these structures.[76] In pre-colonial times, one such role for these structures was to decide whether, in a particular instance, the usurpation of power through violent means

69 See in general *Mogale & Others v Speaker, National Assembly* & Others [2023] ZACC 14.

70 Para 87.

71 Particularly where the Eastern Cape, KwaZulu-Natal, Limpopo, Mpumalanga and North-West provinces are concerned.

72 See *Yende v Yende* (n 1) para 11; see also *Mphephu v Mphephu-Ramabulana & Others* [2019] ZASCA para 38. Therefore, only the royal family is required to meet for this purpose.

73 See sec 8(1)(a) of the TLKA.

74 This is a positive development, if one considers the fact that secs 9, 10A and 11 of the TLGFA required the meeting to be held 'within *a reasonable time* after a need arises to fill in the position … to be filled' (my emphasis).

75 Even though there may in the past have been some confusion, the TLKA places the matter beyond doubt. Sec 1 defines 'royal family' as the 'core customary institution or structure consisting of immediate relatives of ruling family within a traditional [community], who have been identified in terms of customary law and customs; and includes, where applicable, other family members who are close relatives of the ruling family'. See *Netshibumpfe & Another v Mulaudzi* [2018] ZASCA 98 paras 14-15.

76 Eg, the role of Prince Mangosuthu Buthelezi in the Zulu royal household has always been an intriguing one, particularly in relation to King Misuzulu kaZwelithini. See W Phungula 'King Misuzulu accuses Buthelezi of "sabotaging" his court battle with Prince Simakade', iol.co.za/dailynews/news/king-misuzulu-accuses-buthelezi-of-sabotaging-his-court-battle-with-prince-simakade-dee330d5-ddd5-487f-82 (accessed 30 June 2023). Prince Simakade is the incumbent King's elder brother. He is alleged to be the late King Goodwill Zwelithini's extramarital child, who still considers himself the worthy challenger to Misuzulu for the Zulu throne.

was one of the qualifying criteria for that purpose.[77] Moreover, it is the members of the relevant community who give credence and legitimacy to the these structures and attendant processes. For that reason, in some communities the main wife is known as *Masechaba* – the Mother of the Community (or Nation).[78] This is because that community would have provided *lobolo* in respect of such a wife, who eventually would give birth to a traditional leader. In other words, the person who is identified at such a meeting must be a blood relative of the deceased leader. That is implicit in the manner in which the provisions of the TLGFA[79] and the TLKA are couched.[80] Needless to say, this complex statutory arrangement behoves royal families, and other related structures, such as the Royal Council,[81] to keep abreast of the latest legislative developments.[82]

In many traditional communities the process often leads to the eldest son of the deceased[83] (or the one born of his *Indlunkulu*[84] or *timamollo* wife being chosen for this purpose). [85] As indicated above, she is often referred to as the Mother of the Nation or *Dzekiso*

77 *BaPedi Marota Mamone* (n 11) paras 58-59.
78 *See Mamadi* (n 64) para 6.
79 Secs 9, 10A & 11 TLGFA.
80 See sec 8(1) TLKA. Also, on the text-context-purpose triad of statutory interpretation, see B Bekink & C Botha '*Maccsand v City of Cape Town, Minister for Water Affairs and Environment, MEC for Local Government, Environmental Affairs and Development Planning, Western Cape Province, Minister for Rural Development and Land Reform, and Minister for Mineral Resources* 2012 4 SA 181 (CC)' (2015) 2 *De Rebus* 463-466.
81 These structures seem to be covered under the definition 'traditional council' and 'traditional sub-council' as defined in secs 16 and 17 respectively.
82 See *Yende v Yende* (n 1) paras 18-21; see also *Shilubana v Nwamitwa* (n 1) paras 43-49. However, caution should be exercised so as not to elevate a single event or an isolated event to a custom.
83 That would be in the case where the marriage was monogamous, or a simple version of polyandry. However, see sec 2 of the TLKA – a re-enactment of sec 2A (4) of the TLGFA – that provides as follows: 'A kingship or queenship, principal traditional community, traditional community, headmanship, headwomanship and Khoi-San community *must transform and adapt* customary law and customs relevant to the application of this Act so as to – comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by (a) preventing unfair discrimination; (b) promoting equality; and (c) *seeking to progressively advance gender representation in the succession to traditional and Khoi-San leadership positions*' (my emphasis).
84 In isiZulu.
85 See *BaPedi Marota Mamone* (n 11) paras 54-59; see also *Sigcau* (n 16) para 9; and *Mphephu v Mphephu-Ramabulana* (n 72) paras 29-32. Even though one of the contested resolutions of the royal house, in *Mphephu*, was clearly discriminatory in nature and purport, in that it excluded women for consideration, it submitted that the provisions of sec 2 of the TLKA – and sec 2A(4) of the TLGFA – were intended to be applied in a gradual, and incremental manner so as not to abruptly destroy the fabric of the affected traditional community. The word 'adapt' seems to suggest modifying something with a view to making it suitable for use in the fullness of time. As the Constitutional Court stated in *Shilubana v Nwamitwa* (n 1) para 49, 'deference should be paid to the development by a customary community of its own laws and customs where this is possible, consistent with the continuing effective operation of the law'.

wife[86] and should be chosen and recommended for this purpose. Also, it could happen that the family is not of one mind as to the eligibility of the person or persons who are contesting for leadership. There also could be a dispute as to whether the identification of a particular person was in accordance with the applicable customary law. In that case, the appropriate course to follow would be to make representations to the President[87] or the premier of the relevant province in terms of section 8(4)(a) of the TLKA,[88] to set up an investigative committee[89] (which has since replaced the Commission on Disputes and Claims of Traditional Leadership).[90] Another point of disagreement could be that an old custom, sought to be relied on by one or some of the members of the family, has undergone some transmogrification, or been completely discarded.[91] Invariably, the provincial High Court is the forum of first instance.[92] In order to succeed, the applicant[93] will have to demonstrate that the existing custom (for example, male primogeniture) has been replaced by another custom, and that the new custom complies with the sprit, purport and objects of the Bill of Rights.[94] However, the decision

86 In TshiVenda. On the place and role of the *Dzekiso* wife in Venda law, see *Mphephu v Mphephu-Ramabulana* (n 72) paras 28 and 40.

87 In the case of a king or a queen.

88 In the case of a principal traditional leader, senior traditional leader, headman or headwomen. However, the community's own internal structures have an important role play in this regard, and Parliament has acknowledged that; see sec 21 of the TLGFA. Sec 8(4)(a) makes no reference to these structures. However, there is nothing reprehensible about their involvement and participation in this process and, unless the language of the statute under consideration is clear, the legislature is presumed not to intend changing existing law (including customary law and the common law) more than is necessary. The only qualification is that that the law must be in accordance with the provisions of the Constitution. See C Botha *Statutory interpretation* (2005) 44; see also L du Plessis *Re-interpretation of statutes* (2002) 177-182, and sec 39 of the Constitution.

89 The investigative committee can be established only if there is evidence of or an allegation that the process of identifying a particular person was not in accordance with customary law.

90 On the establishment and functions of the Commission, see secs 21-25 of the Traditional Leadership Government Framework Act 41 of 2003.

91 *Shilubana v Nwamitwa* (n 1) paras 44-49; see also *Yende v Yende* (n 1) para 11, and *Mphephu v Mphephu-Ramabulana* (n 72) para 38.

92 Prior to the promulgation of the TLKA, in 2021, whenever the was a dispute or conflicting claims with regard to a vacant position, the court had to refer the matter to the national or provincial Commission on Traditional Disputes and Claims. However, it is important to note that the Commission has now been replaced by the national and provincial investigative committees the status of which seems to be *ad hoc* in nature; see secs 8(4) and (5) of the TLKA.

93 The application could be for an order declaring one of the preferred persons to be the king, queen or senior traditional leader of that particular community, or there could be a counter-application lodged, interdicting the applicant or a particular group or faction within the royal family from convening a meeting; or preventing anyone among the group (or particular faction) from touting himself or herself as the rightful claimant to the throne. The application could also be for an order compelling the different factions within the royal house and related traditional structures to meet in one venue, not as separate, disparate groups. See *Yende v Yende* (n 1) paras 30-31.

94 *Shilubana v Nwamitwa* (n 1) paras 45-49.

in *BaPedi Marota Mamone*[95] serves as a reminder that the historical context remains an important consideration in the adjudication of these matters.

3.3 Excursus: *Bapedi Marota Mamone v Commission*

This case had its genesis in an application for review and setting aside of a determination and decision made by the Commission on Disputes and Claims of Traditional Leadership (Commission), namely, that the traditional leadership of the BaPedi resorted with the house of Sekhukhune I, not that of Mampuru II. The matter ultimately came before the Constitutional Court, the Supreme Court of Appeal having dismissed the appeal from the North Gauteng High Court. The main issue to be determined was whether kingship could, as a matter of custom and tradition among the BaPedi, be usurped through 'might and bloodshed', and whether, if it did happen, it constituted a deviation from the customary law rules of succession. Stated otherwise, the legal question was whether there was any point of distinction between what Sekhukhune did when he deposed Mampuru, and what the latter did to the former, killing him, two decades later.

In his minority judgment Jafta J (Nkabinde J concurring) stated that the Commission had misconstrued its statutory obligation and had failed to take into account the applicable customs and customary law, namely, that the son of the *timamollo* wife had the right to succeed his father.[96] In other words, the Commission ignored the evidence relating to events that took place after the death of Sekhukhune (and Mampuru being installed in that position by the Boers).[97] Jafta J stated that such evidence could not be ignored (despite it having been raised for the first time in the Constitutional Court). His view was that the Commission would not have been prejudiced if such evidence were to be admitted.[98] He stated that 'the new ground of review raises a question of law that does not depend on new facts not on record already [and that] it can hardly be argued that the Commission would be prejudiced by its determination'.[99] The report formed part of the court record, the judge said, and that the applicant was not adding new facts.[100] In his view, the 'the acquisition of kingship through violence did not translate into an automatic transmission of power to

95 *BaPedi Marota Mamone* (n 11).
96 Para 55.
97 Para 50.
98 As above.
99 Para 51.
100 Paras 50-51.

the offspring of a king who assumed kingship by violent means'.[101] In other words, only the usurper or the aggressor benefited from his violent conduct; not his offspring or descendants. The justice of the apex court also said that the Commission, in its investigations and the resultant report, had failed to consider BaPedi law on succession to traditional leadership as it existed at the time when the events under investigation occurred.[102] While acknowledging the fact that any person could, by custom, acquire kingship through violence and usurpation, Jafta J emphasised the point that such a person 'did not acquire it for his own house and could not, therefore, pass kingship on to his successors'.[103] Therefore, even though Sekwati was Mampuru's actual biological father, he was he disqualified by custom from being the rightful heir to the BaPedi throne after the death of Malekutu (his brother's son). In the particular circumstances, he was merely a regent, a place holder, for Malekutu's children. Moreover, paternity was not even a factor; it still is not a factor.[104] Although fathered by Sekwati, Mampuru, in terms of custom, was Malektu's child, and none of Sekwati's descendants, such as Sekhukhune, was entitled to step into his traditional shoes. Jafta J concluded by holding that the decision of the Commission was irrational, in that it was not connected to the 'common cause facts' or 'undisputed facts'[105] that were presented to it.[106] In his view, the BaPedi kingship ought to resort to the house of Sekhukhune.[107]

Kamphephe J, for the majority, stated that there was 'no reason to unsettle the Commission's decision',[108] and that the appeal should fail. In the course of her judgment, she emphasised the importance of deference, on the part of the courts, when they consider reports compiled by expert bodies,[109] and that they should be careful not to substitute their own decisions for those that have been made by bodies such as the Commission.[110] She also stated that respect and due regard should be given to factual findings made by such 'specialist' bodies, which are made up of men and women with the necessary knowledge and expertise.[111] However, it is important to point out that deference should not be confused with judicial timidity that often takes refuge behind the doctrine of *trias politica* at every

101 Para 61.
102 Paras 40-41.
103 Para 61.
104 As above.
105 As above.
106 As above.
107 As above.
108 Para 67.
109 Para 79.
110 As above.
111 Para 79 and the authorities cited therein.

turn.[112] On the statutory scope[113] of the Commission's duties and functions, the judge said that not only was the Commission tasked 'with applying the relevant customary law to the case before it, but also with determining what that law was at the relevant time'.[114] The applicable customary law, she said, depended 'primarily on historical and social facts, which the Commission must establish through evidence led before it and its own investigation'.[115] Kamphephe J stated that the Commission could not be faulted for failing to cover something that was never an issue before it.[116]

On the usurpation of power as a customary law practice, Kamphephe J stated that when Mampuru fled after having been challenged by Sekhukhune, the latter '[legitimately] took the throne'.[117] However, she was really at pains to tell apart that occurrence from the killing of Sekhukhune by Mampuru, 20 years later, under somewhat similar circumstances. The justice was of the view that Mampuru's position 'was different in a material respect'.[118] Her view was that '[Mampuru] did not exert authority over the BaPedi nation', and that he just decided to flee.[119] Also, endorsing the view of the Supreme Court of Appeal on this point, she stated that Mampuru's ascension to the BaPedi throne 'was inconsequential as it was a unilateral act, inconsistent with Bapedi customary law, and intended merely to fulfil that government's policy'.[120] She also stated that Mampuru's coronation was not even sanctioned by the *Bakgoma* and *Bakgomana*.[121] For that reason, she said, Sekhukhune was able to legitimately reclaim his position as soon as he was released from custody. However, it is important to point out that Mampuru did not only abdicate from his position. Sekhukhune, with the support of the Boers, was on his heels – in hot pursuit. The role of the Boers and the British, on either side of the dispute, cannot easily be discounted. Like all the African leaders of their time, the brothers ruled at the pleasure of their colonial rulers.[122] An impression should not be created that being supported by the British, as Sekhukhune was, was less of an evil. The brothers were both in the throes of 'indirect

112 *Mphephu v Mphephu-Ramabulana* (n 72) para 14.
113 See sec 25(3)(a) of the TLGFA.
114 Para 79.
115 As above.
116 Para 105.
117 Para 88.
118 Para 89.
119 As above.
120 Para 94.
121 As above. These are the royal advisors whose task it was (and still is) to identify suitable persons for positions of traditional leadership in terms of BaPedi law and customs.
122 They were, in effect, civil servants in their administrative machinery, or tools in the political machinery of the time and, as indicated below, very little has changed in this regard.

rule' as described above. The original traditions and the correlative customary law practices of their community did not matter much.[123] Further, in pre-colonial times, the matter seemed to revolve on who was more capable of spilling blood and then ascend the throne – and remain ensconced in it – for the time being. It was not so much the nature of the act that resulted in the deposition of the incumbent as the point of time at which it occurred. As the English adage teaches us, 'he laughs best who laughs last'.

4 Eligibility, statutory formalities and processes

From the foregoing it clear that South Africa has moved from pre-colonial times to colonialism, and later to apartheid, with the Black Administration Act as its statutory cornerstone.[124] The Constitution and the Bill of Rights (and the resultant jurisprudence) are a major consideration in situations of this nature.[125] Needless to say, the process of recommending any person, for this specific purpose, has changed significantly. It takes the form of an application to the President of South Africa or the premier of a particular province.[126] Where the predecessor was a king or queen, such an application must be made to the President. Also, where the person to be replaced was a principal traditional leader, senior traditional leader, headman or headwoman, the application must be submitted to a premier.[127] In all instances, the application should indicate that the royal family did, indeed, meet for this specific purpose[128] and, importantly, due regard should be paid to the 'applicable customary law and customs'

123 This position persists even under the Constitution.
124 Act 38 of 1927 and other related statutes.
125 Secs 2, 30, 172 & 211(3) of the Constitution.
126 Sec 8(1)(a)(ii) of the TLKA.
127 When the process relates to a principal traditional leader, senior traditional leader, headman or headwoman, the application should be submitted to the premier of the relevant province. What can reasonably be implied from these provisions is that they set out some of the requirements that the candidate or heir-apparent must satisfy. The requirements under (a) and (c) appear to be peremptory; and those under (b) permissive. However, it is not only the word 'must' or 'may' on its own that should be decisive in this regard, but also the context in which its appears, nor should the language used and the general scheme of the statute itself be ignored. It would, therefore, seem as though the *ratio legis* of the provisions of sec 9, as whole, was intended to ensure that the person who is recommended for the position of traditional leadership is fit for that purpose. He or she must also possess the capacity to administer the affairs of his or her community, and utilise the resources that are intended for their benefit conscientiously. See *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; *Capitec Bank Holdings & Another v Coral Lagoon Investments 194 (Pty) Ltd & Others* [2021] ZASCA 99 para 25; *Macingwane v Masekwameng & Others* [2022] ZASCA 174 paras 21-22, and Bekink & Botha (n 80) 456-466. In these decisions the SCA sought to emphasise the 'triad' of juridical interpretation in these circumstances – the text, context and purpose.
128 In terms of sec 8(1)(a), such a meeting must be held within 90 days after the need has arisen for that position to be filled. Its provisions differ from those of secs 9(1)(a),10A(1)(a) and 11(1)(a) of the TLGFA, which required the royal

of that particular community when such a person is identified (and recommended).[129]

In considering the application, the President or the premier, as the case may be, must ensure that the candidate meets certain statutory, customary law and ethical standards.[130] The President or the premier, as the case may be, must then consider the recommendations submitted by the particular royal family, and the reasons provided for identifying and recommending such a person. If the President decides to accept the application as submitted, and the reasons proffered therefor, he may, after having consulted the premier and the Minister (of Cooperative Governance and Traditional Affairs),[131] appoint such a person as the premier may, after considering the requirements set out in section 8(1)(a) of the TLKA – on eligibility and adherence to process – appoint the person identified and recommended. The language of these provisions is permissive; and the President or the premier, as the case may be, is not obliged or compelled to recognise and appoint that person. However, if satisfied, the President or premier must indicate such recognition and appointment by notice in the national or provincial *Government Gazette*.[132] A certificate signifying that fact must be issued to the person.[133] The premier of the relevant province is required to notify the Provincial House of Traditional Leaders of the person's recognition and appointment.[134]

5 Evaluation

African traditional leadership no longer is exclusively an incident of birth, nor is it likely to be a function of gender for long. This area of the law now is a constitutionalised version of the original one. There also is the 'living' version of this body of law to consider.[135] There is a catalogue of constitutional rights (and duties) to contend with. In other words, South African lawyers and academics now have to rely on the Constitution and the jurisprudence flowing from it to support their arguments. As indicated above, the exercise requires a sound grasp of the provisions of the Constitution, TLKA and the

family concerned to meet 'within a reasonable time' after the need to identify such a person had arisen.

129 As above.

130 Including that he or she is a South African citizen who resides within the jurisdiction of a traditional community in respect of which he or she is to be appointed; secs 16(11)(a) and (h) and 16(14)(a) and (k).

131 Sec 8(1)(b) TLKA.

132 Sec 8(3)(a).

133 Sec 8(3)(b).

134 Sec 8(3)(a).

135 Sec 2 TLKA.

provincial equivalents thereof. However, the historical legal context cannot easily be ignored. That includes the significance of the 'blood and might' mode of usurpation of power. Needless to say, the violent usurpation of power now is only of limited relevance. However, there are a few factors that need to be considered, and constantly borne in mind. First, in the same way that a failed *coup d'état* would be dealt with, legally, violent usurpation could lead to several charges – including murder[136] – being preferred against him or her. Second, it actually lost its currency and potency with the advent of 'indirect rule'. However, it is important to note that there was military and violent meddling – in the affairs of African traditional communities – by both the Boer *Volksraad* and the British administration on either side of the royal bloodline.[137] In a sense, Cetshwayo and Mbuyazi, and Sekhukhune and Mampuru – and their contemporaries – ruled at the pleasure of the successive Boer and British administrators.[138] That is why the view of the Supreme Court of Appeal – which was endorsed by the Constitutional Court in *BaPedi Marota Mamone* – seems incongruous. As indicated above, Kamphephe J, for the majority, stated that 'Mampuru II's conduct in clandestinely killing Sekhukhune I and thereafter fleeing was entirely inconsistent with an intention to conquer and take over kingship and was sheer murder for which he was accordingly convicted by a court of law and executed'.[139] However, there really is no substantive difference between the alternate acts of the royal siblings, Sekhukhune and Mampuru, in their respective or alternate attempts at usurping power.

Also, it really would have made no sense at all for anyone to spill blood under those circumstances, without any future plan or purpose in mind. The distinction between the respective positions of these royal siblings actually lay in the genesis of their entitlement to kingship, and who, between them, was the last to usurp power in that manner. Mampuru was the son of King Sekwati's *timamollo* wife, and Sekhukhune ascended the throne by force of arms. In a sense, the latter was the more fortunate; and the one who 'laughed last'. The majority proffered no plausible reason as to why the Commission would suffer prejudice if the court granted the applicant the

136 See sec 277 of the Criminal Procedure Act 51 of 1977 (as amended).
137 See Laband (n 12) 175-177; see also X Mangcu *Biko: A biography* (2012) 49-54); LA Thompson *History of South Africa: From the earliest known human inhabitants to the present (revised by L Berat)* (2014) 122-124.
138 Laband (n 12) 175-177; see also Mangcu (n 137) 49-54; Thompson (n 137) 122-124.
139 *BaPedi Marota Mamone* (n 11) para 36.

opportunity to file additional papers in support of its contention.[140] It is submitted, therefore, that the decision of the Commission fell to be declared irrational and set aside, for excluding the facts that the applicant sought to present for consideration and ventilation. Third, the role of the 'blood and might' mode of usurpation, under the current South African constitutional order, is limited only to providing a historical matrix for the justification of the practice.[141] Fourth, even though 'the blood and might' method is sometimes described as having been a frequent occurrence or permanent feature of that period and landscape,[142] the instances in which it was resorted to were very few and far between.[143] The military skirmishes or bloody battles appear to have been so periodic or episodic to constitute a concrete custom. Moreover, the decision as to whether usurpation, in the particular circumstances, was constitutive of kingship depended on the approval and ratification of very powerful structures within a particular community.[144]

It would appear as though a will – be it a testamentary document or a verbal dying declaration – was another method in terms of which dynasties and bloodlines could be altered in terms of customary law.[145] Therefore, if a deceased traditional leader has executed a valid will during his or her lifetime, its provisions would have to be interpreted and given effect to.[146] A will, therefore, remains the only way – closest to usurpation – through which such a change can be effected.[147] Therefore, in that specific context, the wishes of

140 It was in the interest of justice that the issues and applicable principles be ventilated by counsel, and the Court pronounced on them – for posterity. On the role of the court in such instances, see *Tsambo v Sengadi* [2020] ZASCA 46 para 32.

141 *BaPedi Marota Mamone* (n 11) para 79.

142 That kingship was not something that a man received on a silver platter; he had to have fought valiantly to earn it. See Laband (n 12) 169-170.

143 Laband (n 12) 19-29, 89-94, 172-177; see also Mangcu (n 137) 49-64.

144 Eg, the *Bakgoma* and *Bakgomana* among the BaPedi – see *BaPedi Marota Mamone* (n 11) paras 100, 108.

145 See sev 23 of the Black Administration Act of 1938, and the regulations made thereunder. In terms of the original version of customary law, wills took the form of a dying declaration made by the deceased on his deathbed; see Rautenbach (n 10) 193; Himonga & Nhlapo (n 7) 158, 167.

146 See, eg, secs 19(1)(a)(iii) and 19A of the KwaZulu-Natal Traditional Leadership Governance Framework Act 5 of 2005. The identification of the current Zulu monarch, King Misuzulu Zulu's name is believed to have been stipulated in a will that allegedly was executed by his mother, Queen Mantfombi Dlamini. She, in turn, is said to have been appointed by her husband, the late King Goodwill Zwelthini kaBhekuZululu Zulu; see K Singh 'AmaZulu throne: Expert claims late King Goodwill Zwelithini's signature on will is a forgery', https://www.news24.com/news24/southafrica/news/amazulu-throne-expert-claims-late-king-goodwill-zwelithinis-signature-on-will-is-a-forgery-20220113 (accessed 28 June 2023).

