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Editorial

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1. Justification for a new law journal

The immediate question that dashes to any researcher’s mind when a new journal breaks into the research space is: why have a new journal? The question is natural because South Africa is comparatively endowed with many journals across disciplines, and law in particular.[1] There is no gainsaying that South Africa is home to some of the most prestigious journals across disciples globally. In the African continent, South Africa is doing relatively well with research output. Thus, it may be somewhat convincingly argued that perhaps South Africa does not need new journals; it needs new ideas.

However, a closer look at the fundamental realities of higher education and South Africa’s research demographics reveals the contrary. The two most gaping and symbiotically related voids still exist in the South African research landscape. The first one is quantitative, and the second one is qualitative. Quantitatively, despite the existence of many law journals in South Africa, the legal academics, like all other academics in South Africa, are still far from reaching the threshold set by the Department of Higher Education and Training (DHET) for research output. In general, the DHET expects every academic in South Africa to publish at least 1.25 research outputs annually in subsidy-earning publications.[2] Although the Department is putting subsidies into academic research enterprise, the target of 1.25 research output per academic is still hard to attain. According to the DHET:

> The average per capita research publications output for all universities in 2019 was 1.06 units. This means that the average permanently employed academic in the country produced one research publication unit in 2019. That is an equivalent of a single article in a peer-reviewed journal. However, the units are for all publication types (journal articles, books and book chapters and conference proceedings). Academics at eight universities (UKZN, SU, UJ, UP, UCT, WITS, RU and UFS) on average produced publications higher than the national average in 2019.[3]

1 Schulze, S ‘Academic Research at a South African Higher Education Institution Issues’ (2008) 22(3) *South African Journal of Higher Education* 644.

2 *Ibid* 644.

3 Department of Higher Education and Training, *Report on the Evaluation of the 2019 Universities’ Research Output* (2021) 34 <https://bit.ly/3m4a3ps> accessed 13 July 2021.

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This is, therefore, a testament to a need for additional platforms to increase the number of research outputs. It is a truism on stilts that emerging scholars always find it hard to break into the research market dominated by established journals.[4] As a result, knowledge and knowledge production continue, by and large, to be the monopoly of a small elitist group.[5] This is contrary to the long-held postmodernist view that knowledge is not absolute. As Ratnapala pointedly puts it: 'since there is no objective knowledge, what passes for knowledge is simply claims of truth legitimated by convention or by some "epistemic authority" that determines the criteria by which truth is established'.[6]

This 'epistemic authority' or what one may call 'intellectual hegemony' has blocked the space for multiplication of research output. One of the biennial rankings released by the Department still demonstrates that the first six places in the rankings are still reserved for previously advantaged universities.[7] These six top research-producing universities collectively produce a whopping 60% of the entire publication output in the country.[8] This clearly evinces the fact that academic research in South Africa is still skewed in favour of the previously advantaged universities. There is, therefore, a need for research effort and activity from the previously disadvantaged universities.

The second justification is transformational in nature. Despite the spirited influx of policies and scholarly interventions that seek to transform higher education since the dawn of democracy,[9] the rate of transformation continues to be disturbingly slow in all its facets. This inertia for transformation is pervasive; research is no exception. Heleta most instructively articulates this view as thus: '[s]ince the end of the oppressive and racist apartheid system in 1994, epistemologies and knowledge systems at most South African universities have not considerably changed; they remain rooted in colonial, apartheid and Western worldviews and epistemological traditions.'[10]

The problem may be more pronounced in research than teaching and learning because research activity is at the coalface of knowledge production – the very same

4 Maluleka, JR and Nkwe, M 'What Can We Learn from Prolific Researchers? Publication Patterns of the NRF-Rated Library and Information Science Researchers in South Africa' (2020) 52(4) *International Information & Library Review* 272.

5 Sebola, MP and Tsheola, JP 'Knowledge in Space and Time: An Editorial Perspective' (2019) 4(1) *Journal of Public Administration and Development Alternatives* i-xiv.