147 As happened after the death of King Dinizulu of the AmaZulu royal house. His younger son, Solomon, seemingly with the help of Lady Colenso, ascended the Zulu throne instead of his older son, David. Lady Colenso claimed to have been in possession of a letter, apparently written by Dinizulu, expressing his

the deceased monarch should be the overriding consideration.[148] In all the other instances, the rules of select, which regulate intestate succession, are almost fixed, and somewhat rigid.[149]

Where the recognition and appointment of a particular person turns on gender and sex, care and caution would have to be exercised. Except where, as in *Shilubana v Nwamitwa*,[150] there is glaring unfair discrimination, women should not abruptly displace their brothers or cousins from these positions, merely because they are women. As against that, the strand of customary law of the affected community would have to be gradually adapted. Otherwise, the social fabric and moral fibre of that community would be torn asunder. It would seem that Van der Westhuizen J was alive to that reality when he delivered his judgment in *Shilubana v Nwamitwa*.[151] The judge specifically stated that 'deference should be paid to the development by a customary community of its own laws and customs where this is possible, *consistent with the continuing effective operation of the law*'.[152] That is what the provisions of section 2(1) of TLKA actually enjoin the courts to do in these circumstances. Therefore, while gender transformation is paramount in this context, it must be characterised by gradual '*adaptation*' of the existing local body of customary law. That process of adaptation should also ensure that every member of the royal family, male or female – extramarital or not – is part of the meeting where one among them is likely to identified – and recommended – for the position of traditional leadership.[153]

6 Conclusion

In 1994 the institution of traditional leadership and the status of the persons involved became fully constitutionalised. That position persists to this day. For that reason, the legal history in this regard is now of limited significance. It only serves to provide the judges with a rear view perspective of the politico-legal terrain as they search for viable juridical solutions to the problems that are associated with traditional leadership. The Constitution behoves the courts to rid South Africa of all the vestiges of colonialism and apartheid, particularly as they relate to customary law and traditional leadership. Legislation has been enacted for that specific purposes,

preference for Solomon. However, no one has ever had sight of that letter; Laband (n 12) 308.

148 Bennett (n 4) 362-363.

149 Bennett (n 7) 335.

150 *Shilubana v Nwamitwa* (n 1).

151 *Shilubana v Nwamitwa* (n 1) paras 44-49.

152 *Shilubana v Nwamitwa* (n 1) para 49 (my emphasis).

153 See in this regard the *dictum* of Molemela J in *Yende v Yende* (n 1) para 22.

namely, to ensure that the institution comports to the values of the Constitution. There have also been legislative attempts at insulating traditional communities and their leaders from political inducement and manipulation. Traditional leaders should not be at the beck and call of the government or any of its functionaries.

However, a measure of caution is required; and a delicate balance would have to be struck between the right to culture (which encompasses traditional leadership and related customs) and the right of every affected person not to be unfairly discriminated against. In other words, the change that is agitated for, in this regard, would have to be gradual and adaptive, and not be imposed on the affected communities in an overly hasty manner, lest there be constitutionally compliant, yet dysfunctional, communities.

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Recognising form through function in the context of integrating the bride requirement in customary marriages in South Africa

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Summary: *In previous scholarship we argued how the state and courts have tended to favour a formal or definitional approach to customary marriages in South Africa, leaving vulnerable parties, particularly women, not adequately protected. In this article we focus on a new approach emerging from the courts, particularly relating to the integration of the bride as a requirement for the validity of a customary marriage. While we affirm the courts' emerging approach regarding integration, we take issue with the language used by the courts, particularly that relating to the word 'waiver'. In considering the recent South African Supreme Court of Appeal decisions on integration, and the High Court decisions that have followed, we believe the courts are in fact not waiving the requirement, but recognising that the requirement of integration may be met in another way. In considering these cases, although the court does not explicitly rely on Ramose's 'social acceptance' thesis as to the validity of law, we believe that adopting this approach will do much*

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to assuage concerns about courts ignoring custom. More importantly, Ramose's 'social acceptance' theory gives credit to living customary law as a legal system which, as widely observed, promotes the very values on which the Constitution is founded. We also believe that Ramose's approach is a much more balanced approach in this context than a typically Western approach that promotes certainty over the protection of vulnerable parties, and represents the very evolving nature of living customary marriage laws and practices.

Key words: *customary marriage; integration of the bride; waiver; flexibility; evolution; Ramose; language; acceptance theory*

1 Introduction

In this article we focus on a new approach emerging from the courts, particularly relating to the integration of the bride as a requirement for the validity of a customary marriage.[1] Integration of the bride is commonly held by most ethnic groups in South Africa as an essential requirement for a valid customary marriage to come into being.[2] It serves an important purpose in a customary marriage, that is, that of integrating the wife into her new family, having particular regard to the cultural importance of bringing together two families (as opposed to two individuals).[3] Despite this, the Supreme Court of Appeal (SCA) has recently found in two cases, *Mbungela & Another*

1 See, eg, the cases of *Mbungela & Another v Mkabi & Others* 2020 (1) SA 41 (SCA); *Tsambo v Sengadi* [2020] ZASCA 46; *Peter & Others v Master of the High Court: Bisho & Another* (547/2020) [2022] ZAECBHC 22; and *Muvhali v Lukhele* (21/34140) [2022] ZAGPJHC 402 (18 July 2022). Our previous scholarship discussed the converse of this approach; see L Mwambene & H Kruuse 'Form over function? The practical application of the Recognition of Customary Marriages Act 1998 in South Africa' (2013) *Acta Juridica* 292.

2 NJJ Olivier and others *Indigenous law* (1995) 20; C Rautenbach (ed) *Introduction to legal pluralism in South Africa* (2018) 86; C Himonga and others *African customary law in Southern Africa: Post-apartheid and living law perspectives* (2014) 98; C Mangema 'Introducing the bride – When is a customary marriage deemed to have been concluded by families' (2020) *De Rebus* 12. See also para 22 in *Mlamla v Robushe* [2019] ZAECM 64 in which the Court, citing *Moropane v Southon* [2014] ZASCA 76, observed that many decided cases across the country have emphasised the importance of the handing over of the bride as a marriage requirement in many different traditional communities in South Africa.

3 Eg, see *Fanti v Boto* 2008 (5) SA 405 (C) paras 23-24; T Nhlapo 'Customary marriage: Missteps threaten the constitutional ideal of common citizenship' (2021) 47 *Journal of Southern African Studies* 273 285. In particular, see *Mabena v Letsoalo* 1998 (2) SA 1068 (T) 1072C-D where the Court recognised that customary marriage is not only a matter between the bride and groom but it is also 'a group concern, legalising a relationship between two groups of relatives'. See also *Mlamla v Rubushe & Others* (6254/2018) [2019] ZAECMHC 64 para 9. More recently, Cakata & Ramose have analysed African language to emphasise the importance of the family relationship formed by marriage. See Z Cakata & MB Ramose 'When *ukucelwa ukuzalwa* becomes bride price: Spiritual meaning lost in translation' (2021) *African Identities* 7.

v Mkabi & Others[4] and *Tsambo v Sengadi*[5] that the requirement is not mandatory and can be waived by the parties/families.[6] These cases have been criticised by a number of academics who consider the Court to have variously (i) ignored their own precedent;[7] (ii) ignored actual custom;[8] and (iii) 'constitutionalised' the issue.[9] These criticisms seem to suggest that there cannot be a valid customary marriage if integration of a woman in the 'prescribed customary form' has not been met.[10]

However, in as much as we sympathise with the criticisms regarding the lack of regard for the 'prescribed customary form', we suggest that the Court's approach affirms the flexibility of customary rules generally[11] even though the Court's reliance or use of the term 'waiver' is regrettable.[12] We believe the courts are in fact not waiving the requirement, but recognising that the ritual can be met in another way.[13] In fact, although the courts do not explicitly rely

4 *Mbungela* (n 1).
5 *Tsambo* (n 1).
6 See, eg, para 26 of *Mbungela* (n 1); *Tsambo* (n 1) para 17. It should also be observed that before the *Mbungela* and *Tsambo* cases, the Court in *Mabuza*, as far back as 2003, held that the practice of *ukumekeza* (formal integration) no doubt has evolved and could thus be waived. ee *Mabuza v Mbata* 2003 (4) SA 218 (C) para 25.
7 *Motsoatsoa v Roro* [2010] ZAGPJHC 122 para 40; *Moropane* (n 2) 76 para 9. See TA Manthwa 'A re-interpretation of the families' participation in customary law of marriage' (2019) 82 *Journal of Contemporary Roman-Dutch Law* 41 and MP Bapela & PL Moyamane 'The "revolving door" of requirements for validity of customary marriages in action: *Mbungela v Mkabi* [2019] ZASCA 134' (2019) *Obiter* 190. See also S Sibisi 'The Supreme Court of Appeal and the handing over of the bride in customary marriages' (2021) 54 *De Jure* 370 371.
8 Manthwa (n 7); Bapela & Moyamane (n 7).
9 As above. However, as pointed out by TW Bennett *Customary law in South Africa* (2004) 215-216, courts grappled with this issue in the 1940s and 1950s, far earlier than the introduction of the Constitution. Thus, it is difficult to accept that courts have 'constitutionalised' the issue. See eg *Mbalela v Thinane* 1950 NAC 7 (C); *Ngcangayi v Jwili* 1944 NAC (C&O) 15; *Mothombeni v Matlou* 1945 NAC (N&T) 123; *Ntabenkomo v Jente* 1946 NAC (C&O) 59; and *Sefolokele v Thekiso* 1951 NAC 25 (C).
10 However, historically, as Bennett (n 9) points out (216), courts found marriages to exist in many situations where the ritual was not strictly observed.
11 Thus, Bennett (n 9) 194 observes that 'strict adherence to the ritual formulae was never absolutely essential'. See also S Nkosi 'Customary marriage as dealt with in *Mxiki v Mabata in re: Mabata v Department of Home Affairs & Others* (GP) (unreported case no A844/2012, 23-10-2014) (Matojane J)' (2015) *De Rebus* 67. Thus, in *Mbungela* (n 1) para 18, the SCA pointed out that '[t]he courts must strive to recognise and give effect to the principle of living, actually observed customary law', as this constitutes a development in accordance with the 'spirit, purport and objects' of the Constitution within the community, to the extent consistent with adequately upholding the protection of rights.
12 According to the Merriam-Webster dictionary, waiver is 'the act of intentionally relinquishing or abandoning a known right, claim, or privilege'. See https://www.merriam-webster.com/dictionary/waiver (accessed 23 August 2021). This may be why, for example, some commentators such as S Sibisi 'Is the requirement of integration of the bride optional in customary marriages?' (2020) 53 *De Jure* 90, and Manthwa (n 7) believe that the court changed the custom.
13 See *Mbungela* (n 1) para 26. Thus, in *Mlamla* (n 2) the Court citing *Moropane* (n 2) para 23 observed that 'the essential requirements cannot be waived, but

on Ramose's 'social acceptance' thesis as to the validity of law, we believe that adopting his approach will do much to assuage concerns about courts ignoring custom, and also not protecting vulnerable parties. We also believe that Ramose's approach is a much more balanced approach in this context than a typically Western approach that appears to promote certainty over the protection of vulnerable parties.[14]

This article is divided into four main parts, including this introduction. The second part is a discussion of Ramose's 'social acceptance' thesis as a theoretical framework. We do this to show the potential value of his 'social acceptance' theory in resolving disputes concerning rituals and customs under customary law. More importantly, we want to highlight that Ramose's 'social acceptance' theory gives credit to living customary law as a legal system that is evolving in nature and promotes the constitutional values. The third part discusses the courts' jurisprudence on the integration of a bride where the flexibility of customary law is highlighted. In this part we attempt to demonstrate how the 'social acceptance' theory has the potential to clarify issues, namely, through (i) the use of language; (ii) by identifying changed social practices; as well as (iii) by attempting to address the concerns of scholars as set out above.[15] The last part presents the conclusion and our recommendations.

2 Theoretical framework

One of the vexed questions in jurisprudence is what counts as law. While this may be seen as an overly broad question regarding the issue of the integration of the bride in customary marriages, we see this as directly relevant and useful.[16] Tamanaha points out that this

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the accompanying rituals and ceremonies may be waived or abbreviated. See also Nkosi (n 11) 67 who observes that there are many decisions that are a study in judicial flexibility, and gives examples of *Shilubana & Others v Nwamitwa* 2009 (2) SA 66 (CC) paras 49-55; see also *Mabena* (n 3) 1074-1075 and *Mabuza* (n 6) 226.

14 While marriage, as an institution, raises the issues of power imbalances and inequality, no matter what the culture or religion, we note that customary marriages are particularly affected. Moore & Himonga notes that '[w]hile almost one in every two men and women in a civil marriage is employed, only two in every five men and women in a customary marriage are employed. Only one-quarter of women in customary marriages are employed, compared to 37,5% of women in civil marriages.' See E Moore & C Himonga 'Customary marriage: Is the law working? Study shows confusion among couples' *GroundUp* 1 March 2016, https://www.groundup.org.za/article/customary-marriage-law-working/ (accessed 13 August 2021.

15 As pointed out in the introduction, commentators point out that courts have (i) ignored their own precedents; (ii) ignored actual custom; and (iii) 'constitutionalised' the issue.

16 We do this given Diala's criticism, correct in our view, that 'as a concept, living customary law has not benefited from a detailed legal theoretical explanation'.

question is answered by legal theorists in three ways, depending on three broad intuitions that legal theorists have about the law. These intuitions fit into the general categories of legal positivism, natural law and historical-sociological jurisprudence.[17] While these categories are familiar to most commentators, it is useful to repeat them briefly here.

Legal positivism sees law as composed of rules, which are easily recognisable by simple evaluation standards such as legislation and case law.[18] According to this approach, law has its own independent self-contained character that is separate and distinct from both morality and history. In this way, the law's origin and sanction essentially lie in 'the will of the state',[19] which may take on many variations.[20] Notwithstanding these variations, theorists according to this approach agree that the one defining feature of legal positivism is an institutional normative system.[21] In contrast with this focus on form, natural law theorists insist that law must conform with objectively true universal moral principles.[22] While variations exist, natural law theorists generally maintain that law is the right reason reflected in a just social order.[23] Without these essential characteristics, the enforcement of norms is not law, but raw power or tyranny.[24] Finally, there are theorists who adopt an historical-sociological approach to law. These theorists deny that systematic institutional enforcement is a necessary feature of law (as the positivists would have it)[25] or that there is some universal understanding of law (as the

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See AC Diala 'The concept of living customary law: A critique' (2017) 49 *Journal of Legal Pluralism and Unofficial Law* 143 144ff.

17 BZ Tamanaha *A realistic theory of law* (2017) 39. See, in general, HJ Berman 'Toward an integrative jurisprudence: Politics, morality, history' (1988) 76 *California Law Review* 779.

18 Diala (n 16) 150.

19 HJ Burman *The nature and function of law* (1958) 21. See also Tamanaha (n 17) 39.

20 Eg, the law is the command of a sovereign (Austin); the law is the combination of primary and secondary rules (Hart); the law is a hierarchy of norms (Kelsen) and so forth. For more on these theories, see J Austin *Austin: The province of jurisprudence determined* (1995); HLA Hart *The concept of law* (1961); and H Kelsen *Pure theory of law* (1934) respectively.

21 J Raz *The authority of law* (1979) 105. See also Tamanaha (n 17) 40.

22 Tamanaha (n 17) 42.

23 As above.

24 As above. While perhaps stated too broadly, Burman suggests that '[i]ndeed, it is a tenet of natural-law theory that governmental acts or commands that grossly contravene fundamental principles of justice do not deserve to be called law at all'. See Burman (n 19) 780.

25 See, eg, Malinowski (quoted in Tamanaha (n 17) 41) who sets out that 'law can exist without 'a definite machinery of enactment, administration and enforcement of law'. In fact, Malinowski states that law can exist as binding obligations on fundamental matters. See also Berman, that it is 'not merely the will or reason of the lawmaker. Law spreads upward from the bottom and not only downward from the top.' See HJ Berman *Law and revolution: The formation of the Western legal tradition* (1983) 40.

natural law theorists would have it). Instead, they see law as a matter of customs, usages and ordered social relations.[26] This is so since they argue that what the law 'is' politically and 'ought to be' morally is to be found in 'the culture, national character, and the historical ideals and traditions of the people or society whose law it is'.[27]

It is trite that legal theorists exploring customary law, for the most part, are adherents to the historical-sociological school of thought, given its proposition that law consists of concrete usages and social practices.[28] The challenge with this view, as Tamanaha and others point out, is that it can be over-inclusive and too expansive.[29] Everything then counts as law and there is little distinction between general rules of social life and law *per se*. In this context, Cohen famously challenged Erlich's identification of law (an early prominent legal sociologist)[30] by suggesting that his terminology would make 'religion, ethical custom, morality, decorum, tact, fashion, and etiquette' all 'law'.[31] This challenge resonates in the context of recognising customary law in South Africa and, in particular, the integration of the bride requirement in customary marriages, as Bennett asks: 'How was the essential, legal, to be distinguished from the optional, and therefore customary?'[32]

In considering this theoretical framework, and its insights for our purposes, we recognise that some commentators have latched on to the 'too expansive' criticism. For example, they have done so by criticising the courts for being over-inclusive in their inclination to treat the 'mere act of cohabitation' as meeting the requirements of customary marriage.[33] Commentators have also criticised the notion of using the social practice of 'a white wedding' or attendance at a funeral as evidence of law.[34] Certainly, we appreciate the cohabitation

26 Tamanaha (n 17) 40.
27 Burman (n 19) 780-781.
28 Tamanaha (n 17) 40. See also C Himonga 'The future of living customary law in African legal systems in the twenty-first century and beyond with special reference to South Africa' in J Fenrich, P Galizi & TE Higgins (eds) *The future of African customary law* (2001) 35.
29 Tamanaha (n 17) 40. Eg, Merry asks '[w]here do we stop speaking of law and find ourselves simply describing social life?' See SE Merry 'Legal pluralism' (1988) 22 *Law and Society Review* 869. Himonga & Bosch ask how living customary law can be 'distinguished from customs and practices?' See C Himonga & C Bosch 'The application of African customary law under the Constitution of South Africa: Problems solved or just beginning' (2000) 117 *South African Law Journal* 306.
30 See, in general, E Ehrlich *Fundamental principles of the sociology of law* (1936).
31 F Cohen *The legal conscience* (1960) 187.
32 Bennett (n 9) 214.
33 Sibisi (n 7) 385; F Osman 'Precedent, waiver and the constitutional analysis of the handing over the bride' (2020) 31 *Stellenbosch Law Review* 85.
34 Bapela & Moyamane (n 7) 191. Contrary to this criticism, Erlank suggests that white weddings have actually been used 'to continue with older marriage-related patterns of reciprocity'. See N Erlank 'The white wedding: Affect and

criticism as a fundamental problem since it dilutes the objective of the requirements of a customary marriage – being the bringing together of two families.[35]

However, one such historical-sociological theorist, Ramose, seems to provide a way of differentiating between an act of a social habit, to one that counts as customary law in a way that can meet some of the criticisms set out above.[36] He suggests that we should recognise that law is flexible, unformalised, reasonable and linked to morality.[37] On this basis, he believes that 'law consists of rules of behaviour contained in the flow of life'.[38] The idea that life is a constant flow and flux means that it cannot be decided in advance that certain legal rules have an irreversible claim to exist permanently.[39] Arguably, this is captured by the Recognition of Customary Marriages Act (RCMA) which leaves the content of these legal rules to a question of evidence.[40] In the context of this discussion, this evidence is then precisely the sort of rules that a community has come to accept as regulative of their behaviour and practices, leading to them being counted as 'law'. Put differently, Ramose's theory suggests that the fact that parties may cohabit is neither here nor there, unless the community has accepted that such cohabitation regulates their compliance with the customary requirement in question.[41] All this, therefore, leads to the question of whether the relevant community has accepted that certain acts achieve the objective set out by the customary marriage requirement.[42] Bilchitz and others state that Ramose's comments implicitly suggest that acts have authority for members of a given community to 'the extent that they accept

economy in South Africa in the early twentieth century' (2014) 57 *African Studies Review* 29 41-42.

35 See, eg, the Court's comments in *DRM v DMK (*2017/2016) [2018] ZALMPPHC 62 (7 November 2018) para 31. See also Mangema (n 2); and Sibisi (n 7) 385 who observes that in *Sengadi v Tsambo,* for example, the Court misdirected itself in placing much emphasis on the parties' cohabitation.

36 See, in general, MG Ramose *African philosophy through ubuntu* (1999) ch 6; MG Ramose 'An African perspective of justice and race' (2001) 3 *Polylog: Forum for Intercultural Philosophy*, https://them.polylog.org/3/frm-en.htm (accessed 19 August 2021); and MB Ramose 'Reconciliation and reconfiliation in South Africa' (2012) 5 *Journal on African Philosophy* 21.

37 Ramose (2001) (n 36) para 6.

38 As above. See also Ramose (1999) (n 36) 84-85 where he quotes De Tejada and concludes: 'Ubuntu or Bantu law is without exception … a combination of rules of behaviour which are contained in the flow of life.'

39 As above. Ramose's description is similar to the Court's views in *Pilane & Another v Pilane & Another* 2013 (4) BCLR 431 (CC) particularly para 34 that '[t]he true nature of customary law is as a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs'.

40 As one of the requirements for the validity of a customary marriage, sec 3(1)(b) of the RCMA provides that 'the marriage must be negotiated and entered into or celebrated in accordance with customary law'.

41 Ramose (2001) (n 36) para 6.

42 See also Nkosi (n 11).

them as binding and regulative of behaviour'.[43] On this basis, then, Ramose's theory requires a court to ask whether the act in question has been 'socially accepted'.[44] This is similar to Bennett's question, as set out above, regarding how the essential can be distinguished from the optional.[45] At the end of the day, this would mean that the court would have to be convinced that members of a community accept particular acts as accomplishing objectives, and that it does not merely amount to a social habit.

In order to understand this, Bakker's insights are useful here in relation to the nature of these acts. He posits that part of the problem with the customary marriage judgments on the integration of the bride is that the acceptance (or not) of a *ritual* is conflated with a *requirement*.[46] The product of such conflation then is that the community's acceptance of a change of ritual is mistakenly seen as a change or waiver of the requirement itself. There is an unfortunate use of the words 'waiver' and 'requirement' in the judgments.[47] As set out below, relinquishing or abandoning (implied by the word 'waiver') is not an accurate characterisation of the issue since it is not the requirement that is abandoned, but the change of particular actions that evidence the requirement.

Our question then is whether the community accepts that it has waived the *requirement* of integration of the bride, or whether the community has accepted that individuals can *find other means or acts of reaching the objective/function of the requirement*. In many of the cases that will be discussed later, there is a clear indication that the requirement remains very important in customary marriages, but that the rituals/associated acts have evolved in different ways to cater for different situations.[48] In *Tsambo*, for example, the requirement was not waived. The integration requirement was met. As the Court correctly observes, 'the wife was given matching attire and both families were present to witness a coming together at the place of

43 D Bilchitz, T Metz & O Oyowe *Jurisprudence in an African context* (2017) 34-35.
44 As above.
45 Bennett (n 9) 214.
46 In this regard Bakker notes that '[i]t is not the essential requirements that can be waived but rather the rituals associated with the essential requirements'. See P Bakker 'Integration of the bride as a requirement for a valid customary marriage: *Mkabe v Minister of Home Affairs* [2016] ZAGPPHC 460' (2018) 21 *Potchefstroom Electronic Law Journal* 10. See also Sibisi (n 12) 97.
47 *Mbungela* (n 1) paras 15 & 26; *Tsambo* (n 1) paras 18, 29 & 31. See also *Mabuza* (n 6) paras 25-26.
48 Eg, in *Mbungela* (n 1) and *Tsambo* (n 1), it seems that *lobolo* and formal delivery/integration of a woman into her husband's family took place at the same time. More importantly, and dispensing with the form, formal delivery happened at the bride's family homestead, and not the groom's family. See generally discussion by Sibisi (n 12).

the *lobola* negotiations, after they had been concluded'.[49] Nkosi bears such interpretation out when he suggests that 'adherence to [the handing over of the bride] ritual has never been monolithic'.[50] Again, in *Mbungela* the integration requirement was met in the following ways:[51]

> The first appellant, in his own words, described the successful *lobola* negotiations, the payment of a significant portion of the amount agreed upon and a live cow and the exchange of gifts by both families as a combination of the two families. It is, therefore, not surprising and of great significance that the couple's families subsequently sent representative delegations to each other's burial ceremonies, as in-laws. Furthermore, it is striking that family members who contested the validity of the customary marriage in question, referred to the couple as 'husband and wife' during unguarded moments as they testified. These were patent Freudian slips that truthfully indicated that they accepted that the couple was indeed married. And it is not insignificant too that the deceased recorded the deceased as her husband in a valuable document which informed the world of her important next of kin.