6 Ratnapala, S *Jurisprudence* (Cambridge University Press 2017) 226; See also Zagzebski, L *Epistemic Authority: A Theory of Trust, Authority, and Autonomy in Belief* (Oxford University Press 2015).

7 These universities are: University of KwaZulu-Natal (UKZN), University of Johannesburg (UJ), University of Pretoria (UP), Stellenbosch University (SU), University of Cape Town (UCT) and the University of the Witwatersrand (Wits) – in that order. According to Kupe, 'the next eight institutions, North West University (NWU), University of South African (Unisa), University of the Free State (UFS), University of the Western Cape (UWC), Rhodes University (RU), Nelson Mandela University (NMU), University of Limpopo (UL) and University of Fort Hare (UFH), in that order, collectively produce 30% and the remaining institutions, including all the Universities of Technology (UoTs), produce the final 10% of the system's publication units'. Kupe, T 'Research outputs do not make a university ranking' *Mail and Guardian* 15 April 2021, <https://bit.ly/3yOxTJc> accessed 13 July 2021.

8 Department of Higher Education and Training (2021).

9 See, for instance, Department of Higher Education and Training, *Research Outputs Policy, 2015* No. 188, 11 March 2015 <https://bit.ly/3xLrOvY> accessed 13 July 2021.

10 Heleta, S 'Decolonisation of higher education: Dismantling epistemic violence and Eurocentrism in South Africa' (2016) 1(1) *Transformation in Higher Education* 1.

knowledge that forms the content of teaching and learning.[11] The content, structure and demographics of research still pre-eminently mirror the pre-democratic outlook.[12] Therefore, there is an urgent need for efforts across the higher education spectrum to deconstruct the old narrative that is persistent and recurrent – that knowledge production is a preserve of certain systems, structures and institutions.[13] The intricacy of this 'old narrative' is ably captured:

> If Western civilisation and culture are responsible for colonial racism, and Europe itself has a racist structure, then we should not be too surprised to find this racism reflected in the discourses of knowledge that emanate from this civilisation and that they work to ensure that structural dominance is maintained.[14]

As the leading research centres, there is overwhelming evidence that South African universities still mirror the discourse of knowledge emanating fundamentally from the European civilisation.[15]

Within this broad justificatory framework, the School of Law of the University of Limpopo deemed it appropriate to launch a law journal to contribute towards decoloniality and transformation in the South African legal research landscape.

2. The nature and purpose of the journal

Hence, the purpose of the journal is to give a platform for high-quality research on transformative perspectives about the law in South Africa. While the journal mainly seeks to respond to legal questions in South Africa, comparative perspectives from Africa and beyond are most welcome. The journal further welcomes contributions that take multi- and inter-disciplinary perspectives to law. This approach is premised on the conviction that '[n]o discipline is an island entirely in itself. That is to say; disciplines are by no means discrete entities – they necessarily overlap, borrow, and infringe upon one another'.[16] Conceptually, multi-disciplinarity is an approach in research in which 'members of two or more disciplines cooperate, using the tools and knowledge of their disciplines in new ways to consider multifaceted problems that have at least one tentacle in another area of study'.[17]

In particular, the journal is targeting high-quality research from emerging scholars and non-conventional perspectives from established researchers.

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11 Hattie, J and Marsh, HW 'The Relationship Between Research and Teaching: A Meta-Analysis' (1996) 66(4) *Review of Educational Research* 507.

12 Waghid, Y 'Knowledge Production and Higher Education Transformation in South Africa: Towards Reflexivity in University Teaching, Research and Community Service' (2002) 43(4) *Higher Education* 457.

13 Heleta, S 'Decolonising Knowledge In South Africa: Dismantling The 'Pedagogy Of Big Lies' (2018) 40(2) *Ufahamu: A Journal of African Studies* 47.