An analogy dealing with how one meets a requirement is to be found in positive (legislated) law.[52] While we recognise the danger of comparing customary law with legislated positive law, the original requirement emanated from a custom in canon law as is described below. Poignantly, Ramose and his co-author, Cakata, point out the following, which is useful in our context: 'Indigenous peoples … have actually always been open to learning, appreciating and taking the cultures of others whenever they see fit. This is expressed in the isiNguni saying *intonga entle igawulwa ezizweni* (a beautiful rod is cut from other nations).'

Thus, in terms of section 29(2) of the Marriage Act,[53] a civil marriage '*shall* take place in a church or other building used for religious service, or in a public office or private dwelling house, with open doors'. In the case of *Ex Parte Dow* the problem was that the entire marriage ceremony, in breach of section 29(2), had taken

49 *Tsambo* (n 1) paras 5-6.
50 Nkosi (n 11) 67. Nkosi goes on to explain the different ways in which this ritual has been accepted as accomplished, for instance, through physical (virilocal) handing over, symbolic, or uxorilocal. In this latter version, Nkosi advises that it may involve the slaughtering of a beast by the father or guardian of the bride, to signify the acceptance of the groom by the family, or as an indication that she is free to join the husband and his people.
51 Mbungela (n 1) para 23.
52 The authors go on to say: 'The problem with Western knowledge is that it imposes itself instead of allowing people to find what could be useful to them from its culture.' See Z Cakata & MB Ramose 'When *ukucelwa ukuzalwa* becomes bride price: Spiritual meaning lost in translation' (2021) *African Identities* 5.
53 Act 25 of 1961.

place in the front garden of a private dwelling place in the open (that is, not under a roof or with open doors).[54] The Court looked at the objects sought to be achieved by the section 29(2) requirement throughout history. The Court found that the requirement was put in place to ensure publicity.[55] Given that many of the issues that required roofs and doors no longer were in play (that of escaping banns and clandestine marriages),[56] the Court found that the publicity was still achieved by holding a marriage ceremony in a garden, albeit as part of a private dwelling home.[57] Thus, while the requirement was still in place, there was a change in the way in which the parties complied with this requirement.

Literature on the integration of the bride requirement demonstrates that some commentators have tended to adopt an 'either/or' characterisation of the issue. We find this ironic, given that the adoption of this binary falls into the very trap of Western ideas around certainty and a family form that relies on individual consent rather than the union of families.[58] For example, Sibisi suggests that commentators usually fall into two schools of thought regarding the integration of the bride requirement.[59] He suggests that the first school argues that integration of the bride is a dispensable or variable requirement that parties may waive if they so choose.[60] The second school argues the opposite – that integration of the bride is an indispensable requirement.[61] This characterisation, we argue, is misguided, and it would be better to consider the issue through the lens of social acceptance of the change and variability of the ritual *underlying* the existing requirement.[62] This is because – despite the SCA's language in the cases of *Tsambo* and *Mbungela* of 'waiver'– there is ample evidence from courts' jurisprudence and empirical studies[63]

54 1987 (3) SA 829 (DCLD).
55 See Broome J's comments at 832F-H in *Ex Parte Dow* (n 54)*:* 'In my view the object of these provisions was essentially to ensure that marriages took place in public, that the public were to be informed of intended marriage so that any objections could be raised, and that a register to which the public had access be kept. The constant reference to open doors is an indication that the public were to be permitted access to every marriage ceremony, the mischief being clandestine marriages.'
56 Cretney & Masson (quoting Poynter) suggest that the theory was that banns were primarily 'addressed to parents and guardians, to excite their vigilance, and afford them fit opportunities of protecting those lawful rights which may be avoided by clandestinity'. See SM Cretney & JM Masson *Principles of family law* (1990) 15-16.
57 *Ex Parte Dow* (n 54) 833G-H.
58 Sibisi (n 12); Nhlapo (n 3) 281.
59 Sibisi (n 12) 90-91.
60 As above.
61 As above. See also *Fanti v Boto* (n 3).
62 See our argument below. See also Bakker (n 46) and Nhlapo (n 3) in general.
63 See, in general, C Himonga & E Moore *Reform of customary marriage, divorce and succession in South Africa* (2015). For references to earlier studies, see J Comaroff

to suggest that most clans and communities continue to believe that the integration of the bride is an important requirement.[64]

However, and in line with the courts' general recognition that integration requires some type of 'constructive delivery',[65] there are particular circumstances where there may be an abbreviation or simplification of the rituals associated with the requirement. We have noted a number of circumstances where this could be said to be the case: first, in urban middle-class settings,[66] and where the future wife is an older woman (often a spinster or a widow)[67] or where both parties are elderly.[68] In these cases there seems to be an understanding in the community that the 'usual' rituals[69] are not necessary, and that simplified or symbolic integration will achieve the objective of the requirement. We believe that this approach is implicitly endorsed by Ramose and that the 'strict compliance with form' approach ironically uses Western law's need for certainty as the appropriate measure, and treats customary law as something other than what it is. Ramose alludes to this when he suggests that when legal language ruptures the (customary) ideas of 'be-ing' into (the Western) 'be!', it becomes a violent act.[70]

& S Roberts *Rules and processes: The cultural logic of dispute in an African context* (1981).

64 Eg, see Himonga & Moore (n 63) 92-93 and Bakker (n 46).

65 *Mlamla* (n 2). Here the judge stated at para 17, in reference to the integration of the bride requirement: 'I also agree with the concept of constructive delivery to the extent that it suggests, at the very least, some authorised members of the bride's family delivering or handing her over to the groom's family without a big formal occasion.'

66 See, eg, the comment by Laing J in *Peter* (n 1) paras 19-20*:* 'It is useful … to reiterate the organic nature of customary law, which is characterised by its continuous and natural development *within a constantly changing socio-economic environment* … Overall, it appears from the case law that the courts have adopted a pragmatic approach, rooted in the practices and lived experiences of the community concerned' (our emphasis).

67 See, eg, *Miya v Mnqayane & Another* (3342/2018)[2020] ZAFSHC 17 paras 13-14 where the Court explored and ultimately accepted the reasons for a truncated handing-over ceremony.'

68 Eg, in *Peter* (n 1) the Court states (para 36) that the spouses were 68 and 61 years old when their customary marriage took place. Later, the Court notes (para 46) that '[i]t would have been reasonable for the couple to have abbreviated the process where both were advanced in years and where it was the deceased's third marriage'.

69 See Nhlapo (n 3) 275.

70 Ramose goes on to say: 'The violent separation of be-ing, becoming and the invention of opposition between be-ing and becoming through the insertion of be! is ontologically and epistemologically questionable.' See Ramose (1999) (n 36) 80. Elsewhere, Ramose has eschewed the idea of a being as 'finite' – he talks about being as 'one continuous wholeness'. See Ramose (2001) (n 36) para 6. In the context of customary marriages, see Nhlapo (n 3) 275, who makes this exact point: '[T]he construction of official customary law under colonialism and apartheid and warns that *the search for common-law style certainty runs the risk of destroying the essence of customary law*, in the process denying legal validity to marriages that are perfectly sound socially' (our emphasis). See also Nhlapo (n 3) 281.

3 Court jurisprudence on formal delivery and integration of a bride requirement

3.1 Categories of court approaches

For the purposes of this discussion, the courts' jurisprudence on the formal delivery and integration of a woman may be divided into three main categories. The first category is where courts use the fact that customary law is recognised subject to the Constitution as a justification for disregarding the formal integration of a woman requirement. *Mabudza v Mbatha*[71] is an example of how the Court used the Constitution to endorse the waiver of the formal integration requirement in the name of developing customary law.[72] Further, in *LS v RL*,[73] while finding that there was compliance with the integration requirement, the Court ultimately held that the requirement was unconstitutional for its alleged discrimination against women.[74] The second category, represented by *Fanti v Boto*[75] and *Motsoatsoa v Roro*,[76] focuses on the Court's *dictum* that formal delivery is a requirement that cannot be waived. On the face of it, this approach seems to suggest that there be strict adherence to the form traditionally accepted of the integration requirement in customary marriages.[77]

The above first and second categories represent missed opportunities in different ways to consider (i) what language is used to describe and understand customary marriage; and (ii) what the Constitution really requires in terms of equality. More importantly, these approaches fail to consider the flexibility of customary marriage rules which, as practised, change to meet the community's social context, among other issues.[78] In this context, Ramose's observations

71 *Mabuza* (n 6). See also *LS v RL* 2019 (4) SA 50 (GJ).
72 In *Mabuza* (n 6), where the Court observed that 'if one accepts that African customary law is recognised in terms of the Constitution, and relevant legislation passed thereunder, such as the Recognition of Customary Marriages Act, No 120 of 1998 … there is no reason, in my view, why the courts should be slow at developing customary law ... the proper approach is to accept that the Constitution is the supreme law of the Republic. Thus any custom which is inconsistent with the Constitution cannot withstand constitutional scrutiny.'
73 *LS v RL* (n 71).
74 In *LS v RL* (n 71) para 34 the Court held that the handing over of a woman 'as a prerequisite in validating the existence of a customary law marriage is inconsistent with the constitutionally guaranteed values of equality, dignity and non-discrimination'.
75 *Fanti* (n 3).
76 *Motsoatsoa* (n 7).
77 See also *Motsoatsoa* (n 7). See also Nkosi (n 11) who observes that 'adherence to [the handing over of the bride] ritual has never been monolithic'.
78 Eg, most communities have accepted the changed realities in which the customary marriage requirement of *lobolo* is now practised, ie, money is delivered

cannot be overemphasised, namely, that the language of form and rules – that conform to tick-box requirements – cannot truly capture the essence of customary marriage. Moreover, as customary law is dynamic, living and linked to morality, it really is concerned with what the community accepts within the framework of an egalitarian Constitution.[79] In this regard, we further argue that courts using the Constitution to do away with the practice seem to disregard the constitutional mandate of developing customary law[80] or, at a minimum, show courts falling into the trap of common law ideas of certainty.

The third category, which is our focus in this article, affirms the flexibility of customary rules as represented by the case of *Mbungela.*[81] In this category of cases, instead of disregarding the requirement, courts seem to recognise other activities/acts undertaken to reach the objective of the formal delivery and integration requirements.[82] In so doing, courts are ultimately focusing on the functionality of the marriage, that is, mutual respect, taking care of each other, to name a few. The function of a marriage, for example, is well represented in the case of *Peter* where, as will be discussed later, the wife assisted the deceased with the renovation of the house, took care of the deceased's illness, and mourned him as the widow.[83] In what subsequently follows, we look at the cases in this category and attempt to show how Ramose's theory is at work.

3.2 *Mbungela & Another v Mkabi*

Similar to the context in *Fanti v Boto*,[84] the issue before the Court in *Mbungela v Mkabi* was whether the first respondent, Mr Mkabi, and the late Ms Ntombi Eunice Mbungela (the deceased) had complied with section 3(1)(b) of the RCMA and concluded a valid customary marriage. The main issue before the Court was that the deceased's

instead of live cows (*Tsambo* (n 1)). It should be recalled that traditionally, *lobolo* was delivered in the form of live cows (Bennett (n 9)).

79 See eg *Shilubana* (n 13).

80 In this regard, see generally discussion by J Sloth-Nielsen & L Mwambene 'Walking the walk and talking the talk: How can the development of African customary law be understood?' (2012) *Law in Context* 27 where the authors highlight the confusion emanating from court when their use of 'develop' actually means 'change'.

81 *Mbungela* (n 1), *Peter* (n 1) and *Muvhali v Lukhele* (21/34140) [2022] ZAGPJHC 402 (18 July 2022).

82 See also *Tsambo* (n 1).

83 *Peter* (n 1) paras 12 & 14.

84 In both *Fanti* (n 3) and *Mbungela* (n 1) the families of the respective deceased wives are challenging the validity of the marriage on the basis that the customary marriage did not take place due to non-fulfilment of the customary marriage requirement of handing over of the bride to her groom's family. However, it is observed that the outcomes of these two cases are different.

family, the appellants, contended that Mr Mkabi and the deceased had not concluded a customary marriage as the deceased was not handed over to the Mkabi family and *lobola* was not paid in full. As a result, the family argued that not all the requirements of section 3(1)(b) of the Act were met.[85]

The brief facts surrounding this case are that Mr Mkabi, a Swati, and the deceased, a Shangaan, who were respectively 59 and 53 years old, started dating in 2007. They each owned immovable property. They regularly visited each other at their respective properties in Kanyamazane, Nelspruit, and in Pienaar. Mr Mkabi, however, spent significant amounts of time at the deceased's home and had his washing done there on a permanent basis.[86] On 2 April 2010 Mr Mkabi sent emissaries from his family to the deceased's home in Bushbuckridge to start the marriage/*lobola* negotiations. The proceedings were successful and the two families concluded an agreement in terms of which Mr Mkabi would pay *lobola* in the sum of R12 000 and a live cow. He immediately paid R9 000 which was accompanied by an exchange of gifts.[87] According to the deceased's family member, the exchange of gifts 'symbolised the combination of a relationship between the bride and the groom and the[ir] families'.[88] It is common cause that Mr Mkabi subsequently delivered the cow to the deceased's family.[89] After the *lobola* negotiations, the deceased remained at her family home for a few days and returned to Mr Mkabi in the following week.[90] Unfortunately, the deceased and Mr Mkabi did not register their customary marriage due to no fault of their own. In 2013 they approached the relevant traditional council in order to obtain an official letter confirming their union as they considered themselves married. The traditional council secretary, however, was absent from the office on that day.[91]

Before determining the issue, the Court highlighted several factors that pointed to a possible conflict of laws in so far as the handing over of the bride requirement was concerned. The Court noted that Mr Mkabi was a Swati man who was not familiar with the customs of the deceased (who was a Shangaan). During the *lobola* negotiations, the deceased's family made no mention of a handing over or a bridal

85 *Mbungela* (n 1) para 3.
86 *Mbungela* (n 1) para 4.
87 The various gifts for the deceased's family included a man's suit, shirt, tie, socks and a pair of shoes for her guardian, a woman's suit for her mother, a blanket, a headscarf, two snuff boxes, brandy, whisky, a case of beers and a case of soft drinks. The deceased's family also gave gifts to the Mkabi emissaries (para 5).
88 *Mbungela* (n 1) para 5.
89 As above.
90 *Mbungela* (n 1) para 6.
91 *Mbungela* (n 1) para 6.

transfer requirement. According to Mr Mkabi, the handing over of the bride was not an absolute requirement to complete a customary marriage in Swati custom.[92] In addition, the Court highlighted several incidents that point to the fact that both the family of the deceased and Mr Mkabi were involved in the processes that led to the marriage and during the marriage.

First, the Court found that Mr Mkabi and the deceased had a white wedding at the deceased's church and they continued living as a married couple.[93] Second, according to the deceased's diary, she had listed her emergency contact persons as Ms Mkhonza and Mr Mkabi, whom she respectively described as her daughter and husband.[94] Third, when Mr Mkabi's mother died in 2012, the deceased's family attended her funeral at his ancestral home in Umkomaas. Likewise, when the deceased's mother passed away in October 2013, members of his family attended the funeral. These attendances were an acknowledgment by the two families of their relationship as in-laws and a corresponding show of respect in accordance with African culture.[95] Finally, the Court found two slips of the tongue during cross-examination. First, the deceased's brother (as first appellant) told the Court – when asked whether he prevented Mr Mkabi from attending the deceased's funeral – that 'I did not stop him all, what I did was to report to him that *his wife* has passed away'.[96] Similarly, the daughter of the deceased (as second appellant) referred to Mr Mkabi as *'my mom's husband'*.[97]

In arriving at the decision, the Court made several observations that, we believe, manifests Ramose's social acceptance theory in its acceptance of the flexibility of customary law but, more importantly, that the law is what is accepted by the community in its contemporary setting. In this regard, the Court notes:[98]

> [C]ustomary law is a dynamic, flexible system, which continuously evolves within the context of its values and norms, consistently with the Constitution, so as to meet the changing needs of the people who live by its norms. The system, therefore, requires its content to be determined with reference to *both the history and the present practice*

92 In addition, according to Mr Mkabi, payment of *lobola* may suffice in Swati culture, depending on the negotiations. Related to this issue, Mr Mkabi further averred in court that he had not been informed that the marriage would be complete only when the entire *lobola* amount was paid. Furthermore, there was no demand for the balance of R3 000 which he intended to pay in due course despite his understanding that *lobola* is never paid in full; *Mbungela* (n 1) para 7.
93 *Mbungela* (n 1) para 7.
94 As above.
95 *Mbungela* (n 1) para 8.
96 *Mbungela* (n 1) para 14 (our emphasis).
97 *Mbungela* (n 1) para 13 (our emphasis).
98 *Mbungela* (n 1) para 17 (our emphasis).

> *of the community concerned*. As this Court has pointed out, although the various African cultures generally observe the same customs and rituals, it is not unusual to find variations and even ambiguities in their local practice because of the pluralistic nature of African society. Thus, the legislature left it open for the various communities to give content to s 3(1)(b) in accordance with their lived experiences.

In addition, and also directly speaking to the flexibility characteristic nature of customary law, the Court pointed out that

> *the Constitutional Court has cautioned courts to be cognisant of the fact that customary law regulates the lives of people and that the need for flexibility and the imperative to facilitate its development must therefore be balanced against the value of legal certainty, respect for vested rights and the protection of constitutional rights*. The courts must strive to recognise and give effect to the principle of living, *actually observed customary law*, as this constitutes a development in accordance with the 'spirit, purport and objects' of the Constitution within the community, to the extent consistent with adequately upholding the protection of rights.[99]

In applying these observations, the Court held that *in casu* there was a valid marriage. In addition to the partial payment of *lobola* and the exchange of gifts, the Court found that several incidents pointed to the integration of the bride, the most important of which was the coming together of both families at a white wedding. However, this was not seen in isolation: The delegations at family burial ceremonies, the recording of the married status in an important document, and the cross-examination slips of the tongue by the appellants in unguarded moments were enough to convince the Court that a customary marriage existed.[100]

More importantly, and directly speaking to the changed form of the practice and Ramose's social acceptance theory, the Court cited Bennett's examples of traditional wedding ceremonies that were simplified or abridged without affecting the validity of a marriage. The Court pointed out:[101]

> Western and Christian innovations have been combined with the traditional rituals … [h]ence a wedding ring may be used in place of the traditional gall bladder or slaughtered beast, and, for many, a church ceremony is now the main event. This seems to be precisely what happened here. To my mind, there can be no greater expression of the couple's consummation of their marriage than their undisputed church wedding.

99 *Mbungela* (n 1) para 18 (our emphasis).
100 *Mbungela* (n 1) para 23.
101 *Mbungela* (n 1) para 24.

Furthermore, and confirming our observation that the Court in fact recognised the importance of handing over of the bride requirement (in spite of its unfortunate use of the word 'waiver'), the Court held that the two families had indeed come together: There was overwhelming evidence that the families, including the deceased's 'guardian', considered the couple husband and wife for all intents and purposes. This, we find, speaks to Ramose's social acceptance theory, essentially boiling down to recognising 'the living law *truly observed by the parties and the actual demands of contemporary society*'.[102] Second, the Court implied that it was the *requirement* and not a specific and inflexible ritual or act that has value in customary law:[103]

> The importance of the observance of the traditional customs and usages that constitute and define the provenance of African culture cannot be understated, nor can the value of custom of bridal transfer be denied. However, it must be recognised that an inflexible rule that there is no valid customary marriage if just this one ritual was not observed, even if other requirements of section 3(1)(b) of the Act, especially spousal consent, have been met, in circumstances such as the present ones, could yield untenable results.

In summary, the Court concluded that both families of the deceased and Mr Mkabi, who come from different ethnic groups, were involved in and acknowledged the formalisation of their marital partnership.[104]

3.3 *Moropane v Southon*

In similar fashion to *Mbungela,* the Court in *Moropane v Southon*[105] concluded that a valid marriage existed.[106] The appellant's case was that there was no evidence that the parties had ever agreed to conclude a customary marriage, suggesting that the requirement in section 3(1)(b) of the Act had not been met.[107] In order to understand the Court's finding, we narrate the brief facts of the case as follows: The parties met and fell in love during 1995. At that time the appellant, Mr Moropane, was still married to his former wife whom he divorced in October 2000, after which the respondent, Ms Southon, moved in with the appellant and they both lived together at the appellant's house in Morningside Manor, Johannesburg.[108]

102 *Mbungela* (n 1) para 26 (our emphasis).
103 *Mbungela* (n 1) para 27.
104 *Mbungela* (n 1) para 30.
105 *Moropane* (n 2).
106 *Moropane* (n 2) para 3 as read with para 55.
107 Sec 3(1)(b) RCMA.
108 *Moropane* (n 2) para 4.

On 17 April 2002 a delegation, led by the appellant's brother, Mr Strike Moropane, was sent to the respondent's parental home in Seshego, Polokwane. The negotiations were carried out between the two families which culminated in an agreed amount of R6 000 being paid by the appellant's delegation to her family.[109] After the negotiations had been completed, the Moropanes gave the Mamabolos two blankets, one for the respondent and the other one for her mother, as well as knives and cutlery.[110] In addition, a sheep was slaughtered to signify the new union between the two families brought about by the customary marriage between the appellant and the respondent.[111] This was followed by festivities during which the two families and the people who had gathered at the Mamabolos' residence sang, danced, ululated and partook in food and drinks in celebration of the customary union. The respondent was draped with the blanket that the Moropanes, her in-laws, had bought for her.[112]

In relation to the integration requirement, the Court noted that on the day of the marriage negotiations, a closed meeting was held between the two families and the appellant's delegation requested the respondent's family to permit the newly-wed bride (the *makoti*) to be delivered to their home. Later on the respondent was driven to the appellant's home in Atteridgeville, Pretoria, where she was welcomed by the appellant's sister.[113] Essentially, the respondent asserted that this context (that is, the closed meeting and being driven to the appellant's home) was what constituted the negotiations and formal delivery.[114]

On the other hand, the appellant contended that the meeting and the drive were no more than preliminary or exploratory discussions and not to conclude a customary marriage.[115] Further, the respondent contended that, after the negotiations on 17 April 2002, the parties continued to live together in the same house as husband and wife in a customary marriage until she left in November 2009. In contesting this, the appellant asserted that such context was a mere cohabitation.[116] The third bone of contention between the parties involved identifying the type of marriage. The respondent maintained that the marriage was customary in nature, while the

109 *Moropane* (n 2) para 6.
110 *Moropane* (n 2) para 7.
111 *Moropane* (n 2) para 8.
112 *Moropane* (n 2) para 9.
113 *Moropane* (n 2) paras 10 & 11.
114 *Moropane* (n 2) para 2.
115 *Moropane* (n 2) para 17.
116 *Moropane* (n 2) para 3.

appellant contended that it was always meant to be a marriage by civil rites.[117] The determination of this issue, therefore, was crucial to the question of whether a customary marriage or a civil marriage came about.

Against this brief background, and in holding that a valid customary marriage existed, the Court considered a number of important events that took place between 2002 and November 2009 while the parties lived together in Johannesburg.[118] These include the following:[119]

> [T]he appellant bought the respondent an 18 carat yellow ring which he arranged with a jeweller to redesign as a wedding ring; he organised a lavish 50th birthday for her which was captured on a DVD; he admitted that at this birthday he freely referred to her as his customary law wife at this party; the appellant further referred to her mother as his mother-in-law and Gilbert, as his brother-in-law; when he applied for her to be a member of the prestigious Johannesburg Country Club, he described her as his customary law wife and also when he applied for a protection order.