14 Sardar, Z 'Foreword to the 2008 Edition. I Think It Would Be Good If Certain Things Were Said: Fanon and The Epidemiology of Oppression' *in* Fanon, F (ed), *Black Skins, White Masks* (Pluto Books 2008) xv

15 Zembylas, M 'Decolonial Possibilities in South African Higher Education: Reconfiguring Humanising Pedagogies As/With Decolonising Pedagogies' (2018) 38(4) *South African Journal of Education* 1.

16 Youngblood, D 'Multidisciplinarity, Interdisciplinarity, and Bridging Disciplines: A Matter of Process' (2007) 3(2) *Journal of Research Practice* 1.

17 *Ibid* 2.

3. The summary of contributions in this issue

Motseotsile Clement Marumoagae, in the article titled *Artificial Barriers that Prevent Underprivileged Law Graduates from Accessing the Legal Profession*, flags one of the unfortunate legacies of apartheid – the inequality in accessing and practising law. The author highlights the plight of underprivileged graduates, the majority of whom are black graduates seeking to join the legal practice. Inequities still mar the post-university training of law graduates, particularly vocational training. The author makes a recommendation to the newly established Legal Practice Council to ensure that the dictates of social justice guide legal practitioners in South Africa to eradicate barriers that make it difficult for underprivileged law graduates to access the legal profession.

Often, scholarly attention is given to the direct rights of the child, but rarely do we look at the rights of the child as they extend to the caregiver. In the article, *The Right of a Child to Care and the Involvement of the Family Advocate in the Sentencing of a Child's Primary Caregiver*, **Bongani Nkosi** traverses one of the most sensitive issues in the children's protection law – the question of imposing a sentence on the caregiver.

Nkosi amplifies the jurisprudence already championed by the Constitutional Court in the 2008 seminal decision in *S v M*.[18] The effect of the decision is that when sentencing the caregiver, the interest of the child must be cosiderd as one of the prominent factors. After a wide-ranging survey of the law and practice on the subject, the author contends that, in giving the caregiver a custodial sentence, the doctrine of the best interest of the child should be an animating factor.

Melvin Mbao, in the article *The Vicissitudes of Constitutional Interpretation in Zambia*, puts the Constitutional Court of Zambia under the spotlight. Mbao picks on two of the court's most controversial decisions since its establishment – *Hakainde Hichilema and Another v Edgar Chagwa Lungu and Others*[19] and *Milford Maambo and Others v The People*.[20] After a thorough analysis of these two critical decisions of the Constitutional Court, Mbao is critical of how the court discharges its mandate as the ultimate repository of the power to interpret the Constitution, and draws on the rich experience in respect of constitutional interpretation in comparable jurisdictions. The author contends that the manner in which the court has discharged its duties in these two cases may have given credence to the already prevalent allegation of gross incompetence.

Madimetja Phakeng untangles a longstanding question in company law – the role of the shareholder during a takeover. *Shareholder Activism and Acting in Concert during Takeovers under the Companies Act 71 of 2008* critically discusses the interaction between shareholder activism and the concept of acting in concert as applied under the takeover provisions of the Companies Act of 2008.[21] The author argues that by highlighting how the provisions of the on acting in concert seek to strike a balance between shareholder activism and the powers of directors to manage the affairs of the company.

18 2008 (3) SA 232 (CC).
19 2016/CC/0031.
20 2016/CC/R001.
21 Act 71 of 2008.

Finally, the author makes suggestions on how shareholder activists should proceed so as to avoid falling foul of the takeover provisions. Much more importantly, the article argues that takeover laws should not be static but should develop and be adaptable to accommodate new practices, such as the actions of hedge fund activists, who may agitate for better financial performance by regulated companies or changes in the management of companies.

The perennial question of land continues to linger on in many, if not all, African countries. In the article titled *The Political Economy of Land Ownership Rights: Lessons from Nigeria, South Africa and Zimbabwe*, **Taiwo Ajala** weaves together a discernible pattern throughout Africa where there has been a steady change in landholding since pre-colonial times. The author observes that during pre-colonial time landholding was primarily based on a customary system which, as the article contends, gave families and communities collective ownership and equitable access to land use. However, colonialism disrupted the customary systems, confined land ownership rights to privileged minority groups and established dualistic agrarian systems that discriminated against local populations and impoverished their livelihoods.

Through a comparison between Nigeria, South Africa and Zimbabwe, the author examines an aspect of the land question in Africa; how to adequately achieve equity in access to land while resolving colonial legacies which suppressed indigenous land ownership rights, displaced communal land administration structures and marginalised the poor majority in access to land.

The regulation of the Nigerian petroleum industry has been a subject of intense engagement for a very long time. To streamline the regulation of the sector, the country hatched a new Bill styled Petroleum Industry Governance Bill (PIGB). The Bill has been in the making for a very long time until it was passed by parliament in 2021. In the article titled *An Analysis of the Petroleum Industry Governance Bill in Nigeria: Prospects and Challenges*, **Oladiran Akinsola Ayodele** gives an in-depth analysis of the ramifications of this newly approved Bill on the country's economy.

The author critiques the Bill and contends that it is fraught with some challenges. The most prominent critique is that the government, through the concerned Minister, still possesses substantial powers over the governance of the sector. For instance, the Minister has pre-emptive power over all petroleum and related products. The Minister may increase the fine imposed by the Bill through regulation. Another critique is that the Bill dispossessed the Ministry of Environment of power over environmental affairs, which is its area of expertise, and gave it to the Nigerian Petroleum Regulatory Commission (NPRC).

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Artificial Barriers that Prevent Underprivileged Law Graduates to Access the Legal Profession

Motseotsile Clement Marumoagae*

Abstract

This article highlights the plight of underprivileged law graduates in South Africa in relation to the difficulties they experience when they attempt to access the legal profession. It demonstrates that, in addition to legislated requirements that they need to meet, they are also met with artificial requirements which are meant to effectively prevent them from accessing the legal profession. This article argues that, while underprivileged law graduates are not entitled to receive practical vocational training by merely having graduated with a law degree, they are nonetheless entitled to be treated equitably when responding to invitations for practical vocational training from law firms. This article makes an argument that, while the Legal Practice Council (LPC) has attempted to deal with this issue, much still needs to be done to ensure that the dictates of social justice guide legal practitioners in South Africa to eradicate barriers that make it difficult for underprivileged law graduates to access the legal profession.

Keywords

access; artificial barriers; candidate legal practitioners; legal profession; social justice

1. Introduction

The preamble to the Constitution of the Republic of South African, 1996 emphatically provides that

> [w]e, the people of South Africa, [r]ecognise the injustices of our past; [h]onour those who suffered for justice and freedom in our land; [r]espect those who have worked to build and develop our country; and [b]elieve that South Africa belongs to all who live in it, united in our diversity.

The preamble is given effect by section 1 of the Constitution which identifies human dignity, the achievement of equality and advancement of human rights and freedoms as

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the founding values of South Africa.[1] These foundational values should enable the creation of an environment for the attainment of the rights contained in the Bill of Rights. The late Chief Justice Langa pointed out that there is need to ensure that the Bill of Rights is used as a tool that can empower people who have been subjected to patterns of discrimination in the past.[2] While much has been achieved, nonetheless, economic inclusion and social cohesion through lack of transformation remains a challenge in South Africa. This is particularly evident within the legal profession.