More importantly, two expert witnesses, Mr Sekhukhune for the appellant and Prof Mokgatswane for the respondent, were called to testify on Pedi customary marriages in an attempt to assist the Court to determine whether the marriage between the parties was 'negotiated and entered into or celebrated in accordance with customary law' of the Bapedi people.[120] In that regard, the Court observed:[121]

> Except for minor and inconsequential differences on cultural rituals, both experts were agreed that the current customary requirements for a valid customary marriage amongst the Bapedi people include amongst others, negotiations between the families in respect of lobola; a token for opening the negotiations (*go kokota or pula molomo*); followed by asking for the bride (*go kopa sego sa metsi*); an agreement on the number of beast payable as lobola (in modern times this is replaced by money); payment of the agreed lobola; the exchange of gifts between the families; the slaughtering of beasts; a feast and counselling (*go laiwa*) of the makoti followed by the formal handing over of the makoti to her in-laws by her elders.

In considering these rituals, the Court – recognising the potential that these rituals can change and indeed that living customary law

117 *Moropane* (n 2) para 5.
118 *Moropane* (n 2) para 17.
119 As above.
120 As above.
121 As above.

is dynamic – confirms our belief that Ramose's social acceptance theory works in practice. The Court noted:[122]

> African law and its customs are not static but dynamic. They develop and change along with the society in which they are practised. This capacity to change requires the court to investigate the customs, cultures, rituals and usages of a particular ethnic group to determine whether their marriage was negotiated and concluded in terms of their *customary law at the particular time of their evolution*. This is so particularly as the Act defines 'customary law' as the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the cultures of those people.

Ultimately, the Court was satisfied that the essential requirements for a valid customary marriage according to the customary law of the Bapedi people had been met.[123]

3.4 *Tsambo v Sengadi*

In similar fashion to *Mbungela* and *Moropane*, the SCA in *Tsambo v Sengadi*[124] also took a flexible approach regarding the formal transfer of the bride requirement and held that the marriage was valid.[125] The two important issues were (i) whether a customary law marriage between the deceased, Tsambo and Mrs Sengadi, came into existence on 28 February 2016;[126] (ii) whether 'pursuant to the conclusion of the *lobolo* negotiations, a *handing over of the bride* ensued in satisfaction of the requirement that the marriage be negotiated and entered into or celebrated in accordance with customary law in terms of section 3(1)(b) of the RCMA 120 of 1998'.[127]

In order to understand the SCA's finding that there was a valid customary marriage, we highlight the brief facts of this case as follows: The respondent (being the alleged wife) averred that the deceased proposed marriage to her on 6 November 2015 while they were in Amsterdam, which she immediately accepted. On 20 January 2016 the appellant (the deceased's father) dispatched a letter to the respondent's mother, requesting that the families of the respondent and the deceased meet 'to discuss the union' of the deceased and the respondent. On 28 February 2016 the two families met at the

122 *Moropane* (n 2) para 36 (our emphasis).
123 *Moropane* (n 2) para 55.
124 *Tsambo* (n 1).
125 *Tsambo* (n 1) para 2. This case was an appeal, directed at the decision of the High Court that found that a valid customary marriage had been concluded between the deceased and the respondent. The court a quo judgment is cited as *Tsambo v Sengadi* 2019 (4) SA 50 (GJ).
126 *Tsambo* (n 1) para 1.
127 As above (our emphasis).

respondent's family home.[128] Upon the successful conclusion of the *lobola* negotiations, the deceased and the respondent were immediately dressed in matching wedding attire, and the celebration by the two families, ululating, and uttering the words 'finally, finally' ensued.[129] It is also important to highlight that the deceased's aunts introduced the respondent to all persons present as the deceased's wife and welcomed her to the Tsambo family.[130] The deceased and the respondent lived in the same house as husband and wife until 2018 when she moved out due to his infidelity.[131] In the same year the deceased committed suicide. The respondent immediately returned to the matrimonial home in order to mourn the passing of her husband. However, she was informed by the appellant that he did not acknowledge her as the deceased's wife and barred her from making funeral arrangements for him.[132]

The appellant's actions led to the respondent launching an urgent application, seeking recognition of her customary marriage to the deceased.[133] In opposing the application, the appellant averred that the respondent had no right to the relief sought, as no customary law marriage had been concluded between her and the deceased. More relevant to the theme of this article, the appellant averred that the handing over of the bride, which he considered as the most crucial part of a customary marriage, did not take place.[134] In addition, he described the meeting that took place between the two families to have been confined to *lobola* negotiations and the celebration of the successful conclusion of the lobola negotiations.[135]

Before looking at the SCA decision, it is important that we pause to highlight that Ramose's social acceptance theory was at play in the High Court decision, when it 'found that there was a tacit waiver of the custom of the handing over of the bride because a *symbolic handing over* of the respondent to the deceased's family had occurred after the conclusion of the customary marriage'.[136] Of course, in as much as the Court's use of the word 'waiver' is regrettable, we find that the Court's approach, that of recognising that the symbolic handing over had taken place, speaks to the Court's focus on the dynamic and flexible nature of the application of living customary rules, and – in line with Ramose's theory – confirmation of a changed

128 *Tsambo* (n 1) paras 3 & 4.
129 *Tsambo* (n 1) para 6.
130 *Tsambo* (n 1) para 5.
131 *Tsambo* (n 1) para 7.
132 As above.
133 *Tsambo* (n 1) para 8.
134 *Tsambo* (n 1) para 10.
135 *Tsambo* (n 1) para 9.
136 *Tsambo* (n 1) para 11 (our emphasis).

practice that everyone in the family and those present accepted at the time.

Reverting to the SCA decision's regarding the validity of the customary marriage, we submit that the Court's citation of certain authorities underlines the applicability of Ramose's theory in this case.[137] This is so for various reasons: First, the Court highlighted that 'when dealing with customary law, it should always be borne in mind that it is a dynamic system of law', endorsing the authorities as laid down in the *Mabuza v Mbatha'*.[138] Second, and in endorsing the flexibility nature of customary rules, the Court observed that 'the appellant's contentions pertaining to the rituals observed during the handing over of the bride ceremony fail to take into account that customary law is by its nature, a constantly evolving system'.[139] Third, and more importantly, the Court cited with approval Bennett's observations regarding the importance of flexibility in the application of customary rules in the following words:[140]

> In contrast, customary law was always flexible and pragmatic. Strict adherence to *ritual formulae* was never absolutely essential in close-knit, rural communities, where certainty was neither a necessity nor a value. So, for instance, the ceremony to celebrate a man's second marriage would normally be simplified; similarly, the wedding might be abbreviated by reason of poverty or the need to expedite matters. Aside from this, the indigenous rituals might be supplanted by exotic ones: a wedding ring may now be used in place of the traditional gall bladder of a slaughtered beast and for many a church ceremony has become indispensable [Moreover], the Court observed that given its obligation imposed on the courts to give effect to the principle of living customary law, 'failure to strictly comply with all rituals and ceremonies that were historically observed cannot invalidate a marriage that has otherwise been negotiated, concluded or celebrated in accordance with customary law'.

Furthermore, in concluding that the requirement of the handing over of the bride had been met – albeit in a different form – the Court made several observations that directly support Ramose's social acceptance theory and, arguably, also confirms the dynamic nature of living customary practices as follows:[141]

> While rituals associated with the handing over of the bride, like the slaughtering of the sheep and the consumption of its bile were indeed not observed, there are some features that bear consideration. First, the court noted that it was striking that the deceased's aunts were the

137 *Tsambo* (n 1) para 14.
138 *Tsambo* (n 1) para 16.
139 *Tsambo* (n 1) para 17.
140 *Tsambo* (n 1) para 18 (our emphasis).
141 *Tsambo* (n 1) paras 25 & 26 (our emphasis).

> ones who provided the respondent with an attire matching that of the deceased and who actually dressed her up in it, describing such attire as her wedding dress. In the court's reasoning, it found that this was a customary practice that is compatible with an acceptance of the respondent by the deceased's family. Second, the clearest indication of her acceptance as the deceased's wife is evidenced by the actual utterances that were made: the respondent was formally introduced as the deceased's wife and welcomed to the Tsambo family. Third, the appellant embraced her and congratulated her on her marriage to the deceased.

In view of the above, the Court, therefore concluded and agreed with the respondent's version that a handing over, in the form of *a declared acceptance of her as a makoti* (daughter-in-law) satisfied the requirement of the handing over of the bride.

3.5 *Peter & Others v Master of the High Court: Bhisho & Another*

In *Peter*[142] the daughter of the deceased (a Mr Blayi) wanted the Court to issue her with letters of executorship in respect of her father's estate. The issue in the case dealt with whether there was a valid marriage between the deceased (Mr Blayi) and the second respondent (Ms Thobeka Joe) who wanted to be appointed as executor instead of the daughter.[143] The brief facts to the case were as follows: Consequent to the passing of Mr Blayi on 23 June 2019, the applicants (being the five children of the deceased) instructed their attorneys to report the death to the Master of the High Court and for letters of executorship to be issued accordingly. However, the Master informed the applicants that the death had already been reported by Ms Joe's attorneys on 12 August 2019 in her capacity as the alleged customary wife of the deceased. The Master had advised Ms Joe's attorneys that no letters of executorship could be issued until the marriage had been registered with the Department of Home Affairs (DHA). The applicants' attorneys invited the second respondent's attorneys to submit proof that a customary marriage had been concluded but received no response.[144]

The first applicant thus brought the application, challenging the validity of the second respondent's marriage to her deceased father, Mr Blayi. In the first applicant's submissions, she conceded that her father had been in a relationship with Ms Joe at the time of his death, but emphatically denied that they had been married.

142 *Peter* (n 1).
143 *Peter* (n 1) para 1.
144 *Peter* (n 1) para 3.

According to the applicants, Mr Blayi had apparently resided with the first applicant's brother, cited as the fourth applicant in these proceedings. The daughter suggested that, while the second respondent would sometimes visit the deceased, spending a night or more at his home, she would return to her own home afterwards, and they never co-habited. None of the applicants was aware of any marriage between the two individuals in question.[145]

In opposing the application, Ms Joe averred that she indeed was the customary wife of the deceased. She stated that on 10 December 2016 she and the deceased arranged to become married at the house of a Mr Kututu, whom the deceased considered a brother. This was due to the fact that Mr Blayi's house was dilapidated. On the day in question, at Mr Kututu's home, Ms Joe was welcomed as the late Mr Blayi's wife-to-be. Customary rites were performed and Ms Joe was adorned as a bride and given a bridal name (Nokhuselo) by the sister of the deceased. The ceremony was witnessed by families on both sides of the union, but not by Mr Blayi's children (that is, the applicants). Subsequently, the couple lived together as man and wife at the deceased's homestead, which they renovated and refurbished during the course of 2017.[146]

The Court considered the following evidence in deciding the matter, consonant with Ramose's theory of 'acceptance': First, subsequent to the passing of the deceased, the respondent grieved and wore black for a period of six months before marking the end of the mourning period at a cultural ceremony (*ukukhulula izila*) held at the homestead and attended by family, neighbours and members of the church. None of the applicants was present on the occasion.[147] In addition, the daughter assisted Ms Joe with preparations for the funeral, at which the latter was recognised as the surviving spouse. To that effect, Ms Joe pointed out that (i) she had been seated in the place reserved for a widow at the church; (ii) her union with the late Mr Blayi was acknowledged in the funeral programme; and (iii) speakers acknowledged her as the spouse in their various eulogies.[148] The second respondent's version was confirmed by Mr Katutu who stated that he saw himself as the representative of Mr Blayi's family as he and the deceased grew up together and were both of the Mkhuma clan. They viewed each other as brothers. He confirmed that the marriage was held at his house.[149] In addition, Mr Petros

145 *Peter* (n 1) para 2.
146 *Peter* (n 1) para 6.
147 *Peter* (n 1) para 8.
148 *Peter* (n 1) para 9.
149 *Peter* (n 1) para 11.

Meti, the son of the daughter (as first applicant) and grandson of the late Mr Blayi, also confirmed to have met the second respondent at the deceased's homestead and observed that the couple lived together as man and wife. In addition, Mr Meti also pointed out that in 2018, he noticed the homestead of his grandfather was being renovated. In addition, he heard his grandfather (the deceased) acknowledge the second respondent as his wife when he spoke to the first applicant. In summary, Mr Meti's evidence was confirmatory to all that Ms Joe had told the Court, that is, that Ms Joe had nursed and taken care of the late Mr Blayi, she was present at his death, and that she mourned the passing of the late Mr Blayi.[150]

Before holding that a valid customary marriage had been concluded, the Court made similar observations as those made in the *Mbungela* and *Tsambo* cases, confirming our reliance on Ramose regarding the importance of 'acceptance' by the family and the community. In this context, the children were largely estranged from their father. In the circumstances then, the Court adopted a pragmatic approach in considering who was 'family'. In its approach, it found its approach needed to be 'rooted in the practices and lived experiences of the community concerned'.[151]

As a result, in deciding whether the question/requirement of the handing over of the second respondent had been met, the Court seemed to align with the social acceptance theory when it observed that 'the second respondent was accompanied by her brother at the time of the marriage ceremony. She was welcomed into the deceased's family by, *inter alia*, Mr Kututu and the late Mr Blayi's sister.'[152] In particular – and following the acceptance of the community idea – the Court observed that Mr Kututu's clan link with the deceased made him 'family' as envisaged by the requirement:[153]

> It is apparent that the concept of clanship is integral to the practices and lived experiences of the isiXhosa community. The presence of members of the same clan at the marriage ceremony, especially individuals with whom the deceased had grown up and treated as his brothers, would have been akin to the deceased's having had close members of his direct family in attendance to have facilitated the handing over of the bride. This would have been all the more necessary where there were few if any surviving elders in the late Mr Blayi's family and where relations with his children were complicated, at best.

150 *Peter* (n 1) para 12.
151 *Peter* (n 1) para 20.
152 *Peter* (n 1) para 27.
153 *Peter* (n 1) para 30.

Consequently, the Court observed:[154]

> In the present matter, there does not seem to be any reason why the customary practice of the handing over of the bride could not be said to have *evolved to accommodate a situation where the groom's family is represented by members of the same clan*. This is all the more so where the circumstances at the time did not allow for the presence of any elders, simply because there were none or where the surviving elder lacked the capacity to represent the family meaningfully, and where the late Mr Blayi no longer enjoyed a close relationship with all of his surviving children.

In emphasising the importance of observing the cultural requirement of the handing over of the bride, albeit in different form, the Court quoted the remarks of the SCA in *Mbungela*:[155]

> The importance of the observance of traditional customs and usages that constitute and define the provenance of African culture cannot be understated. Neither can the value of the custom of bridal transfer be denied. But it must also be recognised that an inflexible rule that there is no valid customary marriage if just this one ritual has not been observed, even if the other requirements of section 3(1) of the Act, especially spousal consent, have been met, in circumstances such as the present ones, could yield untenable results.

In addition, and reflecting on how the social acceptance theory was applicable in this case, the Court observed:[156]

> Whereas a compelling enough argument can be made to the effect that there was a handing over of the bride and that *lobolo* was waived, the ultimate question remains whether this was sufficient to indicate that the marriage was customary in nature. To answer that, it would be remiss of the court not to take into account the evidence in relation to how *the union was viewed by the community itself, whose practices and lived experiences inform the content of customary law*.

In conclusion, we see the *Peter* decision as not only emphasising the need to be flexible in the light of living customary law, but also emphasising the importance of considering evidence of *acceptance* in the parties' family and community – constituted in the light of widowhood, advanced age, and socio-economic realities. We consider the emphasis on 'acceptance' as a test for validity as a much more balanced approach than a typically Western approach that prioritises certainty over the protection of vulnerable parties. The Court in *Peter* was at pains to emphasise Bennett's points (also cited by the Court in *Tsambo*) that 'strict adherence to ritual formulae has

154 *Peter* (n 1) para 32 (our emphasis).
155 *Peter* (n 1) para 40, citing *Mbungela* (n 1) para 27.
156 *Peter* (n 1) para 42 (our emphasis).

never been absolutely essential' and that it was important to consider 'how the community viewed the union'.[157]

For our purposes, then, it shows how Ramose's social acceptance theory was at play when the Court observed that 'how the community itself viewed the union has to be taken into account … cannot be ignored'.[158]

3.6 *Muvhali v Lukhele & Others*

In *Muvhali v Lukhele*[159] the issue before the Court concerned a determination of the applicant's marital status following the death of a Mr Lubisi (the deceased).[160] The applicant approached the Court for an order declaring that the customary marriage entered into between her and the deceased on 22 December 2018 was a valid customary marriage as envisaged in section 3 of the RCMA; that she was the customary wife of the deceased; and that she be granted leave to posthumously register her customary marriage with the DHA.[161] The respondents, who were the deceased's family members, opposed the application, stating that no valid customary marriage had been concluded between the applicant and the deceased.

Ms Muvhali alleged that the deceased proposed that they get married by customary law in September 2016.[162] She accepted his proposal and they got engaged to be married. The engagement was made known to their respective families.[163] During the course of 2018 the deceased proposed to pay *lobola*. Arrangements were made for their families to meet. The families met at her parental home on 22 December 2018 in Maungani village in Limpopo, and commenced *lobola* negotiations.[164] After the successful *lobolo* negotiations, the two families agreed that the deceased would pay a total sum of R90 000 as *lobola*, R23 000 of which would be in cash. The deceased family undertook to pay the outstanding *lobola* as soon as they were ready. At the time of the passing of the deceased, this had not happened.[165] It is also important to highlight that after the *lobola* negotiations, the two families started celebrating their

157 *Peter* (n 1) para 46 (our emphasis).
158 *Peter* (n 1) para 42 (our emphasis).
159 *Muvhali* (n 1).
160 *Muvhali* (n 1) para 1.
161 *Muvhali* (n 1) para 10.
162 According to *Muvhali* (n 1) paras 11-12, the applicant and deceased had been in love since 2009, and had been living together in the same house since 2014.
163 *Muvhali* (n 1) para 14.
164 *Muvhali* (n 1) para 15.
165 *Muvhali* (n 1) para 18.

customary marriage on that same day, and the deceased's family referred to her as their *makoti* or bride.[166]

In challenging the validity of Ms Muvhali's marriage to the deceased, the respondents contended that, although the applicant and the deceased resided together, their joint home was not a marital home. Furthermore, even though they admitted that they referred to her as 'their *makoti*' (the traditional wife), the use of the term was in 'a manner of speaking'. They reasoned that they used the term since the couple were cohabiting and not because they were officially married.[167] In addition, the respondents stated that the objective of the meeting on 22 December 2018 was to negotiate the payment of *lobola* and not to *celebrate* a customary marriage. The meeting served as a formal introduction of the applicant to the delegates of the deceased. They claim that the deceased's representatives met Ms Muvhali's representatives for the first and only time. They claimed that the deceased's elders were not present at the time as it was merely *lobola* negotiations and not the celebration of a customary marriage.[168] Furthermore, in terms of the Swati customs and traditions, a cow should have been slaughtered by the husband's family as a sign that they accepted their new *makoti*. This custom is known as *imvume* – an acceptance custom. The family of the groom would then pour cow bile on the head of their *makoti*, known as the *ukubikwa* custom, which represents that the new wife is introduced to the ancestors of the groom's family.[169] In essence, the respondents challenged the validity of the marriage as the prescribed form of celebrating the marriage according to Swati culture was not followed.

In determining the matter, and holding that there was a valid marriage between the applicant and the deceased, as envisaged by section 3 of the RCMA,[170] the Court made the following observations: First, the Court berated the respondents regarding their assertion that the events of 22 December 2018 were confined to *lobola* negotiations. The Court found that this type of assertion was common in customary marriage disputes and stated that it was

> duty bound to decry the often unwarranted attempts by parties to tabularise and dissect constituent components of an otherwise rich and generous system of law to meet legal exigencies. The unfortunate

166 *Muvhali* (n 1) para 19.
167 *Muvhali* (n 1) para 31.
168 *Muvhali* (n 1) para 34.
169 *Muvhali* (n 1) para 35.
170 *Muvhali* (n 1) para 65.

> consequence is to denude customary law of its inherent feature and strength – namely the spirit of generosity and human dignity.[171]

Second, and in line with the social acceptance theory, the Court observed that it could, in fact, 'look at other features which constitute customary practices that are indicative of, or are compatible with an acceptance of the bride by the groom's family'.[172] The Court found that considering these features served a vital purpose, which was to 'bring an objective view of issues away from the subjective predilections of the protagonists'.[173]

Third, the Court noted that the deceased's family referred to her as their *makoti* after the 22 December meeting, and that one of respondents attended her uncle's funeral, which was an indication that he recognised the extended relationship. Futhermore, communications between the wife and some of the deceased's family by means of WhatsApp clearly indicated that the family recognised her as their daughter-in-law/the deceased's wife in both manner and tone. The Court found that the respondents' explanation of addressing the applicant as their *makoti* was specious when considered with other objective facts.[174]

Finally, and referring to *Mbungela*, the Court found that it was significant that a family member made reference to the couple as husband and wife, and that the one spouse had registered the other as 'husband' in an important document. The Court found that essentially the respondents considered her the deceased's wife, and it was only after the death of the deceased that they had a change of heart.[175] The Court also made reference to the deceased's conduct when he was alive, in that he introduced the applicant as 'his wife' in their new home. In addition, the deceased took out an FNB Law on Call Personal Plan and registered the applicant as 'a spouse'. More importantly, the Court observed that the applicant and the deceased were consistent about the relationship from the time they met, and that they had lived together throughout and bought a home together.[176]

171 *Muvhali* (n 1) para 52.
172 *Muvhali* (n 1) para 58.
173 As above.
174 *Muvhali* (n 1) para 60.
175 *Muvhali* (n 1) para 61.
176 *Muvhali* (n 1) para 62.

4 Conclusion and recommendations

The SCA in *Moropane* confirmed the legal standing of the handing over of the *makoti* to her in-laws as one of most crucial parts of a customary marriage in most clans.[177] Its importance as a symbolic customary practice is that the *makoti* is finally welcomed and integrated into the groom's family, which henceforth becomes her new family. For that reason, Bakker's sentiments are apt:[178]

> After the decision in *Moropane v Southon* the integration of the bride is a requirement for a valid customary marriage in the official customary law. A deviation can be allowed only if it can be proved that the living customary law of a certain tribe has evolved to such an extent that integration of the bride can no longer be regarded as an essential requirement for a valid customary marriage.

Nothing in the recent SCA cases discussed has changed this approach, despite commentary to the contrary.[179] Considering the first two categories of court cases mentioned above, namely, (i) constitutionalising, and (ii) adherence to strict form, it is clear that there is a challenge in the language that is used to differentiate requirements, customs, rituals and acts. Language difficulties are borne out of attempts to resolve dynamic and living rules within the formal and certain structure of litigation. The language at times struggles to accommodate the nuances implicit in customary law, particularly that many requirements are processual as opposed to once-off.[180] Nhlapo identifies this issue poignantly when he states that '[t]he current pressure on the courts to identify and then prescribe clear essentials for the validity of a customary marriage is misplaced. *This is because African marriage is essentially a process that "ripens" into unassailable status over time.*'[181]

Further, contractual terms such as 'waiver' lose the meaning of what the courts are actually trying to do. In these cases, the courts accept that integration has occurred despite the 'traditionally accepted' rituals in certain prescribed forms not taking place. In the cases discussed above, courts have found integration to take place in the following circumstances, almost invariably being in the light of – rather than exclusively – the fact that the parties cohabited:

177 *Moropane* (n 2) para 40.
178 Bakker (n 46) 12.
179 Sibisi (n 12); Manthwa (n 7); Bapela & Moyamane (n 7).
180 Ramose (n 36). See also Comaroff & Roberts (n 63) 134 where the authors describe a customary marriage as an institution that matures slowly 'progressively attaining incidents, as time passes'.
181 Nhlapo (n 3) 275 (our emphasis).