The South African government has identified access to the legal profession, representativity and diversity as some of the major challenges facing the legal profession.[3] In its 2014 report, the Centre for Applied Legal Studies observed that '[t]he South African legal profession continues to face the challenge of meaningful transformation'.[4] One of the major issues that leads to lack of transformation is artificial barriers that are placed by members of the profession that prevent access to the legal profession. Some law firms, when inviting law graduates to apply to be trained to become legal practitioners, require artificial requirements which do not amount to inherent requirements of practical vocational training.[5] It is even more worrying when these artificial requirements are required by public interest institutions that one would expect to have a better sense of social justice.[6]

In this article, I discuss some of the artificial requirements that law graduates are usually expected to satisfy in order to receive practical vocational training contracts. I demonstrate that some of these requirements are effectively preventing underprivileged law graduates generally, graduates from African descent and those living with disabilities, in particular, from accessing the legal profession. I will be arguing that these requirements demonstrate clear racial and class disconnect and reflect lack of commitment to social justice in South Africa. Further, while the Legal Practice Council (LPC) has attempted to

1 See the *United Democratic Movement v President of the Republic of South Africa* 2002 11 BCLR (CC) para 19 where it was held that '[t]hese founding values have an important place in our constitution. They inform the interpretation of the Constitution and other law, and set positive standards with which all law must comply in order to be valid'. See also *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* 2005 (3) SA 280 (CC) para 21 where it was held that '[t]he values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of section 1 itself, but also from the way the Constitution is structured and in particular the provisions of Chapter 2 which contains the Bill of Rights'.

2 Langa, P 'A new Constitution and the Bill of Rights' (2000) 4(2) *Law Democracy and Development* 115, 117.

3 South African Government 'Transformation of the legal profession: Discussion Paper' <https://bit.ly/3xNqqcj> accessed 30 March 2020.

4 Centre for Applied Legal Studies 'Transformation of the Legal Profession' (2014) 6 <https://bit.ly/3yN53cp>. The report further observes that '[t]he top positions in the profession, from senior partners of law firms, to senior counsel at the bar and senior members of the judiciary, remain largely homogenous. These positions are dominated by white men, with a marked absence of diversity on the basis of race, gender and other marginalising characterisation'.

5 The Legal Practice Council 'Vacancies – Candidate Attorneys – Articles' <https://bit.ly/3CDqRZC> accessed 30 March 2020.

6 Marumoagae, M 'The role of candidate attorneys in the legal profession' (2014) *De Rebus* 54.

address this issue, there is still a need for the profession to commit itself to eradicate these barriers in practice. First, I start with a deconstruction of the content of the phrase 'social justice' in a constitutional state. Herein I will argue that social justice drives transformation and the deliberate disregard thereof will delay the project of transformation of the legal profession. Further, that there is need for the members of legal profession, regardless of their race and class, to understand the social conditions of the majority of law graduates in South Africa, particularly those from poor backgrounds who often graduate with extensive debts behind their names.

Second, I reflect on specific artificial barriers that have the effect of preventing access to the legal profession. Herein, I will demonstrate how these barriers infringes on the Constitution and different provisions of the Legal Practice Act (LPA).[7] I will argue that the imposition of these artificial barriers to the extent to which they prevent access to the legal profession is unlawful. I will further reflect on the initiative taken by the LPC regarding drivers' licences with a view to determine whether this will effectively deter law firm from preventing law graduates without licences from accessing the legal profession. Throughout the article, I will make recommendations for law reform.

2. The legal profession and social justice

2.1 Contextual meaning of social justice

There is no doubt that freedom of trade and equality of justice are some of the most important ideals that seek to ensure that the benefits of democracy are not enjoyed only by certain citizens while others continue to endure perpetual economic systematic exclusions.[8] In South Africa, given the racial, gender and class divide, there is a constant cry for equality of opportunities, not only for the currently underprivileged, but also those who were denied such opportunities in the past by virtue of their natural involuntary membership of certain groups that were seen as unworthy of such opportunities. Since South Africa has committed to be guided by democratic principles, human interaction has increasingly highlighted the duty of the state, its organs and private persons to act in a just manner and ensure that everyone in the country is treated in an equitable manner. The concept of social justice plays an important role in assisting us to determine when a particular conduct can be referred to as unjust or when a particular person can be said to have been treated in an unjust manner. Nkoane convincingly argues:

> Socio-political tensions and inequalities in South Africa created by colonialism crystallised in apartheid and, boosted by neo-colonial and neo-liberal modes of governments, seems to perpetuate social injustice.[9]

Unfortunately, while many may claim to be progressive and point to some or other initiatives that they have been engaged in, their thinking suggests that they are comfortable with the status quo. There are South Africans with financial resources whose sense of comfort

7 28 of 2014.

8 Smith, RH *Justice and the Poor* (The Academy of Political Science, 1919) 3.

9 Nkoane, MM 'Critical emancipatory research for social justice and democratic citizenship' (2012) 30(4) *Perspectives in Education* 98.

with their privilege has made them oblivious of the realities of inequality in the country and the role that they can play in eradicating these inequalities. Some of these people are direct or indirect beneficiaries of racial laws that ensured that there is perpetual economic and class division in South Africa, wherein some live in abject poverty and others continue to enjoy the economic fruits of the country. In many countries class differences are usually fortuitous in line with historical reasons and access to opportunities, and South Africa is no exception.[10] Class divisions usually lead to instances where other persons are benefiting whereas others are suffering. The demand for social justice is a call for equity in relation to access to available opportunities that would enable members of every class to survive.

Social justice provides everyone the confidence to claim an equitable share which is proportional to his or her efforts to the advantages which are generally desired and conducive to his or her well-being.[11] When such a person is preparing him/herself to claim such advantages or when he or she actually claims such advantages, social justice dictates that such a person must not be denied such advantages because of their underprivileged personal circumstances or involuntary membership of a particular group of people.

Social justice can be described as the branch of the virtue of justice that encourages conscious persons to use their best efforts to foster a just society wherein people's needs are more fully met irrespective of the groups they belong.[12] According to Madonsela, social justice 'is about just and fair access to and equitable distribution of opportunities, resources, privileges and burdens in a group or between groups'.[13] She further argues that social justice 'is ultimately about equal enjoyment of all rights and freedoms by all regardless of human diversity and historical injustices'.[14] Social justice is supposed to be an effective weapon against those who wish to deny others equitable access to opportunities through ostracism and exclusionary practices.[15] A proper understanding of social justice should lead to a society that is willing to constantly eradicate deliberately created and enforced inequalities that have privileged some at the expense of other.[16] This is in line with the practice of democracy which embraces the inclusion of the diverse populations, particularly those from marginalised, subordinated and underrepresented groups.[17]

There is a need for a contextual understanding of social justice in South Africa which takes into account the plight of those who are less privileged. Lack of such an understanding relegates social justice to mere sloganeering concept that is wonderful and popular to use by those who are privileged but totally meaningless in practice. In South Africa, the concept of social justice is actually rooted directly in the Constitution. Apart

10 Rodes, RE. Jr 'Social Justice and Liberation' (1996) 71(4) *Notre Dame Law Review* 619, 626.
11 Honore, AM 'Social Justice' (1962) 8(2) *McGill Law Journal* 77, 78.
12 Rodes, RE Jr 'Social Justice and Liberation' (1996) 71(4) *Notre Dame Law Review* 619, 620.
13 Madonsela T 'Social Justice: What Are We Doing Wrong?' (2018) 7 <https://bit.ly/3CSwfJh> accessed 30 March 2020.
14 *Ibid* 8.
15 Hlalele, D 'Social justice and rural education in South Africa' (2012) 30(1) *Perspectives in Education* 111.
16 Calderwood, PE 'Toward a professional community for social justice' (2003) 4(1) *Journal of Transformative Education* 301.
17 Wildman, SM 'Democracy and Social Justice: Founding Centers for Social Justice in Law Schools' (2005) 55(1) *Journal of Legal Education* 252.

from express reference in the preamble, the Bill of Rights enjoin everyone to practice social justice by recognising and respecting other people's rights to life,[18] dignity,[19] equality,[20] freedom of trade[21] and association.[22] It is imperative that this understanding of social justice is reflected more particularly by the legal fraternity, members of which are often called upon to assist community members, businesses and government to assert their rights. It is important that members of the legal profession are at the forefront of entrenching social justice in South Africa. Unfortunately, as it will be demonstrated below, this is sadly not the case when it comes to the training of future legal practitioners.