(1) There was evidence of the groom's father and aunts physically congratulating the bride after the ceremony, and also introducing her as the bride to other family members.[182]
(2) A combination of 'incidents' was enough to persuade a court that integration had taken place, the most important of which was the attendance of both families at a 'white wedding' (that is, a church wedding) after *lobolo* negotiations had taken place.[183]
(3) The general acknowledgment by one spouse of the other spouse as a customary spouse in the presence of both families, taken together with the redesign and wearing of a wedding ring by the female spouse.[184]

As seen in *Peter,* in the contemporary reality of advanced age and estranged children, the Court has acknowledged that a wider understanding of who constitutes the family can exist. We believe that High Court decisions we have discussed (after the SCA decisions of *Mbungela* and *Tsambo*) illustrate the courts' implicit acceptance and endorsement of Ramose's social acceptance theory, having been given the 'go-ahead' by the SCA. In the *Peter* case in particular, we find the Court's statement resonating with all aspects of our argument thus far:[185]

> It cannot be said that a neat and clearly demarcated set of facts, unequivocally demonstrating compliance with the basic requirements for a customary marriage, has emerged from the proceedings. Whereas a compelling enough argument can be made to the effect that there was a handing over of the bride and that *lobolo* was waived, the ultimate question remains whether this was sufficient to indicate that the marriage was customary in nature. To answer that, it would be remiss of the court not to take into account the evidence in relation to h*ow the union was viewed by the community itself, whose practices and lived experiences inform the content of customary law.*

It bears emphasising that we are not advocating the waiving or the ignoring or constitutionalising of the requirement (the latter idea being problematic in that the Constitution is always at play, but never operates in a vacuum). We believe that there should be social acceptance by the community in a way that is flexible and can be accomplished in contemporary settings. As such, Ramose's theory to obtain a clearer account of what could be achieved is recommended. In this way, we can pay attention to the function of the customary marriage requirements – which is the ultimate union of two families.

182 *LS v RL* (n 71); *Miya* (n 67).
183 *Mbungela* (n 1).
184 *Tsambo* (n 1)
185 *Peter* (n 1) para 42. This comment replicates Nhlapo's suggestion that 'the behaviour of the families in question and that of the community towards the couple is a reasonable indicator of the social status – and therefore the legal incidents – that the relationship has attained'. See Nhlapo (n 3) 275.

By following this approach, we also try to address Bennett and others' concern that the observance of traditional procedures and ceremonies is important because it helps to define the 'cultural provenance' of the union and gives it the character of a customary marriage.[186]

More importantly, our analysis of the Court's interpretation of the handing over of the bride requirement, in the different contexts and persons from different tribes, bears testimony to the fact that living customary law is dynamic, and each case should be considered on its own merits. The impact on future cases, therefore, is that even where persons seem to be from the same tribe, the court has to consider how in that particular case there is social acceptance, and how living customary law has evolved. This means essentially finding that the application of the doctrine of precedent may not align with the dynamic nature of living customary law.

186 Bennett (n 17) 217.

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Beyond symmetrical binaries: The emergence of the constitutional recognition of transgender persons in Zimbabwe with reference to *Nathanson v Mteliso & Others*

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Summary: *In this case discussion we explore the constitutional and human rights implications of a decision of a High Court of Zimbabwe in* Nathanson v Mteliso & Others *for the recognition of transgender identity. The Court found that the arrest and detention of a transgender woman on the claim that she was a man who had entered a women's toilet were unlawful. It is argued that while the decision stops well short of a comprehensive engagement with the intersection between gender diversity and fundamental rights, it nonetheless is progressive. The decision should be understood as standing for the proposition that transgender persons are entitled to rights guaranteed in the Constitution and international human rights law.*

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Key words: *transgender; constitutional rights; human rights; equality; non-discrimination; human dignity*

1 Introduction

> Transgender citizens are part of Zimbabwean society. Their rights ought to be recognised like those of other citizens. Our constitution does not provide for their discrimination. It is nothing but delusional thinking to wish away the rights of transgenders.[1]

In this article we analyse the constitutional and human rights significance of a decision of the High Court of Zimbabwe in *Nathanson v Mteliso & Others* for the recognition of the constitutional rights of transgender persons.[2] The Court found that the arrest and detention of a transgender woman on the claim that she was a man who had entered a women's toilet were unlawful and contrary to section 25 of the Criminal Procedure and Evidence Act that regulates arrest without a warrant. It also found that the arrest and detention were contrary to sections 50, 51 and 53 of the Constitution of Zimbabwe of 2013. Section 50 guarantees the rights of arrested and detained persons. Sections 51 and 53 respectively guarantee the rights to human dignity and freedom from cruel, inhuman or degrading treatment. The Court ordered damages for unlawful arrest, malicious prosecution, emotional distress and *contumelia*.

The *Nathanson* case is Zimbabwe's first domestic juridical pronouncement on the constitutional status of transgender identity. While the decision did not deliberate comprehensively on the fundamental rights of transgender and gender diverse persons, it struck an unequivocally progressive note. The Court stressed that transgender persons were entitled to equal enjoyment of fundamental rights, including the rights to human dignity, equality and privacy.

We begin by summarising the facts, the issues and the decision.

2 Facts

This was an application brought before a High Court of Zimbabwe sitting in Bulawayo challenging the arrest and prosecution of Ricky Nathanson (plaintiff), a transgender woman, who was arrested on the claim that she was a man who had entered a women's toilet. She

1 *Nathanson v Mteliso & Others* (HB 176/19, HC 1873/14) [2019] ZWBHC 135 (14 November 2019) per Bere J para 131.
2 *Nathanson* (n 1).

had gone to meet a client at a hotel. At the hotel she was forcefully detained for approximately 45 minutes by two men after having refused to buy them a bottle of whisky. Essentially, Ricky refused to be blackmailed on account of her transgender identity.[3] One of the men instigated an arrest by summoning the police, alleging that 'there was a man walking around in a dress who needed to be fixed'.[4] Six police officers, who had no warrant, came to arrest her. She was bundled into an open police vehicle and taken to a police station.

Ricky was ordered to remove her shoes and sit on the floor at the police station.[5] Ricky's arrest had attracted publicity. At the police station she was paraded before a crowd. Later, five male officers took her to a room to interrogate her about her gender and, specifically, whether she was a man or a woman. Ricky was ordered to lower her pants for them to verify whether she was a man or a woman. On seeing her genitalia, the officers laughed and jeered.[6] Later that same evening, Ricky was taken to a hospital for a 'gender verification' examination. The doctor who examined her recommended further examination at another hospital by a gynaecologist. The finding of the gynaecologist was that Ricky was a transgender woman even if she was biologically male.[7] At no point was her consent sought for the examinations and Ricky offered no objection as she understandably was frightened of the police officers, this being her first arrest.[8] During the trial, the police made an admission that they would have forced Ricky to undergo the examination even in the face of any objection from her.[9]

Ricky was further detained in police custody in a dark cell that reeked of human waste. She signed a cautioned statement confirming that while she was male by biology, she had hormones that caused her to live as a woman.[10] She admitted without informed understanding that she had committed the offence of criminal nuisance under section 46 of the Criminal Codification and Reform Act of Zimbabwe.[11] The alleged offence was based on the insistence that she was a man who had entered a women's toilet.

The next day Ricky was taken to court and charged with committing a criminal nuisance. The charge was based on the allegation that

3 *Nathanson* para 7.
4 *Nathanson* para 8.
5 *Nathanson* paras 8-10.
6 *Nathanson* paras 10-12.
7 *Nathanson* paras 13-15.
8 *Nathanson* para 43.
9 *Nathanson* para 62.
10 *Nathanson* para 16.
11 Criminal Codification and Reform Act [Chapter 9:23].

Ricky was a man who had entered a women's toilet.[12] Although she was eventually granted bail, she was forced to go into hiding after being subjected to threats by one of the men who had instigated her arrest.[13] For the three days she was detained in police custody, Ricky reported that she was subjected to taunting and paraded outside her cell. The publicity around her court appearance adversely impacted on her modelling business, causing her to abandon it. Several media articles were written attacking her personally and degrading her mainly because of her transgender identity.[14]

Almost two years later, the charges against Ricky were withdrawn because no clear-cut offence was disclosed on the facts. The charges have never been reinstituted.[15] Ricky sought psychological support from a clinical psychologist who confirmed that the arrest, the invasive examinations and the attendant publicity of the case had taken their toll and that Ricky had been diagnosed with post-traumatic stress disorder (PTSD).[16] Ricky then instituted action seeking damages.

At the trial the arresting officers insisted that they had acted lawfully and that a suspicion based on reasonable grounds that a man had entered a women's toilet justified Ricky's arrest.[17]

3 Issues

Before the High Court, Bere J, the trial judge, had to determine the following main issues:

(1) whether Ricky was arrested unlawfully and prosecuted maliciously;
(2) whether Ricky was subjected to inhuman or degrading treatment;
(3) whether Ricky suffered damages as a result of the defendants' conduct;
(4) whether Ricky was entitled to damages for unlawful arrest, unlawful detention, emotional distress and *contumelia*, as well as to exemplary damages; and
(5) the quantum of damages in the event of finding the defendants liable.

12 *Nathanson* para 17.
13 *Nathanson* para 18.
14 *Nathanson* paras 36-39.
15 *Nathanson* para 19.
16 *Nathanson* paras 45-54.
17 *Nathanson* para 62.

4 Decision

The Court found that Ricky's arrest was contrary to section 25 of the Criminal Procedure and Evidence Act,[18] which regulates arrest without a warrant. The Court stated that the Criminal Procedure and Evidence Act does not criminalise the entering of a toilet by a person not belonging to the gender to which it is assigned.[19] The Court reiterated that there was no such offence under Zimbabwean law.[20] The Court was of the view that it was a serious breach of the law for the police to arrest and detain Ricky merely on the basis of an allegation. It found that the arrest was prompted by malice and that the involvement of the six riot police officers to effect the arrest was an aggravating factor.[21] The Court remarked at the overly high-handed manner in which the police conducted the arrest.[22] The Court concluded that there could never be any justification for how the police conducted themselves. It found that Ricky had not violated any law and that her alleged admission to a non-existent crime under section 46 of the Criminal Codification and Reform Act was immaterial.[23] According to the Court, the case might have been different if Ricky had entered the toilet and encountered another person in a way that causes that person to feel that their dignity has been compromised.[24] Even then, it noted, this would have required a complainant to first allege criminal conduct against Ricky.[25]

While it is not clear from the facts whether Ricky had specifically relied on her constitutional rights to frame her arguments, the Court applied the Constitution. It found that Ricky had not been informed of the reasons for her arrest and that her humiliating treatment in police custody was unlawful. Therefore, this conduct also constituted violations of sections 50, 51 and 53 of the Constitution being inhuman and degrading treatment.[26] Section 50 guarantees a person who is arrested and detained to be informed of the reasons for the arrest and to treated humanely and have their dignity respected. Section 51 guarantees every person a right to dignity in their private and public life, while section 53 guarantees freedom from inhuman and degrading treatment.

18 Criminal Procedure and Evidence Act of Zimbabwe [Chapter 9:07].
19 *Nathanson* para 72.
20 As above.
21 *Nathanson* para 73.
22 *Nathanson* para 79.
23 *Nathanson* para 81.
24 *Nathanson* para 82.
25 As above.
26 Constitution of Zimbabwe Amendment Act 20 of 2013.

Regarding damages, it was the opinion of the Court that Ricky had suffered substantial emotional distress and loss of dignity on account of the unlawful arrest and treatment in detention.[27] The Court found that the procedures to verify her gender were invasive to the point of undermining the very foundation of her dignity. Along with the adverse publicity engendered by her court appearance, Ricky was left emotionally extremely harmed.[28] The Court ordered damages for unlawful arrest, malicious prosecution, emotional distress and *contumelia* in the total amount of Z$400 000 including interest, but declined the claim for exemplary damages. According to the Court, damages should seek to compensate for the injuries suffered but not enrich the victim.

Although identifying as transgender woman was not a contested issue before the Court, it was clear to the Court that it was at the root of the reason why Ricky had been subjected to violations of her constitutional rights. The Court took it upon itself to pronounce on the constitutional standing of transgender persons. In the absence of a domestic precedent, it looked to foreign jurisprudence for interpretive guidance, and specifically to the Supreme Court of India. When interpreting provisions of the Constitution, Zimbabwean courts may consider foreign law.[29]

In the *Nathanson* case the Court followed with approval the pronouncements on the constitutional standing of transgender persons in *Navtej Singh Johar & Others v Union of India Ministry of Law & Justice*, a decision of the Supreme Court of India.[30] The main issue in this case was whether a statute that criminalised consensual sexual intercourse between persons of the same sex was unconstitutional and should be struck down. The statute criminalising same-sex intercourse was a colonial outgrowth, having been introduced to India when it was a British colony and inherited at independence. In answering the question affirmatively, the Supreme Court of India broadened its judicial gaze beyond non-conforming sexualities to also pronounce more generally on the constitutional status of sexual and gender minorities. At the same time as affirming the constitutional recognition of people who are attracted to the same sex and striking down the statute as discriminatory and an erosion of liberty, human dignity and privacy, it also affirmed transgender people as constitutionally protected for analogous reasons.

27 *Nathanson* para 125.
28 *Nathanson* para 125.
29 Sec 46(1)(e) Constitution of Zimbabwe (n 26).
30 AIR 2018 SC 4321.

Bere J drew inspiration from the *Navtej Singh Johar* case, treating the Constitution of India as comparable to that of Zimbabwe and the transgender recognition-related judicial pronouncements in the case as instructive.[31] He quoted with approval the following enunciation by Dipak Misra CJ affirming non-conforming gender identity:[32]

> The emphasis on the unique being of an individual is the salt of his/her life. Denial of self-expression is inviting death. Irreplaceability of individuality and identity is grant of respect to self. This realisation is one's signature and self-determined design. One defines oneself. That is the glorious form of individuality.

The *Nathanson* decision relied on the *Navtej Singh Johar* case to construct gender identity as an intrinsic part of an individual's personhood and to unequivocally affirm that transgender persons were entitled to the full measure of fundamental rights guaranteed by the Constitution of Zimbabwe. Bere J concluded:[33]

> Transgender citizens are part of the Zimbabwean society. Their rights ought to be recognised like those of other citizens. Our constitution does not provide for their discrimination. It is nothing but delusional thinking to wish away the rights of transgenders.

5 Analysis

In our analysis, we focus mainly on the following aspects: the naming of 'transgender' identity; the social and legal privileging of a symmetrical two-gender system; the pathologisation of transgender identity; the recognition of the constitutional and human rights of transgender persons; and access to bathrooms.

5.1 'Transgender' and the naming of transgressive genders

When using 'transgender' to describe non-conforming identities in an African context, the Euro-American origins of the term must be borne in mind to ensure that Africans are substantively included rather than normatively constituted or erased. In its popularised identitarian form, the term 'transgender' may be colonising. It entered transnational constitutional and human rights jurisprudence from its specific origins in the Global North. The term gained popularity in the late 1980s as self-naming and identity politics in a social and political context where gender-affirming hormonal therapies and gender surgeries had been validated by the medical profession and

31 *Nathanson* para 2.
32 *Nathanson* para 130, citing *Navtej Singh Johar* (n 30) para 1.
33 *Nathanson* para 131.

were becoming increasingly accessible to populations in the Global North.[34] This is not an argument for abandoning a term that has acquired valence and global popularity in advocacy for challenging discriminatory regimes, including in the African region. Indeed, identities may be the outcome of enculturation in which Africans identify with naming whose origins lie outside their locale, as has generally occurred with the appropriation of the LGBTQIA+ acronym and the term 'queer'.[35] Rather, it is to acknowledge that naming is always culturally invested. When naming is culturally transplanted, it carries the risk of cultural imperialism and misrecognition.

The predominant Euro-American usage of 'transgender' implies a binary transitioning – a crossing over – from one identifiable gender to another that is often accompanied by gender affirming therapies and/or surgeries.[36] It is built around a 'wrong body' narrative that privileges Western identities while alienating persons from other cultures of which the gender identity may be non-binary or have no access to or do not desire gender-affirming therapies.[37] Equally, for persons who derive gender non-conforming identities from indigenous life worlds and spiritualities, the Euro-American use of 'transgender' is colonising.[38] Even allowing for enculturation, naming should be appropriated in ways that are conscious of the name's epistemic limits and potential for cultural imperialism. A transplanted identity category may have the effect of universalising only the experience of the Global North. While serving to articulate a cause and mobilise against discrimination, it can also serve to marginalise African experiences that are outside Western gender paradigms. When the social experiences of a historically-marginalised group are not fully integrated into the collective understanding of the social world, the outcome is epistemic injustice and the persistence of coloniality.[39]

Cognisant of the epistemic limits of the term 'transgender', we use it in this commentary as an umbrella term to denote the widest possible range of persons whose gender identity, that is, a deeply-felt psychological identification with their gender, is not congruent

34 R Pearce and others 'The introduction: The emergence of trans' (2019) 21 *Sexualities* 4-5.
35 C Ngwena *What is Africanness? Contesting nativism in race, culture and sexualities* (2018) 214.
36 S Duffy 'Contested subjects of human rights: Trans and gender-variant subjects of international human rights law' (2021) 84 *Modern Law Review* 1041.
37 As above.
38 As above.
39 J Ogone 'Epistemic injustice: African knowledge and scholarship in the global context' in A Bartels and others (eds) *Postcolonial justice* (2017) 17.

to the sex assigned at birth.[40] To maintain the inclusiveness of the category of 'transgender', there should be no qualifiers placed on the term based on aspects such as bodily alterations arising from hormonal or surgical treatment, the way in which one chooses to express themselves, construct their appearance or behave, or genital characteristics. Any such qualifiers would only serve to erase the heterogeneity of the transgender community.[41] We, therefore, align with the inclusive approach of the Yogyakarta Principles, which conceptualises gender identity as

> each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.[42]

In defining transgender identity in the *Nathanson* case, Bere J was implicitly guided by the Yogyakarta Principles. He followed the approach of the Supreme Court of India in the *Navtej Singh Johar* case in endorsing a definition of gender identity that was taken from the Yogyakarta Principles.[43] In *Navtej Singh Johar*[44] the Indian Supreme Court was in turn following its own decision in *National Legal Services Authority v Union of India (NALSA*).[45] The *NALSA* case recognised transgender identity as entitled to constitutional protection. It adopted the Yogyakarta Principles in defining gender identity.[46]

Implicit in this expansive judicial construction of gender identity is an awareness that some transgender persons may identify with a binarised gender identity, identifying as either male or female, but others may not. As noted by the Supreme Court of India, the Hijras of India, for example, provide a historical archive of a gender that is neither male nor female.[47] Transgender identity should not depend on first undergoing gender-affirming therapy. To render the legal recognition of transgender identity contingent upon gender-affirming therapies would be to medicalise or even pathologise

40 S Stryker & S Whittle *The transgender studies reader* (2006) 666.
41 KP Magashula 'A case for removing barriers to the legal recognition of transgender persons in Botswana' in E Durojaye and others (eds) *Advancing sexual and reproductive health and rights: Constraints and opportunities* (2021) 153.
42 Conference of International Legal Scholars *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007) 6.
43 *Nathanson* para 2, citing *Navtej Singh Johar* (n 30) para 5.
44 *Navtej Singh Johar* (n 30) para 5.
45 (2014) 5 SCC 438.
46 *National Legal Services Authority* (n 45) para 19.
47 *National Legal Services Authority* (n 45) para 11.

an individual's self-sense of their gender. Transgender eschews identitarian homogeneity since there is a multiplicity of transgender subjectivities. What unites transgender identity is not somatic or cultural sameness or, much less, medical validation. Instead, it is the experience of being stigmatised because of non-conforming gender status that is seen as socially transgressive and threatening to a dominant cultural norm.

When transposed to gender, Hall's work on rethinking cultural identities cautions us against inclining towards naturalising the category of transgender and using only a biological construct.[48] Transgender identities are produced in a social, cultural and historical setting. Consequently, we should guard against the notion of essential or authentic transgender identity. Rather than treat gender identities as pre-discursive, we are better served by an approach that interrogates the ways in which gender is subjectively constructed in a given historical and cultural setting. Hall underscores the provisional nature of any identity as a temporal as well as temporary, rather than fixed, attachment to mark 'becoming and being' in ways that are always subject to transformation through the play of history.[49]

Transgender identities, therefore, should not be prescribed identities but 'specific enunciations' that are situated in historical contingency.[50] They are diverse, fluid identifications located in time and place but with no essential transgender home. Their subjectivities reflect a multiplicity of gendered experiences mediated by 'race', ethnicity, culture, religion, class, access to health services, geographical location and other intersectionalities. Above all, we argue that 'transgender' should be used contextually and remain under the constant gaze of intersectionalities. Transgender identity should centre the locale and not imply singularity or a Western-spawned universalism that ignores differences, including culture, ethnicity, race, socio-economic status and coloniality.[51]

Though awareness about the existence of African transgender identities is coming to the fore, there is a need to raise the bar of continental awareness. Outside of transgender rights advocacy and activism, which in any case is unevenly spread across the continent, there is no comprehensive transgender archive that is historically and culturally specific to Africa. Without such an archive, there is

48 S Hall 'Cultural identity and diaspora' in J Rutherford (ed) *Identity: Community, culture, difference* (1990); S Hall 'Who needs "identity"?' in P du Gay, J Evans & P Redman (eds) *Identity: A reader* (2000) 15.
49 Hall (1990) (n 48) 225.
50 Hall (2000) (n 48) 17.
51 Ngwena (n 35) 214.

a real risk of unproductive mimicry and essentialisation in African transgender discourses through an overreliance on transgender archives produced in the Global North.[52] More scholarly and activist efforts must be expended to excavate and articulate an epistemology of transgender, including its naming, that speaks to the specificities of the African region without abandoning the importance of building cross-cultural alliances and global solidarity.

5.2 The social and legal privileging of symmetrical gender binaries

The *Nathanson* case and, more specifically, Ricky's experience of a contrived and violent arrest, a humiliating stay in police custody, harassment following release from detention and the loss of her modelling business on account of adverse media publicity, are a sharp reminder that genders that 'transgress' experience hybrid modes of injustice.[53] Transgressive genders do not simply become targets of demeaning misrepresentations and spoiled identity, but also experience socio-economic exclusion, repression, hate and violence.[54] The agency, equality and human dignity of transgender persons are constrained not only by invidious or attitudinal discrimination based on unfounded, derogatory stereotypes, but more so by systemic or structural inequality and violence.

Because of her gender identity, Ricky was cast at the receiving end of socially-produced transphobia in the form of individual, institutional and societal discrimination accompanied by hate and violence. A wide spectrum of society was implicated: the civilian who instigated the arrest by summoning the police simply because Ricky resisted blackmail; the police who arrested and detained her, subjecting her to violence and humiliating invasions of privacy on a contrived charge; the doctors who conducted 'gender verification tests' without her consent; the public that jeered at Ricky while in police custody; and the media that wrote negatively and salaciously about her gender identity and supposed sexuality. The police, in particular, served as a veritable vector of institutional transphobic violence.

The fabricated nature of Ricky's arrest illustrates that when gender identity status is claimed outside its presumed moorings to a binarised

52 S Tamale 'Researching and theorising African sexualities' in S Tamale (ed) *African sexualities: A reader* (2011) 10-12.
53 N Fraser *Justice interruptus: Critical reflections on the 'post-socialist' condition* (1997) 16-23.
54 E Goffman *Notes on the management of spoiled identity* (1963).

male or female sex category assigned at birth, it poses an iconoclastic demand precisely on account of the historical pervasiveness of patriarchy. There is universal evidence that transgender is the object of intense discrimination and status subordination across jurisdictions.[55] Transgender persons overwhelmingly experience 'precarity', encountering discriminatory practices to the point of becoming targets of hatred, extreme forms of violence and even killings.[56] The institutionalised exclusion of transgender persons from citizenship is evident not so much in explicit proclamations or proscriptions, but in the hegemonic silences of formal laws, practices and social norms that assume only congruent gender binarism as the basis upon which citizens engage with institutions of society from the cradle to the grave.

In social and political systems where dominant cultural discourses are in thrall to patriarchy – which is the better part of the world's systems – a principle of binarised symmetry or consistency is used to normatively construct the connections between sex, gender and sexuality. This is a consequence of heteropatriarchy, that is, an ideology that valorises masculinity and heterosexuality. The principle of binarised symmetry informs law, policy and dominant social practices. It explains, for example, the use of gender markers in birth, marriage, death and education certificates, driver's licences, national identity documents and passports. The heteronormative bias in the regulation of how sexuality and gender are expressed, marriage and the provision of male and female public restrooms is a manifestation of a socially-embedded symmetrical gender binary.[57] The pervasiveness of the societal exclusion of transgender persons is an institutionalised misrecognition that functions as a form of civil death.