2.2 Social justice and transformation of the legal profession

The preamble of the Constitution recognises the need to '[h]eal the divisions of the past and [to] establish a society based on democratic values, social justice and fundamental human rights'. This is a clear recognition that respect for democratic values – equality, dignity and freedom, as well as the basic human right to be treated equally with dignity – are fundamentally linked to the concept of social justice. Without the values espoused in the Constitution generally and the rights enshrined in the Bill of Rights in particular, it will be easy to disregard the demands of social justice. In order for social justice to materialise, it is important for members of the legal profession to become obedient students of the Bill of Rights and to be committed to the fundamental rights enshrined therein. In 1992, before the adoption of the Constitution, Dlamini forcefully argued that

> [e]xperience in Africa and elsewhere has taught that to provide for a Bill of Rights is one thing, but to make it work is another. To make a Bill of Rights work depends on massive education of the public in general on the role of the Bill of Rights and the rights it contains; it also depends on the development of a rights culture and on the commitment on the part of those in power to the values that underpin a Bill of Rights.[23]

Post-1996, after the adoption of the Constitution, it became apparent that education of the rights contained in the Bill of Rights was not enough to ensure transformation of the legal profession. It was more important that members of the profession were willing to practice social justice that would ensure that the rights enshrined in the Bill of Rights are not infringed. However, it is disappointing that there has been silence from those with relevant expertise on the dynamics of social justice and equality studies on the issue of transformation of the legal profession.

This silence might be because some may have been at the forefront of the injustices and inequalities that have delayed the transformation of the legal profession. Some may have been part of the project that ensured that opportunities within the legal profession

18 Section 11 of the Constitution.
19 Section 10 of the Constitution.
20 Section 9 of the Constitution.
21 Section 22 of the Constitution.
22 Section 18 of the Constitution.
23 Dlamini, CRM 'Towards a new legal order for a new South Africa' (1992) 16 *Legal Studies Forum* 131, 139.

are not equitably distributed. Members of the legal profession who engage in career limiting antics of their colleagues, or future colleagues in the form of candidate legal practitioners, demonstrate that education of the rights in the Bill of Rights without a contextual understanding of the ideals of social justice is meaningless. To transform the legal profession, which is in desperate need for transformation, there is an urgent need for all the members of the legal profession to be true advocates of social justice.

The Centre of Applied Legal Studies (CALS) has explained the ideal of transformation in the context of the legal profession in line with social justice as the process of removing barriers that hinder talented legal practitioners from opportunities which would enable them to develop the necessary skills and experience that would enable them to excel within the legal profession.[24] In this sense, awareness of social justice imperatives empower those with the ability to transform the legal profession to take conscious decisions that would advance, as opposed to hinder, constitutional values and rights by ensuring that the path to access the legal profession is not reserved only for the selected few from privileged groups and classes of people. A transformative understanding of social justice would ensure that many barriers of difference that exist not only to hinder progress within the legal profession but also to prevent access to this profession are actively eradicated.

Lack of appreciation of social justice ideals is at the heart of lack of transformation of the legal profession. Those with a sense of social justice would immediately appreciate their own privilege and use it to assist others who are less privileged to access the legal profession without regard to artificial barriers. Awareness of social justice will also encourage them to use human and financial resources available to them to ensure that those who need legal training are adequately trained to succeed. According to Phama and Nase, 'the sustained lack of transformation in the legal profession has less to do with lack of awareness, and more to do with the fact that no one is willing to take bold enough steps to do anything about it'.[25]

This suggests that members of the legal profession are aware of the demands of social justice, but their comfort has made it difficult for them to be agents of social justice orientated change that will transform the legal profession. Deliberate disregard of the dictates of social justice has delayed the much talked about transformation of the legal profession. Transformation of the legal profession will continue to delay for as long as those with the means to bring about change do not appreciate social justice and ignore the impact of their decisions on those who are not as privileged and fortunate as they are.