5.3 Pathologisation

Societal pathologisation of transgender identity explains why Ricky was treated inhumanely in detention, including being subjected to humiliating gender-verification tests. Pathologisation of transgender identity is rooted in the ideology of heteropatriarchy that legitimises

55 BM Dickens 'Transsexuality: Legal and ethical challenges' (2020) 151 *International Journal of Obstetrics and Gynecology* 165.

56 Accountability International 'Southern Africa trans diverse situational analysis: Accountability to reduce barriers to accessing health care' (nd), https://accountability.international/projects/trans-diverse-africans-situational-analysis-2016-2019/ (accessed 5 July 2022).

57 F Valdes 'Unpacking hetero-patriarchy: Tracing the conflation of sex, gender and sexual orientation to its origins' (1996) 8 *Yale Journal of Law and the Humanities* 161.

the social, political and economic dominance of heterosexual males in society.[58] Heteropatriarchy naturalises the connections between sex, gender and sexuality so that there is normative heterosexual congruence within the confines of a male/female binary.[59] This ideology legitimises cisgenders, that is, genders that conform to symmetrical gender binaries of male and female.[60] The effect is to valorise as 'proper' gender identities and expressions that align with heterosexual congruence, and to denigrate as 'improper' genders that are not in alignment.[61] This differentiation is propped up by religious, medical, cultural and political discourses that reward cisgenderism and heteronormativity with unquestioned mental health, respectability, legality and institutional support.[62] Non-conformity, on the other hand, is equated with mental illness and criminal conduct. This assumption is used to justify constraining the social and physical mobility of non-conforming persons and denying them institutional support.[63]

Medical discourses have played a prominent role in pathologising transgender identity as well as validating it. The emergence of transgender as an identitarian category in contemporary times has been preceded by a universalised medical discourse that began with constructing transgender as a pathology. As in the case of homosexuality, the articulation of gender diversity and variance first gained a semblance of public validity and legitimacy once it was given a scientific imprimatur by medicine.[64] The medical study of transgender identities and gender incongruence began in earnest in the nineteenth century.[65] At first, the medical approach was to treat transgender identity as a clinical 'disorder', a form of delusion requiring reality testing and psychotherapy.[66] These negative framings have shifted over the years as the understanding of transgender identities grows. However, influences of oppositional sexism and heteropatriarchy persist in medical discourses about gender identity.[67]

58 As above.
59 As above.
60 E Lennon & BJ Mistler 'Cisgenderism' (2014) 1 *Transgender Studies Quarterly* 63.
61 As above.
62 G Rubin 'Thinking sex: Notes for a radical theory of the politics of sexuality' in P Aggleton & R Parker (eds) *Culture, society and sexuality: A reader* (2006) 150.
63 Rubin (n 62) 151.
64 S Long 'When doctors torture: The anus and the state in Egypt and beyond' (2008) 7 *Health Human Rights* 116.
65 J Drescher 'Transsexualism, gender identity disorder and the DSM' (2010) 14 *Journal of Gay and Lesbian Mental Health* 111.
66 As above.
67 G Ansara 'Cisgenderism in medical settings: Challenging structural violence through collaborative partnerships' in I Rivers & R Wards (eds) *Out of the ordinary: LGBT lives* (2012) 102.

On a global scale, the World Health Organisation (WHO) took a lead in officially pathologising transgender identity using the International Statistical Classification of Diseases and Related Health Problems Manual (ICD-9) of 1975.[68] Across the world, including in the African region, doctors use WHO's ICD in conjunction with the Diagnostic and Statistical Manual of Mental Disorders (DSM) of the American Psychiatric Association to classify and diagnose mental health conditions.[69] 'Transgenderism' has been classified by ICD and DSM as a psychiatric 'disorder' because of incongruence between the sex that was assigned and the psychological sex or gender identity.[70] Once diagnosed as a psychiatric disorder, transgender identity becomes a mental illness that can or ought to be treated medically such as by counselling, administration of hormones and gender-reassignment surgery.

The ICD and DSM manuals have since been revised to move away from pathologising transgender identities and reflect new understandings of health and advances in medical science. In 2019 the eleventh revision of ICD (ICD-11) was revised to include a new chapter titled 'Conditions related to sexual health'. The revision served to reclassify transgender identities as 'gender incongruence' and no longer mental disorders. The reclassification emanated from the recommendations of a working group on sexual disorders and behaviours set up by WHO. The recommendations were influenced by submissions from multi-sectors, including civil society and activists, critical of the pathologisation of transgender people and the stigma that accompanies equating transgender identity with mental illness.[71] The working group acknowledged that pathologising transgender identity deprives transgender persons of legal recognition, undermines human rights protections and creates barriers to accessing health care.[72] The working group recommended the removal of transgender identities as a mental disorder to reduce the stigma, but retained the classification of gender incongruence to safeguard access to health care.[73]

68 Magashula (n 41) 154.
69 American Psychiatric Association *The diagnostic and statistical manual of mental disorders, Fifth edition, text revision (DSM-5-TR)* (2022).
70 P Cohen-Kettenis & F Pfäfflin 'The DSM diagnostic criteria for gender identity disorder in adolescents and adults' (2009) 2 *Archives of Sexual Behaviour* 499.
71 GM Reed and others 'Disorders related to sexuality and gender identity in the ICD-11: Revising the ICD-10 classification based on current scientific evidence, best clinical practices, and human rights conditions' (2017) 16 *World Psychiatry Journal* 209.
72 As above.
73 As above.

This 2019 revision followed an earlier revision to the DSM (2013) that removed the term 'gender identity disorder' as a psychiatric diagnosis and reclassified it as 'gender incongruence' to signal that identifying as transgender is not a mental disorder. The psychological distress that results from gender incongruence was also re-categorised as 'gender dysphoria' to more accurately reflect individual experiences and reduce stigma against transgender people while ensuring clinical care to transgender persons.[74] A working group on sexual and gender identity disorders met to deliberate on whether to completely remove the experiences of transgender people from the DSM-V but decided against it in order to protect access to health care for transgender people.[75] Significantly, as part of depathologising transgender identity, the working group recommended transitioning from binary terminology when framing gender incongruence by substituting terms such as 'opposite sex' and 'anatomic sex' with non-binary terminology such as 'experienced gender' and 'assigned gender'.[76]

Because Ricky claimed an identity outside the limitations of a socially as well as medically-binarised understanding of male and female, law enforcement officers felt emboldened to subject her to 'gender-verification tests' with the unquestioning support of the medical profession. The doctors who examined her treated her gender as a pathology, adding to the violence inflicted upon her by the police. Despite Ricky's own determination of her gender identity, without her consent, they proceeded to conduct medically-unsubstantiated examinations, invalidating her agency and violating her right to dignity and privacy. Ricky's experiences are a case study in pathologisation and how medicalised constructions of transgender identities continue to perpetuate institutionalised transphobic violence and embed symmetrical gender binaries.

5.4 Affirming the constitutional and human rights of transgender persons

The struggle for the recognition of transgender identities is more than a quest for a mutual identitarian recognition that can be met within a paradigm of formal equality.[77] Ultimately, it is a struggle for lived equality. It is a demand for inclusive equality to overcome

74 American Psychiatric Association 'DSM-V Fact Sheet on gender dysphoria' (2013).
75 Reed and others (n 71).
76 As above.
77 N Fraser 'Rethinking recognition' (2000) 123 *New Left Review* 109-110; GWF Hegel *Phenomenology of spirit* (1977) 104-109.

status subordination and achieve status recognition so that there is parity in societal participation for all.[78] With a few exceptions, the 'post-colonial' African state is a conservative variant of its colonial counterpart, having inherited and reinforced a heteropatriarchal state.

The *Nathanson* case illustrates that normative gender binarism is not an unchallenged master dichotomy. Alternative discourses, which have been silenced historically, are surfacing across the globe not just in activism and scholarship, but also in litigation and legal reform. Albeit in their beginnings, insurgent African voices to transform cisgender binarism and recognise alternative gender identities – among others, through litigation to vindicate fundamental rights – are making themselves heard.[79] The *Nathanson* case is one such voice.

Especially for a country such as Zimbabwe – where the state has been highly instrumental in promoting a discourse of homophobia, including hate speech, in ways that are transposable to transphobia – the *Nathanson* case represents a landmark decision.[80] Homophobia and transphobia correlate, uniting in their strong antipathy towards non-heteronormative sexualities and genders.[81]

The *Nathanson* case lends its voice to a small but growing body of case law emanating from the region that recognises sexual and gender diversity and calls for plurality and legal inclusion. Botswana,[82] Kenya[83] and South Africa[84] are the other jurisdictions where there has been constitutional recognition of transgender identities in Africa.

78 We align with the concept of inclusive equality articulated by the Committee on the Rights of Persons with Disabilities in General Comment 6 on equality and discrimination CRPD/C/GC/6 (2018) para 11.

79 A Mbugua 'Gender dynamics: A transsexual overview' in Tamale (n 52) 238; B Deyi 'First class constitution, second class citizen: Exploring the adoption of the third gender category in South Africa' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 128; B Camminga *Transgender refugees and the imagined South Africa: Bodies over borders and borders over bodies* (2019); Magashula (n 41).

80 N Muparamoto 'LGBT individuals and the struggle against Robert Mugabe's extirpation in Zimbabwe' (2021) *3 Africa Review* 51.

81 JL Nagoshi 'Gender differences in correlates of homophobia and transphobia' (2008) 59 *Sex Roles* 521.

82 *ND v Attorney General & the Registrar of National Registration* (2017) Botswana High Court Case MAHGB-000449-15.

83 *Republic v Kenya National Examinations Council & Another Ex-Parte Audrey Mbugua Ithibu* Judicial Review Case 147 of 2013 (2014) Kenya Law Reports 6.

84 *Lallu v Van Staden* Roodepoort Equality Court, Case 3 of 2011; *KOS & Others v Minister of Home Affairs & Others* 2017 (6) SA 588 (WCC); *September v Subramoney NO & Others* (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC). South Africa also has legislation: The Alteration of Sex Description and Sex Status Act 49 of 2003 enables transgender and intersex persons undergoing gender affirming treatment to change their names and the gender markers in their identity documents.

The *Nathanson* judgment lays a foundation that is conducive for African transgender activism as well as for domestic legal reforms. While the judgment falls short of a comprehensive engagement with the intersection between transgender identities and fundamental rights, we argue that it did not detract from the constitutional imperatives. Implicitly, it supports the rights of transgender persons to constitutional equality, human dignity and privacy under the Zimbabwean Constitution of 2013.

5.4.1 Relevance of international human rights law to interpreting the Constitution of Zimbabwe

Zimbabwean courts are required to give 'full effect' to the fundamental rights guaranteed by the Constitution.[85] The canons of interpretation that are prescribed by the Constitution provide guidance. Courts have a duty to promote the foundational values and principles that underpin a 'democratic society based on openness, justice, human dignity, equality and freedom'.[86] It is not only domestically-grown law that matters but also international law. Courts are enjoined to take into cognisance norms arising from treaties and conventions that Zimbabwe has signed.[87] Where there is more than one possible interpretation or conflicting interpretations, an interpretation that is in consonance with international law must be preferred.[88] Cumulatively, the provisions of the Zimbabwean Constitution evidence a clear intention to protect constitutional rights consistent with international human rights.

Zimbabwe has ratified, without reservations, treaties that have been used by United Nations (UN) treaty-monitoring bodies or special mechanisms to recognise transgender identity. Examples are the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[89] The UN Independent Expert on Sexual Orientation and Gender Identity has recognised transgender identity as a 'cornerstone of the person's identity' which is manifested by the way in which the person makes free and voluntary choices, feels, expresses themselves or behaves.[90] The Yogyakarta

85 Sec 46(1)(a) Constitution of Zimbabwe.
86 Sec 46(1)(b) Constitution of Zimbabwe.
87 Sec 46(1)(c) Constitution of Zimbabwe.
88 Sec 327(6) Constitution of Zimbabwe.
89 Duffy (n 36).
90 UN Independent Expert on Sexual Orientation and Gender Identity 'Report of the Independent Expert on Protection against Violence and Discrimination

Principles, which were adopted in 2007 at a meeting of international human groups, are also an important source of international law.[91] The Principles have been influential in promoting the recognition of transgender persons as rights holders in international, regional and domestic law. The Principles, which constitute soft law, are the most comprehensive set of norms and standards for recognising and affirming the human rights of sexual and gender minorities.

Regional instruments are another source of international law supportive of the human rights of transgender people. Zimbabwe has ratified African Charter-based human rights instruments that, in our view, support the rights to human rights of transgender persons even if there is no express affirmation. Article 2, the non-discrimination clause of the African Charter on Human and Peoples' Rights (African Charter), which Zimbabwe has ratified, is supportive of this argument.[92] While transgender status is not mentioned as a protected ground, article 2 is not exhaustive. It includes analogous grounds as it protects 'other status' against discrimination. It can, therefore, be extended to gender minorities.[93] This argument, likewise, may be extended to article 3 which guarantees equality to social groups protected by article 2 of the African Charter. Zimbabwe has ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol). The Protocol protects the rights of women. Article 2 guarantees women protection against unfair discrimination. Under the Protocol 'women' means persons of the 'female gender'. [94] By using 'gender' rather than 'sex' to define women, it may be inferred that the protected category are any women regardless of their gender identity.[95]

At the regional level, the role of the African Commission on Human and Peoples' Rights (African Commission) has also been significant. The African Commission has weighed in to protect sexual and gender minorities against violence and human rights violations.

Based on Sexual Orientation and Gender Identity' (UN General Assembly 2018) A/73/152 para 21.

91 Conference of International Legal Scholars (n 42); International Commission of Jurists (ICJ) *The Yogyakarta Principles Plus 10 – Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (2017).

92 F Viljoen & R Murray 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 86.

93 As above.

94 Art 1(k) African Women's Protocol.

95 Magashula (n 41) 163.

In 2014 it adopted Resolution 275.[96] The Resolution, which explicitly draws on article 2, the non-discrimination clause of the African Charter, calls upon African states to ensure that sexual and gender minorities are protected from violence and that victims of violence have access to adequate remedies. The Commission has since been building on Resolution 275 to enhance the protection of sexual and gender minorities. At its sixtieth ordinary session the Commission underscored the importance of protections against human rights violations connected to sexual orientation, gender identity and sex characteristics, protections for human rights defenders and training for law enforcement officers.[97] In 2018, as a follow-up to a dialogue held in 2015,[98] the Commission was part of a meeting with the Inter-American Commission on Human Rights and the UN human rights mechanisms to discuss human rights protections for sexual and gender minorities.[99] The African Commission's initiatives augur well for the development of a conducive environment for protecting the human rights of trans communities in the African region.

In one important respect, however, the Zimbabwean Constitution implicitly detracts from affirming the rights of transgender persons. It proscribes same-sex marriage in section 78(3). This provision was adopted at the insistence of the ruling ZANU Patriotic Front. Its history lies in assuaging homophobic discourses that were promoted during the presidency of Robert Mugabe.[100] While the proscription of same-sex marriage should not be conflated with proscribing transgender identity, the intersections between same-sex sex and transgender identity may be tantamount to proscribing both. We argue that section 78(3) should be interpreted restrictively so that it only limits the rights of transgender persons as they apply to the institution of marriage between persons identifying as having the same sex. Thus, it should not apply, for example, to transgender persons whose partners do not identity as the same sex or who do not desire marriage. In any event, the provision should be interpreted in ways that separate 'sex' from gender.

96 African Commission on Human and Peoples' Rights Resolution 275 on protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity (2014).

97 Final Communiqué of the 60th ordinary session of the African Commission on Human and Peoples' Rights (2017), https://www.achpr.org/sessions/info?id=269 (accessed 30 June 2022).

98 Centre for Human Rights 'Ending violence and other human rights violations based on sexual orientation and gender identity: A joint dialogue of the African Commission on Human and Peoples' Rights, Inter-American Commission on Human Rights and United Nations' (2016).

99 Inter-American Commission on Human Rights, African Commission on Human and Peoples' Rights and United Nations human rights mechanisms 'Joint thematic dialogue on sexual orientation, gender identity and intersex related issues' (2018).

100 Muparamoto (n 80).

5.4.2 Affirming equality and non-discrimination

While the Court in the *Nathanson* case did not consider the relevance of the equality and non-discrimination clause of the Zimbabwean Constitution, the treatment to which Ricky was subjected, including gender-verification tests, suggests that she was denied equality and suffered unfair discrimination because of her gender identity. We argue that the Constitution of Zimbabwe of 2013 is a transformative document. Unlike its predecessor, the Constitution of 1980, which was more or less imposed on Zimbabwe by the United Kingdom, the departing colonising power, the Constitution of 2013 represents a 'people-driven' autochthonous supreme law.[101] It signals a desire to make a fresh start through, among others, constitutional reforms aimed at fostering broad-based national ownership of a constitution, revitalising membership of the national constitutional community, domesticating international human rights norms, and recognising equal citizenship. The 2013 Constitution resembles that of Kenya and South Africa[102] in having the architectural hallmarks of a constitution committed to the achievement of substantive equality, including the recognition of transgender identity given executive, legislative and judicial commitment.

The foundational values of the Constitution of Zimbabwe include equality, gender, fundamental human rights and freedoms, and human dignity.[103] Unfair discrimination is incompatible with the equality and non-discrimination protections in the Bill of Rights. Section 56(1) states that 'all persons are equal before the law and have the right to equal protection and benefit of the law'. When read together with the foundational values of the Constitution and the interpretative guidance, we can infer that transgender persons have a right to substantive equality under the 2013 Constitution.

5.4.3 Affirming human dignity

The idea of a fundamental right to human dignity speaks to the imperative of recognising that every person has a right to unqualified inherent self-worth by virtue of being a human being and that that they should be treated with respect as well as concern by others.[104] Human dignity is a foundational value under the Constitution of

101 GA Dzinesa *Zimbabwe's constitutional reform process: Challenges and prospects* (2012) 2-6.
102 Constitution of Kenya of 2010 and Constitution of the Republic of South Africa, 1996, respectively.
103 Sec 3 Constitution of Zimbabwe.
104 Art 1 Universal Declaration on Human Rights (1948).

Zimbabwe.[105] It is also a canon of constitutional interpretation.[106] Above all, it is a fundamental right in more than one provision. In the *Nathanson* case the Court specifically applied it drawing on section 50 that guarantees a person who is arrested and detained to be informed of the reasons for the arrest and to treated humanely and have their dignity respected. Section 51 guarantees every person a right to dignity in their private and public life and section 53 guarantees freedom from inhuman and degrading treatment. In finding violation of human dignity, Bere J stated:[107]

> I imagine how uneasy one feels if they have to go to a medical doctor of their choice (someone who is specifically trained on issues of confidentiality), and expose their genitalia, if a medical need arose. Imagine five male strangers demanding and ordering one to display their genitalia for them to examine it. It is better left to imagination how the plaintiff must have felt after this invasive conduct by these five police officers. It must naturally have gotten worse for the plaintiff when the officers started fidgeting and making fun of her after this inconclusive examination.

The conduct that Bere J is describing is concomitantly evidence of egregious violations of the right to privacy. Apart from being an integral part of the right to dignity, the right to privacy is also guaranteed by section 57 of the Constitution. Not everyone under arrest is required to verify their gender, and it remains unclear, even from the medical examination, exactly how a person's gender is effectively verified. This is reminiscent of the practice of forced anal examinations that are used to provide evidence when consenting males are prosecuted under sodomy laws.[108] This practice has no sound medical basis and is a serious violation of medical ethics as well as human rights.[109]

The *Nathanson* decision demonstrates not only an affirmation of respect for the human dignity of transgender persons, but also a remarkable allyship in its deliberate use of feminine pronouns to refer to Ricky. This not only served to validate her gender identity but revealed a growing judicial openness to diversity. In *September v Subramoney*[110] the Equality Court of South Africa put a spotlight on the intersection between the recognition of transgender identity and human dignity. The Court explained that at the core of human

105 Sec 3(1)(e) Constitution of Zimbabwe.
106 Secs 46(1)(b), 56(5) & 86 Constitution of Zimbabwe.
107 *Nathanson* para 92.
108 C Cichowitz and others 'Forced anal examinations to ascertain sexual orientation and sexual behaviour: An abusive and medically unsound practice' (2018) 15 *PLoS Medicine* e1002536.
109 As above.
110 *September v Subramoney* (n 84).

dignity is the imperative of unqualified recognition of the self-worth of a person so that they are treated with respect as well as concern by others. The fundamental right to dignity is impaired where the state castigates an attribute or conduct that is an integral part of being human.[111] The *September* case concerns a transgender woman who was serving a prison sentence. She had not undergone the medical or surgical procedures prescribed under the Alterations of Sex Description and Sex Status Act[112] as legal requirements for changing previously-registered gender.[113] She contended that expressing herself as a woman was the only way in which she could assert her gender identity but that prison authorities denied her this right.[114] Prison authorities did not permit her to keep long hair and style it in a feminine way, wear make-up or women's underwear. She was not addressed as a female person as the authorities insisted on using a male pronoun because she had not formally changed her gender marker under Alterations of Sex Description and Sex Status Act. She had also been punished for expressing herself as a woman.[115] She argued that her treatment constituted unfair discrimination under the Promotion of Equality and Prevention of Unfair Discrimination Act.[116] Fortuin J held that the failure to accommodate transgender inmates by allowing them to express their gender identity was discriminatory and extremely burdensome on transgender persons.[117] The judge affirmed that gender identity was at the core of human dignity and that it was entitled to recognition.[118] Significantly, the Equality Court highlighted the unqualified nature of human dignity. It did not treat the formal requirements for changing a gender marker on identity documents under the Alterations of Sex Description and Sex Status Act as a precondition for respecting the human dignity of transgender persons and recognising their gender identity.

5.4.4 Access to bathrooms

The *Nathanson* case also concerns a hidden site of contestation – bathroom access for transgender people. Although easily dismissible as a minor inconvenience and even a frivolous issue for those privileged enough to have an identity that is rewarded with social approval and institutional support, bathroom access is a critical issue for the transgender community. Any discussion on the recognition,

111 *September v Subramoney* (n 84) para 117.
112 Act 49 of 2002.
113 *September v Subramoney* (n 84) para 15.
114 *September v Subramoney* (n 84) para 31.
115 As above.
116 Act 4 of 2000 (PEPUDA or Equality Act).
117 *September v Subramoney* (n 84) para 156.
118 *September v Subramoney* (n 84) para 121.

equality and dignity of transgender people is incomplete without considering the issue of their access to public toilets. Safe access to public toilets is necessary for participation in social and economic life such as in the workplace, educational sector, recreational facilities and in public spaces generally.[119] For transgender people, it can be a cause for harassment, exclusion, trauma and even violence, as evidenced by Ricky's experience. Public toilet access, in particular, and spatial segregation on the basis of gender, more broadly, are only some of the ways in which heteropatriarchy is enforced. Gender-segregated toilets solidify and make visible the binary conception of gender.

Unfortunately, this conception of gender is not an issue the merit of which Bere J delved into adequately, missing an opportunity to examine the micro-aggressions that communicate hostility towards transgender people in everyday life. It is true that the Court was quick to cast doubt on any belief that the police genuinely thought Ricky had committed a criminal offence by entering the women's toilet when she was biologically a man.[120] However, the Court did not properly ventilate this issue, only mentioning it in passing. Before proceeding to give its orders, the Court stated that 'to avoid the recurrence of what happened to the plaintiff … it might be prudent to construct unisex toilets as an addition to the resting rooms in public spaces'.[121] We argue that this proposal clearly is not the solution. The Court failed to realise how the construction of a different set of toilets is stigmatising. It would only serve to further segregate and 'other' transgender people instead of granting them equal access.

Although well intentioned, the proposal for a unisex toilet itself belies the understanding of equality as including transgender persons. A unisex toilet, additional to other 'normal' gender-assigned toilets, would offer a sharp example of what the 'other' is. Requiring transgender people to use unisex or gender-neutral toilets singles them out as extra-societal, communicating clearly that they do not fit in. The Court wasted an opportunity to provide a clearer statement of law to ensure that the right of transgender people to access public toilets free from hostility is protected. This was an opportune moment to develop the concept of inclusive equality and the accommodation of difference through a transformative process of institutional change that addresses the hidden interstices of dominant norms. There are ways of preserving privacy while permitting equitable access. There

119 BP Bagagli and others 'Trans women and public restrooms: The legal discourse and its violence' (2021) 6 *Frontiers in Sociology* 1.
120 *Nathanson* para 79.
121 *Nathanson* para 132.

is nothing to suggest that the presence of trans people in bathrooms that correlate with their gender identity heightens the risk of any invasion of privacy.

6 Conclusion

In the *Nathanson* case the High Court of Zimbabwe affirmed gender identity as a constitutionally-protected right. It pronounced unequivocally that 'transgender citizens' enjoy equal rights under the country's Constitution.[122] While the fundamental rights of transgender persons were not directly in issue in the *Nathanson* case, the Court took it upon itself to uncover that transphobia was at the root of the unlawful arrest and detention of Ricky. Although the Court did not explore the rights of transgender persons comprehensively, it affirmed that transgender persons enjoy equal rights under the Constitution. By deriving a persuasive precedent from the Supreme of Court of India and its robust recognition of the human dignity and equality of transgender persons,[123] the Court implicitly signalled its willingness to align with progressive jurisprudence. The *Nathanson* case provides civil society with a springboard from which to advocate a legal reform to accommodate the recognition of transgender identities in all social and economic life, including access to administrative procedures for changing gender markers on identity documents and gender-affirming care.

122 *Nathanson* para 131.
123 *Navtej Singh Johar* (n 30).

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The Mariana Trench of transphobia in South Africa: The legislative *lacunae* in *KOS v Minister of Home Affairs*

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Summary: *Society as a whole has for eons been premised on the importance of patriarchy and heteronormatity. During this time society has seen gradual leaps regarding people in the LGBTQI+ community. South Africa appears to be at the foreground of this recognition of the rights of people in this marginalised grouping. However, what may be present on paper may not appear to be what it is. This case discussion examines the extent to which, among others, the Alteration of Sex Description and Sex Status Act as well as the Marriage Act fail to address the matters ancillary to transgender individuals and the glaring discrimination faced by the transgender community in the face of a country that prides itself in a sense of equality that unfortunately is not enjoyed by all its people. To illustrate this point, it is important to examine the above-mentioned Acts in conjunction with* KOS v Minister of Home Affairs. *There appears to also be a glaring deficit in the fundamental understanding between sex and gender within the legislation and a need to update the legislation to the contemporary shift in the issues faced by the LGBTQI+ community.*

Key words: *LGBTQI+; marriages; civil unions; alteration of gender; transgender; SOGIESC*

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1 Introduction

Society as a whole has for centuries been premised on the perceived importance of patriarchy and heteronormativity.[1] Patriarchy is described as social organisation marked by the supremacy of the father in the clan or family, the legal dependence of wives and children, and the reckoning of descent and inheritance in the male line and, in broad terms, control by men of a disproportionately large share of power.[2] Patriarchy has informed many facets of everyday life, whether it be expected gender norms or systemically.[3] On the other hand, heteronormativity describes the ways in which heterosexuality is normalised through a myriad of practices, so that it becomes naturalised as the only legitimate form of sexuality.[4] Heteronormativity systemically and purposefully excludes the lesbian, gay, bisexual, transgender and queer or questioning (LGBTQI+) community. For the purposes of this discussion it is important to note that there has been a shift to rather use the terminology of sexual orientation, gender identity gender expression and sex characteristics (SOGI/SOGIESC) as it may be perceived as more inclusive. Thus, the author uses SOGI/SOGIESC interchangeably as to better reflect the lived experience of the LGBTQI+ community where appropriate. These concepts find themselves seeped in the legal system through the enforcement or archaic laws that no longer find application within the ever-changing landscape of a constitutional democracy premised on human rights such as dignity, equality, reasonableness and justice. One such law is that which governs the alteration of sex and/or gender descriptors as per the national birth register.[5] The focus of the research requires a strong understanding of sex, gender and gender identity.

Transgender is an umbrella term for persons whose gender identity, gender expression or behaviour does not conform to that typically associated with the sex to which they were assigned at birth.[6] Gender identity refers to a person's internal sense of being male, female or otherwise.[7] The manner in which one may communicate gender identity to others through behaviour, clothing, hairstyles,

1 L Henderson 'Law's patriarchy' (1991) 25 *Law and Society Review* 142.
2 https://www.merriam-webster.com/dictionary/patriarchy (accessed 1 February 2021).
3 Merriam-Webster (n 2).
4 D Bell *International encyclopedia of human geography* (2009) 387-391.
5 T Boezaart (ed) *Law of persons* (2021).
6 American Psychological Association 'Transgender people, gender identity and gender expression' (AMA report), https://www.apa.org/topics/lgbtq/transgender (accessed 10 January 2022).
7 As above.

voice or body characteristics is referred to as 'gender expression'.[8] Sex is assigned at birth, refers to one's biological status as either male or female, and is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy.[9] Gender refers to the socially-constructed roles, behaviours, activities and attributes that a given society considers appropriate for boys and men or girls and women. These influence the ways in which people act, interact, and feel about themselves.[10] Gender, patriarchy and the law may be areas that remain contentious in this regard. These ideals seep into every facet of life, including the institution of marriage.

Marriage in and of itself is viewed as a sacred union and has its cultural and legal roots in the legal sphere as well.[11] The rules and norms thereof have changed over time as society has progressed over the years.[12] In South Africa there are three legislative documents governing marriage and the legal consequences thereof, such as matrimonial property regimes, among others. The aforementioned legislative frameworks find their application in common law, but additionally in the Marriage Act 25 of 61 (Marriage Act), the Civil Union Act 17 of 2006 (Civil Union Act) and the Recognition of Customary Marriages Act 120 of 1998 (RCMA). The focus of this article will be limited to the common law, the Marriage Act and the Civil Union Act.

It is common cause that both the Marriage Act and the common law are gendered. The common law definition states that marriage in South Africa is 'a union of one man with one woman, to the exclusion, while it lasts, of all others'.[13] It is clear from the wording that the common law envisions that the spouses hereto are both cisgendered,[14] that , male and female. Section 31(1) of the Marriage Act provides the wording that a marriage official must use when officiating the wedding ceremony. The section includes that one person takes the other party as their lawfully wedded wife (or husband). This will be explored in depth below.

It is clear from the wording of the applicable legislation that no one foresaw the possibility of the situation as complex as that found

8 As above.
9 As above.
10 As above.
11 WA Haviland and others (eds) *Cultural anthropology: The human challenge* (2016).
12 LT Hobhouse *Morals in evolution: A study in comparative ethics* (1925).
13 *Mashia Ebrahim v Mahomed Essop* 1905 TS 59 61.
14 Cisgender means 'of, relating to, or being a person whose gender identity corresponds with the sex the person had or was identified as having at birth'.

in *KOS v Minister of Home Affairs* (*KOS* case).[15] This case calls into question the definition of marriage, the scope thereof and the cultural and societal norms surrounding, not only marriage and civil unions, but the response to complex issues in which there are *lacunae* in the law regarding marriage, civil unions and SOGI/SOGIESC matters.

In this matter three applicants (all of whom had been born male) lodged applications to the Director-General of Home Affairs incidental to the change of their sex description as they were all transgender.[16] Thus, they each (born male) desired to be identified as women. The applicants all faced the same difficulty: They had all been married to their respective partners, in terms of the Marriage Act.[17] Their respective partners made the decision to stay in the marriage. This posed an issue for Home Affairs that contested that the marriage should then be dissolved and be solemnised in terms of the Civil Union Act. This contention was made on the basis that the marriage had now become a same-sex union and, therefore, could not be in line with the common law definition of marriage or the Marriage Act.[18]

The state did acknowledge the severe gap in the legislation that effectively caused a number of violations against the applicant's rights in terms of the Constitution of the Republic of South Africa, 1996 (Constitution). However, the state contended that their hands were tied as there are no mechanisms, in terms of their computer system, in place to take into account the change in sex description.[19] This case not only illustrates the violation of human rights, but presents a demonstration of antiquated laws that seek to uphold heteronormative ideals. The judiciary can only go so far. This is what is demonstrated by the decision in the *KOS* decision. The legislature must intervene with immediate effect in order to see that justice is done.

2 Factual background to the *KOS* case

The first, third and fifth applicants, referred to individually as 'KOS', 'GNC' and 'WJV', respectively, were all born biologically male.[20] The second, fourth and sixth applicants, to whom KOS, GNC and WJV are respectively married, are female. At some point in their respective

15 2017 (6) SA 588 (WCC).
16 Boezaart (n 5).
17 Para 2.
18 *KOS* (n 15) 61 64.
19 *KOS* 61.
20 *KOS* 2.

marriages KOS, GNC, and WJV discovered that they had gender dysphoria, the term used as per the facts of the case. The author is of the opinion that the categorisation of 'gender dysphoria' as part of the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision (DSM V) is problematic as it seeks to pathologise the lived experience of human beings as being mentally ill for wanting to affirm their gender and/or sex.[21] It may lead to the further stigmatisation and victimisation of people who hold transphobic values.[22] In terms of transitioning; support may also include affirmation in various domains that may not necessarily be medical in nature. Social affirmation may include an individual adopting affirming pronouns, names, and various aspects of gender expression that match their gender identity.[23] Legal affirmation may involve changing name and sex markers on various forms of government identification, which is the crux of this article. As per the medical community, gender dysphoria (which usually manifests in early childhood) describes a psychological condition in which they experience incongruence between their experienced gender and the gender associated with their biological sex.[24] However, it is important to note that not all transgender persons experience gender dysphoria.[25]

The respective partners of KOS, GNC and WJV made the decision to stay in the marriage. This posed an issue for the Department of Home Affairs that contested that the marriage should then be dissolved and be solemnised in terms of the Civil Union Act. This contention was made on the basis that the marriage had now become a same-sex union and, therefore, could not be in line with the common law definition of marriage or the Marriage Act.[26] The state acknowledged the severe gap in the legislation that effectively caused a number of violations against the applicants' rights in terms of the Constitution.[27] However, the state contended that it was unable to comply with the

21 Z Davy & M Toze 'What is gender dysphoria? A critical systematic narrative review' (2018) 3 *Transgender Health* 159-169; J Drescher 'Queer diagnoses: Parallels and contrasts in the history of homosexuality, gender variation, and the diagnostic and statistical manual' (2010) 39 *Archives of Sexual Behaviour* 427-460.

22 As above.

23 L Durwood, KA McLaughlin & KR Olson 'Mental health and self-worth in socially transitioned transgender youth' (2017) 56 *Journal of the American Academy of Child and Adolescent Psychiatry* 116-123.

24 American College of Pediatricians 'Gender dysphoria in children' (2017) 32 *Issues in Law and Medicine* 287.

25 American Psychiatric Association 'What is gender dysphoria?' https://psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria (accessed 8 August 2022).

26 *KOS* (n 15) 60.

27 *KOS* (n 15) 61 64.

relevant legislation as there are no mechanisms in place to take into account the change in sex description.[28]

In the *KOS* case, after they had married their respective spouses, each of the transgender spouses underwent surgical and/or medical treatment to alter their sexual characteristics.[29] The transgender spouses essentially wanted to transition – that is, the process of shifting toward a gender role different from that assigned at birth, which can include social transition, such as new names, pronouns and clothing, and medical transition, such as hormone therapy or surgery.[30] The parties wished to alter their sex in terms of the Alteration of Sex Description and Sex Status Act 49 of 2003 (Alteration Act).[31] The applications had the support of the transgender spouses' marriage partners, who additionally did not wish to end their respective marital relationships.[32] However, this was met with a myriad of problems. The parties were effectively told that they could not remain in a marriage in terms of the Marriage Act and had to go ahead with divorce proceedings and then 're-marry' in terms of the Civil Union Act as this had now become a same-sex marriage. None of the parties wished to do so.

The result was that the applications by KOS and GNC in terms of the Alteration Act have effectively been refused and the Department of Home Affairs has failed to come to a decision in respect of them. In WJV's case the Department did alter the sex description. However, when it did so, it simultaneously deleted the particulars recorded in the population register of WJV's marriage with the sixth applicant. This was done without permission from the spouses. It also changed the record of the sixth applicant's surname to her maiden name.[33]

The applicants in this case also faced hostility and ignorance on the part of the Home Affairs officials. Comments made included that changing one's sex 'must be an offence of some kind'.[34] Further problems arose as the surgical interventions and treatment to facilitate the transition from male to female began to manifest physically day by day.

28 As above.
29 *KOS* (n 15) 2.
30 https://www.apa.org/monitor/2018/09/ce-corner-glossary#:~:text=Transition%3A%20The%20process%20of%20shifting,as%20hormone%20therapy%20or%20surgery (accessed 8 August 2022). Also see Durwood and others (n 23).
31 Sec 2(1).
32 *KOS* (n 15) 11.
33 *KOS* 15.
34 *KOS* 34.

The delay in the process by the Department of Home Affairs had real-life consequences for the transgender spouses as they began to look more female by the day. It resulted in a number of embarrassing and invasive scenarios when called upon to explain why their appearance did not correspond with that depicted on their official identity cards.[35] This also resulted in a number of issues such as the opening of bank accounts and other daily scenarios for which an identity card is a prerequisite.[36] This contributed to the mental deterioration of the transgendered spouses as they found themselves within the realm of a transphobic world.[37]

3 National legislative framework

The Preamble to the South African Constitution sets the foundation for these discussions. The Preamble states, among others, that the Constitution (as the supreme law of South Africa) shall lay the foundations for a democratic and open society in which government is based on the will of the people, and every citizen is equally protected by law. Section of 9 of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law.[38] Furthermore, this section provides that the state may not directly or indirectly unfairly discriminate against anyone on the grounds of, among others, gender, sex and sexual orientation.[39] Gender identity is not an explicitly-protected category. However, courts have interpreted this as falling under non-discrimination protection on the basis of gender.[40] It therefore is imperative for purposes of this discussion that the shortfalls of the law in this regard be analysed against the backdrop of the aims of justice, non-discrimination and equality. There are also a number of other constitutional rights that come to the fore in this discussion. The rights to human dignity,[41] privacy,[42] bodily and psychological

35 *KOS* 36.
36 *KOS* 36, 47, 55.
37 KOS, eg, began to withdraw from dealing with the outside world and left the management of her affairs to her wife.
38 Sec 9(1).
39 Sec 9(3).
40 *Qwelane v South African Human Rights Commission & Another* 2021 (6) SA 579 (CC); W Luhur, L Mokgoroane & A Shaw 'Public opinion of transgender rights in South Africa' Williams Institute, UCLA School of Law, June 2021, https://williamsinstitute.law.ucla.edu/wp-content/uploads/Public-Opinion-Trans-South-Africa-Jun-2021.pdfPublic-Opinion-Trans-South-Africa-Jun-2021.pdf (accessed 20 October 2023).
41 Sec 10.
42 Sec 14.

integrity[43] and freedom of movement[44] are all violated by the *lacunae* in the law.

In terms of the Alteration Act the purpose thereof is to provide for the alteration of the sex description of certain individuals in certain circumstances, and to amend the Births and Deaths Registration Act 51 of 1992 (BDRA) as a consequence, and to provide for matters incidental thereto.[45] The Alteration Act is severely wanting. Section 1 of the Alteration Act displays an incorrect conflation of sex and gender in a number of ways. This, for example, is best displayed in the definition of sexual characteristics. The definition provides that it means 'primary or secondary sexual characteristics or gender characteristics'. The issue is further exacerbated by the definitions of primary and secondary sexual characteristics as defined by the Act: The term 'primary sexual characteristics' means the form of the genitalia at birth; 'secondary sexual characteristics' means those that develop throughout life and that are dependent upon the hormonal base of the individual person.

This conflation can also be seen in section 7(2)(a) of the Identification Act 68 of 1997 (Identification Act), which states:[46]

> An identity number shall be compiled in the prescribed manner out of figures and shall, in addition to a serial, index and control number, consist of a reproduction, in figure codes, of the following particulars, and no other particulars whatsoever, of the person to whom it has been assigned, namely – (a) *his or her* date of birth and *gender.*

As pointed out in *September v Subramoney NO & Others*,[47] according to the BDRA, no provision is made for persons who have commenced treatment for a sex alteration, but before a change on the population register occurred.[48] The implication, therefore, is that a transgender person shall be considered by their sex assigned at birth until such time that they commence treatment. Furthermore, as previously stated and as will be demonstrated below, there is no requirement for surgical transitioning in terms of the Alteration Act.[49] There are a number of issues here. First, the use of 'his' or 'her' feeds into the binary view of gender, that is, there are only two genders – male and female.[50] Second, gender and sex appear to be conflated. This

43 Sec 12(2)(b).
44 Sec 21.
45 Preamble to the Alteration Act.
46 My emphasis.
47 4 All SA 927 (WCC).
48 *September v Subramoney* (n 47) 56.
49 *KOS* (n 15) 39.
50 J Drescher 'Out of DSM: Depathologising homosexuality' (2015) 5 *Behavioural Sciences* 3.

is further demonstrated in the absence of a definition for gender in section 1 of the definitions of the Identification Act. Finally, if the Alteration Act does not require medical treatment, why does the BDRA make the implication that it is necessary to medically transition before a change on the population register occurred as per *September v Subramoney*? This conflation is typical of those who do not understand the nuance thereof. Since the 1980s sex began to be understood, like gender, as a historical and social phenomenon and, as such, a fluid, variable and constructed category.[51] Sex and gender are not only applicable in the realm of scientific and anthropological studies; but must also be construed in terms of politics and the law. 'It must be questioned whether it is correct that people should be required to fit the convenience of legal categories rather than the law reflecting the complexities and realities for individuals.'[52] By doing so, the state must be cognisant enough to navigate these complexities and realities within the realm of the legislative framework. However, at present it seems that South African transgender persons currently have to be legally recognised as one of two genders (male or female).[53] The legal contextualisation of sex/gender in a binary system has historically relied heavily on biomedical definitions.[54]

Furthermore, the aforementioned Acts (the Alteration Act, the BDRA and the Identification Act) do not speak to one another. The effect of section 3(3) of the Alteration Act is that the recordal of a post-nuptial sex/gender change in respect of either or both the spouses has no effect on their mutual marital rights and obligations.[55] These endure as long as the marriage does. It also has no effect on the transgendered person's rights against and obligations to third parties.[56] This effectively provides that a marriage should not, in theory, be affected in any manner by the change in sex/gender of any of the spouses to a marriage. An issue arises concerning the change of recordal of the alteration in terms of the BDRA and the Identification Act. Both these Acts require an alteration of the record of a person's gender or sex description on their birth register[57] and, subsequently ,section 8 of the Identification Act states that the information to be recorded includes particulars of such persons' names, dates of birth, gender and identity numbers. Interestingly

51 T Klein 'Who decides whose gender? Medico-legal classifications of sex and gender and their impact on transgendered South Africans' family rights' (2012) *Ethnoscripts* 14.
52 PL Chau & J Herring 'Defining, assigning and designing sex' (2002) 16 *International Journal of Law, Policy and the Family* 354.
53 Drescher (n 50) 28.
54 As above.
55 *KOS* (n 15) 4.
56 As above.
57 Sec 5 BDRA.

enough, the Identification Act speaks of 'gender' and not 'sex' as per the aforementioned section thereof. The word 'gender' is used in the Identification Act to the same effect as the expression 'sex description' is used in the Alteration Act.[58] The issue now becomes that the Identification Act then, pursuant to section 8(e), states that the following should be in the population register: 'the particulars of his or her marriage contained in the relevant marriage register or other documents relating to the contracting of his or her marriage, and such other particulars concerning his or her marital status as may be furnished to the Director-General'.

According to the population register, the identification number of a person is expressed as a set of figures. While it does not reflect a person's marital status, it does indicate a person's gender.[59] Therefore, according to the Identification Act and the BDRA, the identification number will change to reflect the change in sex/gender. The actual identification document states 'sex'. It does not state 'gender'.

In making an argument for purposes of satisfying the requirements for a legally-appropriate population register, there is a discussion to be had regarding the rights affected by the strict compliance of the applicable legislation. There are a number of other constitutional rights that come to the fore in this discussion (as stated in under this heading). The rights affected are, namely, the rights to human dignity, privacy, bodily and psychological integrity and freedom of movement.

Regarding the constitutional rights violated as mentioned above, the right to human dignity, although at times difficult to definitely properly define, often speaks for itself. Dignity is defined as 'the quality or state of being worthy, honoured, or esteemed'.[60] This was clearly violated in this case as the Department of Home Affairs disregarded the worth of the applicants and reduced their plight to a number of transphobic tropes. With regard to privacy, the inner sanctums of the person's physiological traits were questioned not only in public at the Department of Home Affairs; but also with regard to people who did not believe that the transgender spouses were who they said they were based on their physical appearance. This led to embarrassing situations, in the *KOS* case, where the transgender spouses had to explain to complete strangers why their physical appearance did not

58 *KOS* (n 15) 5.
59 Sec 7(2)(a) Identification Act. Once again there is no mention of the term 'sex'.
60 https://www.merriam-webster.com/dictionary/dignity (accessed 8 August 2022); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 1 BCLR 1517 (CC) 125.

match the biological sex descriptor on their identity documents.[61] To have to be questioned and having to explain your gender identity, any medical procedures or treatment done, is a clear violation of a person's medical history as well as their privacy in general. With regard to bodily and psychological integrity, it is clear by what the transgender spouses stated regarding their mental health and their desire to retreat from everyday life in order to escape questions that it took a toll on them psychologically. Transgender people suffer from high levels of stigmatisation, discrimination and victimisation, contributing to negative self-image and increased rates of other mental health disorders.[62]

Further, gender reassignment surgery actually is not a requirement for relief in terms of the Alteration Act.[63] This, therefore, may be construed as a violation of the rights in section 12(2)(b) of the Constitution which includes the right to have security in and control over their body insofar as it places an undue duty on individuals to medically transition in order to satisfy the requirements of the conflicting BDRA regulations. The conundrum finds application in that in terms of regulation 19 of the BDRA a person is required to apply for a change in sex descriptors, in line with the Alteration Act, by filing the application as provided in Annexure 12 (that is, Form DHA-526). The BDRA (nor its regulations), however, does not in fact state anything about needing to have undergone gender reassignment surgery or any other treatment. In contrast, however, Form DHA-526 contains a provision that the applicant must produce medical reports from two different medical doctors. This discrepancy between the Alteration Act and the BDRA creates the impression, on the one hand, that one need not undergo gender reassignment surgery (as per the Alteration Act) but, on the other hand, there is a need for gender reassignment surgery (according to Form DHA-526 of the regulations of the BDRA). One Act, therefore, allows for a reading of bodily autonomy, while the other Act does not.

Finally, regarding freedom of movement, section 21 of the Constitution states the following:

(1) Everyone has the right to freedom of movement.

(2) Everyone has the right to leave the Republic.

(3) Every citizen has the right to enter, to remain in and to reside anywhere in the Republic.

61 *KOS* (n 15) 39.
62 SL Reisner and others 'Global health burden and needs of transgender populations: A review' (2016) 388 *The Lancet* 412-436.
63 *KOS* (n 15) 39.

(4) Every citizen has the right to a passport.

The problem herein as it pertains to free movement is evident. If one cannot obtain identification documents, one's movement is severely restricted. One does not have the right to leave or return to the Republic. One may be prevented in certain instances from entering establishments that require an identification document or a driver's licence as proof of identity and one cannot access a passport, among other things.

All of the above-mentioned rights violations do not accord with the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). The long title of PEPUDA makes it clear that section 9 of the Constitution be upheld and that the state prevents and prohibits, among other things, unfair discrimination and harassment; and promote equality and eliminate unfair discrimination. Section 2 of PEPUDA contains the objects of the Act. Therein lays the provision that the state must enact legislation that gives effect to the objects of section 9 of the Constitution.[64] Furthermore, PEPUDA seeks to give effect to the spirit of the Constitution, particularly the equal enjoyment of all rights and freedoms by every person and the promotion of equality, among others.[65] In failing to uphold the spirit, object and purpose of the Bill of Rights, the contradictory and exclusionary legislation that seeks to gate-keep marriage within heteronormativity and patriarchal values cannot be in line with PEPUDA.

4 Inconsistent application of the legislation

It is apparent from the facts of the *KOS* case that the rules pertaining to this particular situation are inconsistent. There is a long-standing belief that that homosexuality (and, by extension, SOGIESC issues) is 'un-African'.[66] This is a systemic issue that has seeped into the very fabric of the African lived experience, and South Africa (despite its Constitution) is no stranger thereto. It speaks to the sentiments of a country that may be progressive in terms of its laws, but not in terms of the conservative sensibilities of the people on the ground. The treatment that each of the transgender spouses received was different in the implementation thereof, but still deeply rooted in transphobic sentiments. This may offer one reasons as to why the officials of the Department of Home Affairs were allowed to act with impunity: from the applicants in the *KOS* case needing to see two

64 Sec 2(a).
65 Sec 2(b).
66 S Nyanzi 'Dismantling reified African culture through localised homosexualities in Uganda' (2013) 15 *Culture, Health and Sexuality* 952-967.

different officials who both were clearly not acquainted with the Alteration Act[67] to the erasure of pertinent information about WJV and her wife and learning that the Department's 'system' reflecting that they had never married.

Gender Dynamix (GDX), a registered non-profit organisation that seeks to advance, promote and defend the rights of transgender and 'gender non-conforming' persons in South Africa and beyond[68] had a heavy hand in pointing out these inconsistencies. GDX entered these proceedings as an applicant. They stated that the absence of a uniform approach by the Department of Home Affairs to these matters was astounding.[69]

In an example provided by GDX in 2011, a person who had applied for relief under the Alteration Act was initially informed by the Department of Home Affairs that she would first need to obtain a divorce, which she refused to do. The Department of Home Affairs was eventually persuaded, after the applicant had obtained legal representation with the assistance of GDX, to amend the gender marker despite the continued subsistence of the marriage. It did so without 'converting' the record of the union to one under the Civil Union Act.[70] The Court in *KOS* noted that it was unclear of the circumstances under which this was allowed to happen.[71] Another example was that in 2009 an applicant had had the record of her marriage, which had been solemnised in 1976 in terms of the Marriage Act, changed, without her knowledge, to that of a marriage purportedly solemnised under the Civil Union Act in 2009 (just as in the case of applicant WJV in the *KOS* case).[72]

In terms of section 33(1) of the Constitution, everyone has the right to administrative action that is lawful, reasonable and procedurally fair. In executing just administrative action, legislation must, among other things, promote the efficient administration thereof.[73] The Alteration Act does not have a set of procedures that allows for fair and reasonable administration thereof. In fact, there is an absence of prescribed forms and procedures for the administration of the Alteration Act.[74] Further, in executing the administration of the Identification Act, there are provisions contained therein that

67 *KOS* (n 15) 27 34.
68 https://www.genderdynamix.org.za/ (accessed 9 August 2022).
69 *KOS* (n 15) 30.
70 *KOS* 29.
71 *KOS* (n 71).
72 *KOS* 27.
73 Sec 33(3).
74 *KOS* (n 15).

demonstrate a clear relationship between the Alteration Act and the Identification Act. For example, chapter 4 of the Identification Act creates criminal offences for not being in possession of an identity document and being unable to provide proof of identity, among other things. A person whose application is declined in terms of the Alteration Act cannot obtain a change in their identity number and, therefore, cannot possess an identity document. The prevention of the ability to obtain an identity document on the basis of marriage on the face of it appears arbitrary and not in line with section 33 of the Constitution and, thus, also unconstitutional in terms of section 172(1)(a) of the Constitution which states 'that when deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'. For the purposes of this this article, the author will not delve deeper into issues that are in the purview of the Promotion of Administrative Justice Act 3 of 2000. However, it is important to note that that there is a very clear symbiotic relationship between the Alteration Act and the Identification Act in terms of, among other things, the administration thereof.[75]

5 Marriage Act and Civil Union Act

The contestation of the Department of Home Affairs is that they cannot change the sex markers on their system as the marriage is no longer heterosexual in nature and that, thus, the parties must enter into a civil union in terms of the Civil Union Act.[76] The Court in the *KOS* case stated that it seemed as though the respondents' approach had been influenced by the persisting influence of the religious and social prejudice against the recognition of same-sex unions.[77] This is very clear in light of the decision by the legislature to create a parallel system in passing the Civil Union Act and not an amendment to the Marriage Act to include same-sex marriages. As Ntlama rightly puts it, the Civil Union Act has the potential to produce new forms of marginalisation, despite the caution by the Court in *Minister of Home Affairs v Fourie* (*Fourie* case),[78] namely, that Parliament, in creating the Civil Union Act did not create a new form of marginalisation through a parallel system of marriage[79] – especially with South Africa's past regarding 'separate, but equal' sentiments expressed

75 *KOS* 77.
76 *KOS* 67.
77 *KOS* 69.
78 2006 (1) SA 542 (CC), 139 150; N Ntlama 'A brief overview of the Civil Union Act' (2010) (13) *Potchefstroom Electronic Law Journal* 192.
79 This was altered to a degree in the *Fourie* case, which led to Parliament correcting the defect identified in sec 30(1) of the Marriage Act to include 'spouse' and not just 'husband/wife'.

by the oppression of black people during apartheid. The decision to have a parallel system of marriage has no shortage of critique in jurisprudence, and it is not the intention of the author to dwell on those vastly-correct critiques and sentiments. The crux herein is to illustrate the farce that is 'separate but equal development'. The creation of a separate institution of 'marriage' has reduced the equal rights of couples in same-sex relationships and still reduces same-sex couples to the realm of second-class citizens.[80]

Both the Civil Union Act and the Marriages Act are devoid of a definition of 'marriage', and we thus rely on the common law position. However, according to section 1 of the Civil Union Act, a 'civil union' means 'the voluntary union of two persons who are both 18 years of age or older. Which is solemnised and registered by way of either marriage or a civil partnership in accordance with the procedures prescribed in this Act. To the exclusion, while it lasts, of all others.'

The word 'marriage' is included in this definition. However, it also includes 'civil partnership', which is also devoid of a definition. The language seems oddly placed in order to distinguish one institution from the other. It seems to give gravitas of a marriage solemnised in terms of the Marriage Act top billing.[81]

Thus, in the *KOS* case the conundrum regarding the institution of marriage seems grounded in the sensibilities, as warned in the *Fourie* case. It seemingly seeks to erase decades-long institutions solemnised in terms of the Marriages Act to the above-mentioned inferior institution of a civil union. It completely ignores the espoused views that the spouses involved herein are and have been satisfied with their respective marital relationships. Furthermore, the prevailing sentiment by the Department of Home Affairs officials is that the spouses obtain a divorce and then solemnise their union in terms of the Civil Union Act. Nowhere in the Divorce Act 70 of 1979 (Divorce Act) is it stated that a gender reassignment as envisaged in terms of the Alteration Act is sufficient grounds for divorce. It is common cause that a marriage may be dissolved in the following scenarios: (i) the irretrievable break-down of the marriage as contemplated in section 4 of the Divorce Act; and (ii) the mental illness or the continuous unconsciousness, as contemplated in section 5 of the Divorce Act, of a party to the marriage. As stated above in this article, the wives of the transgender spouses did not wish to get a divorce

80 Ntlama (n 78) 197.
81 Ntlama (n 78) 199.

as there were no grounds. Therefore, and as emphasised throughout this article, the wives of the transgender spouses were supportive of their transgender spouses and wished to continue the marital relationship. As one of the applicants aptly put it, 'she sees "no need to get a divorce to satisfy a computer system"'.[82] To obtain a decree of divorce on the basis of the Alteration Act surely was not envisaged if the spouses did not find it to be the basis of the irretrievable breakdown of the marriage. There could indeed be circumstances in which it would lead to the irretrievable breakdown of the marriage, but this evidently was not the case in *KOS*.

6 Possible solutions?

What is clear is that there is a need for change. What is difficult is the question of what that change would look like. It is clear that the computer system employed by the Department of Home Affairs is flawed if it allows for the denigration of constitutional rights. But how would one fix the problem? The author will delve into three possible solutions.

6.1 Case-by-case basis

The matters relating to marriages solemnised in terms of the Marriage Act where transgender spouses are involved could be upheld under the discretion of the director-general of the Department of Home Affairs. This would entail an official escalating of the matter to the director-general for approval. The issues with this method are four-fold:

6.1.1 The bureaucracy, red-tape and paperwork

The process of altering one's sex/gender in terms of the Alteration Act is already onerous on the part of the party seeking the alteration. There substantial paperwork involved in terms of the BDRA. One not only completes Form DHA-526 as discussed in part 3 above, but there is also the process of changing the identity number in terms of the system at Department of Home Affairs, with shockingly poor service of the Department in general, including long queues and sheer number of complaints regarding the poor demeanour of the

82 *KOS* (n 15) 46.

Department's officials as well as long waiting times to receive identity documentation after application therefor.[83]

Another setback would be the lack of awareness by the officials at the Department of Home Affairs regarding the Alteration Act as discussed in part 2 above. A lack of awareness regarding legislation within the purview of one's entire occupation points to a possible lack of education and training at the Department of Home Affairs. *KOS* even had a copy of the Alteration Act with her and the officials still refused to either assist her or were sceptical of the existence of the alteration process.[84] There is a need at ground level to educate the officials at the Department of Home Affairs and to conscientise those officials with regard to the sensitive issue of the various human rights involved.

There are also the discretionary powers of the director-general of the Department of Home Affairs to consider. The powers and duties of the director-general are contained in regulation 2 in the regulations of the BDRA. According to section 5(1)(a) of the BDRA, the director-general is the custodian of all documents relating to births and deaths (required to be furnished) under this Act or any other law. The section contains *any other law*. However, when construed with the births and deaths specifically, it does not lend itself leeway into the realm of the Alteration Act. *Any other law* would suggest that the list is not closed, but the caveat is that it must relate to births and deaths specifically. Does this mean that the Alteration Act is not a consideration? The BDRA makes mention of the Alteration Act in section 27A in broad terms, namely, the mechanic manner in which forenames or surnames and gender markers must be changed to accord with the Alteration Act. This section states, among others, that if the director-general grants an application in terms of the Alteration Act, the director-general shall alter the sex description on the birth certificate of the person concerned. It does so without elaborating on issues incidental to that alteration. This seems peculiar as a transgender person may want to assume another name or surname, which the BDRA does allow in terms of section 24 (forename) and section 26 (surname) thereof. The administrative process is very onerous and provides for the wide discretion of the director-general.

83 T Washinyira 'South Africans hamstrung by Home Affairs as complaints over queues and service standards escalate' *Daily Maverick* 21 October 2021, https://www.dailymaverick.co.za/article/2021-10-21-south-africans-hamstrung-by-home-affairs-as-complaints-over-queues-and-service-standards-escalate/ (accessed 11 August 2022).

84 *KOS* (n 15) 34.

The first obstacles find their application in the heteronormative and patriarchal list of duties with which the applicant must comply:[85]

> Subject to the provisions of this Act or any other law, no person shall assume or describe himself or herself by or pass under any surname other than that under which he or she has been included in the population register, unless the Director-General has authorised him or her to assume that other surname: Provided that this subsection shall not apply when –
>
> (a) a woman after her marriage, assumes the surname of the man with whom she concluded such marriage or after having assumed his or her surname, resumes a surname which she bore at any prior time;
> (b) married or divorced woman or a widow resumes a surname which she bore at any prior time;
> (c) a woman, whether married or divorced, or a widow adds to the surname which she assumed after the marriage, any surname which she bore at any prior time.

Note the usage of binary terms and the focus on women and no mention of men, transgender men, intersex persons and gender-non-binary persons. Section 26(1) of the BDRA displays the discretionary powers of the director-general of Home Affairs in this regard:

> At the request of any person, in the prescribed manner, the Director-General may, if he or she is satisfied that there is a good and sufficient reason as may be prescribed for that person's assumption of another surname, authorise the person to assume a surname other than his or her surname as included in the population register, and the Director-General shall include the substitutive surname in the population register in the prescribed manner.

The regulations are even more onerous. The Department of Home Affairs requires, among other things, a certified copy of an identity document[86] (an identity document which in reality would not be issued because of the rejection of an application as per the Alteration Act) and proof of payment of the application fee.[87] What would the director-general consider 'good and sufficient' reasons? This discretion seems too open-ended and there is the possibility of abuse thereof.[88]

85 Sec 26(1).
86 Regulation 18(3)(a).
87 Regulation 18(3)(f). This fee is non-refundable.
88 *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2004 (4) SA 125 (CC). Discretion is characterised as involving a degree of judgment and choice in that a discretionary power permits a public authority some freedom to decide how it should act; also see *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 para 46 regarding how the exercise of the discretion by public officials must be done in a manner consistent with the provisions of the Bill of Rights.

6.1.2 The repeal of the Civil Union Act in its entirety

The parallel system of marriage is a farce at best. As discussed at length in part 2 above, the Civil Union Act actually reinforces ideas that that a 'union' is inferior to a 'marriage'. There is no set definition of 'marriage' in either piece of legislation. It would perhaps be wise for the legislature to provide such a definition. As pointed out in the *Fourie* case:[89]

> Marriage and its legal consequences sit at the heart of the common law of persons, family and succession and of the statutory scheme of the Marriage Act. Moreover, marriage touches on many other aspects of law, including labour law, insurance and tax. These issues are of importance not only to the applicants and the gay and lesbian community but also to society at large.

In the *Fourie* case the common law definition of marriage was declared to be inconsistent with the Constitution and invalid to the extent that it did not permit same-sex couples to enjoy the same rights as heterosexual couples. The Constitutional Court ordered that the legislature align the legal position in light of the *Fourie* case. The result thereof was the enacting of the Civil Union Act, a piece of legislation that flies in the face of the seemingly pertinent issue that same-sex couples be allowed be to be married and not unionised. The Civil Union Act also contains the provision that a marriage officer may object to performing a civil union.[90] Section 1 of the Civil Union Act defines a marriage officer as follows:

> 'Marriage officer' means –
>
> (a) a marriage officer *ex officio* or so designated by virtue of section 2 of the Marriage Act; or
>
> (b) any minister of religion or any person holding a responsible position in any religious denomination or organisation, designated as marriage officers under section 5 of this Act.

Section 23 of the Marriage Act also contains a provision under which a marriage officer may object to solemnise a marriage. Thus, there is unnecessary repetition contained in the Civil Union Act and the Marriage Act. Therefore, if a marriage officer raised their right to constitutional right to freedom of religion, belief and opinion,[91] it would have the same effect, or at least it would have had the same effect but for section 6 of the Civil Union Act being repealed in terms of the Civil Union Amendment Act 8 of 2020 (Amendment Act). In terms of section 6 of the Civil Union Act a marriage officer, who is a

89 *Fourie* (n 78) 9.
90 Sec 9.
91 Sec 15.

part of a religious denomination or organisation who applied to be a marriage officer, would not be compelled to perform a same-sex union and could apply in writing to the Minister of Home Affairs that he or she objects on the ground of conscience, religion, and belief to solemnising a civil union between persons of the same sex. However, with the repealing of this section by the Amendment Act, it means that such a marriage officer may be compelled to solemnise a same-sex union. This surely begs the question of whether the Marriage Act would be amended in this manner. If we measure this against section 9 of the Constitution, the author argues that it would not be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom[92] to differentiate between the Marriage Act and the Civil Union Act in this regard.

It is the author's contention that if the Civil Union Act were repealed and there was only one manner in which to solemnise a marriage (not including the RCMA as that may open up a can of worms in terms of South African customary law), there would then be no need to call upon transgender spouses to seek out a divorce and solemnise the marriage in terms of the Civil Union Act.

6.1.3 Technological intervention

One of the arguments brought forth by the Department of Home Affairs hinged on the computer system employed by the Department. In many instances in the *KOS* case the officials at the Department of Home Affairs and, indeed, the respondents themselves insisted that the system would not allow a change in sex descriptors as the population register would now recognise the marriage as a same-sex marriage.[93] The course of action would then be to dissolve the marriage and solemnise the marriage in terms of the Civil Union Act. One official even stated that attempting to stay married in terms of the Marriages Act and seeking to alter one's sex in terms of the Civil Union Act would 'confuse the system' and slow down the process of approval.[94]

As described in part 3 above, in terms of section 7(2) of the Identification Act an identity number is compiled in the prescribed manner out of figures with a serial, index and control number. Section 7(2)(a) of the Identification Act provides that 'gender' [*sic*]

92 Sec 36 – the limitation clause in the Constitution that allows for the limitation of rights if it is reasonable and justifiable to do so.
93 *KOS* (n 15) 46 50.
94 *KOS* 50.

must be specified as well. If it is a technological issue, there should be a technological solution thereto. Would there not be a manner in which a person who is transgender and married (who had their marriage solemnised in terms of the Marriage Act) seeking to alter their sex in terms of the Alteration Act would be flagged by the system and not have their marriage dissolved, questioned and become a barrier to a successful application in terms of the Alteration Act? If such a system were in place, there would be no need to engage with the Department of Home Affairs regarding the status of one's marriage in light of the Alteration Act and the Identification Act.

7 Conclusion

It is within the ethos of the Constitution that everyone be treated equally in the eyes of the law. The dignity of each person shall be protected and the sanctity of their privacy respected. In embracing a dispensation that protects transgender persons, one must be willing to invoke the spirit of equality. In terms of section 39(1)(a) of the Constitution in interpreting the Bill of Rights a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. This also means recognising means recognising the value and inherent worth of a person's identity – gender or otherwise. Cisgendered persons may take for granted that they can obtain identity documents, open bank accounts, apply for driver's licences, open clothing store accounts and be asked by a designated person for an identity document to confirm their identity. As WJV (who often has to travel out of the country for work) rightly stated, the concerns for a transgender person would be the constant fear of 'what if'? It has been a constant concern to her that the incongruence between her identity documents and her physical presentation might lead to difficulties on her business trips, as is the prospect of being stopped by the local law enforcement authorities and having to explain her situation to strangers who might not accept her account and arrest her.[95] All of the transgender spouses in the *KOS* case laid out in detail the difficulty of navigating ordinary life and how it took a toll on their mental health and threats to their well-being.

The Court in *KOS* upheld the right in terms of section 39(1)(a) of the Constitution. The relief sought by the parties in this case was granted. It was declared, in terms of section 172(1)(a) of the Constitution, that the manner in which the Department of

95 *KOS* 55.

Home Affairs dealt with the applications by the first, third and fifth applicants under the Alteration Act was conduct inconsistent with the Constitution and unlawful in that it:[96]

(a) infringed the said applicants' right to administrative justice;
(b) infringed the said applicants' rights and those of the second, fourth and sixth applicants to equality and human dignity; and
(c) was inconsistent with the state's obligations in terms of s 7(2) of the Constitution.

The Court further held that applications pursuant to a change in sex/gender under the Alteration Act should not have an effect on a marriage solemnised in terms of the Marriage Act.[97]

While this judgment is to be heralded as a step in the right direction for the rights of sexual and gender minorities, it is the author's opinion that the matter should be considered before the Constitutional Court and the legislature in order to result in substantive change.

96 *KOS* 90.
97 As above.

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- Numbers up to ten are written out in full; from 11 use numerals.
- Capitals are not used for generic terms 'constitution', but when a specific country's constitution is referred to, capitals are used ('Constitution').
- Official titles are capitalised: eg 'the President of the Constitutional Court'.
- Refer to the *Journal* or https://www.ahrlj.up.ac.za/submissions for additional aspects of house style.

CHART OF RATIFICATIONS: AU HUMAN RIGHTS TREATIES

Position as at 31 July 2023
Compiled by: I de Meyer
Source: http//www.au.int (accessed 31 October 2023)

	African Charter on Human and Peoples' Rights	AU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights	Protocol to the African Charter on the Rights of Women	African Charter on Democracy, Elections and Governance
COUNTRY	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**
Algeria	01/03/87	24/05/74	08/07/03	22/04/03	20/11/16	10/01/17
Angola	02/03/90	30/04/81	11/04/92		30/08/07	08/06/21
Benin	20/01/86	26/02/73	17/04/97	10/06/14	30/09/05	28/06/12
Botswana	17/07/86	04/05/95	10/07/01			
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98*	09/06/06	26/05/10
Burundi	28/07/89	31/10/75	28/06/04	02/04/03		
Cameroon	20/06/89	07/09/85	05/09/97	09/12/14	13/09/12	24/08/11
Cape Verde	02/06/87	16/02/89	20/07/93		21/06/05	
Central African Republic	26/04/86	23/07/70	07/07/16			24/04/07
Chad	09/10/86	12/08/81	30/03/00	27/01/16		11/07/11
Comoros	01/06/86	02/04/04	18/03/04	23/12/03	18/03/04	30/11/16
Congo	09/12/82	16/01/71	08/09/06	10/08/10	14/12/11	
Côte d'Ivoire	06/01/92	26/02/98	01/03/02	07/01/03	05/10/11	16/10/13
Democratic Republic of Congo	20/07/87	14/02/73	31/01/17	31/01/17	09/06/08	
Djibouti	11/11/91		03/01/11		02/02/05	02/12/12
Egypt	20/03/84	12/06/80	09/05/01			
Equatorial Guinea	07/04/86	08/09/80	20/12/02		27/10/09	11/07/17
Eritrea	14/01/99		22/12/99			
Eswatini	15/09/95	16/01/89	05/10/12		05/10/12	
Ethiopia	15/06/98	15/10/73	02/10/02		18/07/18	05/12/08
Gabon	20/02/86	21/03/86	18/05/07	14/08/00	10/01/11	
The Gambia	08/06/83	12/11/80	14/12/00	30/06/99*	25/05/05	11/06/08
Ghana	24/01/89	19/06/75	10/06/05	25/08/04*	13/06/07	06/09/10
Guinea	16/02/82	18/10/72	27/05/99		16/04/12	17/06/11

Guinea-Bissau	04/12/85	27/06/89	19/06/08	4/10/21*	19/06/08	23/12/11
Kenya	23/01/92	23/06/92	25/07/00	04/02/04	06/10/10	07/01/21
Lesotho	10/02/92	18/11/88	27/09/99	28/10/03	26/10/04	30/06/10
Liberia	04/08/82	01/10/71	01/08/07		14/12/07	23/02/14
Libya	19/07/86	25/04/81	23/09/00	19/11/03	23/05/04	
Madagascar	09/03/92		30/03/05	12/10/21		23/02/17
Malawi	17/11/89	04/11/87	16/09/99	09/09/08	20/05/05	11/10/12
Mali	21/12/81	10/10/81	03/06/98	10/05/00	13/01/05	13/08/13
Mauritania	14/06/86	22/07/72	21/09/05	19/05/05	21/09/05	07/07/08
Mauritius	19/06/92		14/02/92	03/03/03	16/06/17	
Mozambique	22/02/89	22/02/89	15/07/98	17/07/04	09/12/05	24/04/18
Namibia	30/07/92		23/07/04		11/08/04	23/08/16
Niger	15/07/86	16/09/71	11/12/99	17/05/04*		04/10/11
Nigeria	22/06/83	23/05/86	23/07/01	20/05/04	16/12/04	01/12/11
Rwanda	15/07/83	19/11/79	11/05/01	05/05/03	25/06/04	09/07/10
Sahrawi Arab Democratic Rep.	02/05/86			27/11/13	19/03/22	27/11/13
São Tomé and Príncipe	23/05/86		18/04/19		18/04/19	18/04/19
Senegal	13/08/82	01/04/71	29/09/98	29/09/98	27/12/04	
Seychelles	13/04/92	11/09/80	13/02/92		09/03/06	12/08/16
Sierra Leone	21/09/83	28/12/87	13/05/02		03/07/15	17/02/09
Somalia	31/07/85					
South Africa	09/07/96	15/12/95	07/01/00	03/07/02	17/12/04	24/12/10
South Sudan		04/12/13			24/02/23	13/04/15
Sudan	18/02/86	24/12/72	30/07/05			19/06/13
Tanzania	18/02/84	10/01/75	16/03/03	07/02/06	03/03/07	
Togo	05/11/82	10/04/70	05/05/98	23/06/03	21/10/05	24/01/12
Tunisia	16/03/83	17/11/89		21/08/07*	23/08/18	
Uganda	10/05/86	24/07/87	17/08/94	16/02/01	22/07/10	
Zambia	10/01/84	30/07/73	02/12/08	28/12/22	02/05/06	31/05/11
Zimbabwe	30/05/86	28/09/85	19/01/95		15/04/08	06/04/22
TOTAL NUMBER OF STATES	**54**	**46**	**50**	**34**	**44**	**38**

Ratifications after 31 July 2023 are indicated in bold

* State parties to the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights that have made a declaration under article 34(6) of this Protocol, which is still valid.