The South African government has also pronounced itself in the slow pace of the transformation of the legal profession. In 2000, the Department of Justice (as it was then) released a document titled 'Justice Vision 2000: Five year National Strategy for Transforming the Administration of Justice and the State Legal Affairs' (hereinafter "Justice Vision 2000").[26] This document was released by the late Minister of Justice,

24 Centre for Applied Legal Studies (CALS) 'Transformation of the legal profession' (2014) 10 <https://bit.ly/3CQzcty> accessed 10 April 2020.

25 'Transformation of the legal profession: To betray or fulfil the mission' (5 November 2015) <https://bit.ly/3zJXfHY> accessed 10 April 2020.

26 Ministry of Justice 'Justice Vision 2000' 1997 <https://bit.ly/3xQBtRU> accessed 10 April 2020.

Dr Dullah Omar. The vision of this document was to provide a system of justice that gives everyone fair and equal access to justice while also guaranteeing their dignity and security of person irrespective of their race, gender and any other difference.[27] This document recognises that '[t]he legal profession will play a critical role in fulfilling the transformation of the administration of justice'.[28] The document enjoins legal practitioners to develop knowledge, awareness and understanding of diversity, changes in society and human rights.[29] This document also called upon the legal profession, not only to be sensitive and responsive to people's different needs, but to also make the profession representative of all the people who live in South Africa.[30]

Most importantly, this document made a self-evaluation appeal to all legal practitioners by requiring them to '… start a process of internal self-appraisal, and also one that will make the profession itself more representative'.[31] This was perhaps the most important part of the document in relation to the transformation of the legal profession. This was a clear recognition of the reality that the required change cannot take place mechanically, but it required self-realisation of the role that each member of the legal profession played in either advancing or hindering the required transformation.

This was a direct challenge to those who were actively preventing transformation to repent, change their ways and start contributing towards transforming the legal profession. Unfortunately, this call was ignored by many and the legal profession remains largely untransformed, particularly in relation to the distribution and access to the quality of work by legal practitioners from previously disadvantaged groups. One of the unfortunate observations that were made in this document that was true then and unfortunately is also true now is that

> … the [legal] profession does not reflect the diverse nature of the South African society. Disadvantaged groups, especially black people, are not well represented in the legal profession. Few black graduates are able to enter the profession. To a lesser extent, the same is true of white female graduates. Of those that do enter the profession, only a few develop specialised expertise in areas like corporate law, tax, commercial law and constitutional practice.[32]

There are those who might be inclined to argue that there has been progress since the release of this report and that many people have been able to enter the legal profession. While this might be true to some extent, available evidence clearly indicates the structural challenges for those who are lucky enough to be 'allowed' into the legal profession. These challenges includes: difficulty in making connections which are necessary for briefings; payment of excessive bar fees; cultural alienation; racial stereotypes; shameless racism; sexism; lack of adequate training; being treated as BEE candidates; deliberate

27 *Ibid* iii.
28 *Ibid* 108.
29 *Ibid.*
30 *Ibid.*
31 *Ibid.*
32 *Ibid.*

undermining of the intellectual capital and ability; as well as a lack of exposure to specialised areas of law.[33]

There are those who were 'allowed' into big law firms who have found the strength to share their unfortunate experiences and provide personal accounts of concerted exclusionary practices adopted by members of the legal profession who are not conscious of the ideals of social justice to delay the transformation of the legal profession. Reflecting on his own experiences with a big law firm, Ramashia tells what appears to be a hypothetical story between a black candidate attorney (himself) and a white candidate attorney, who he refers to as 'Cathy'.[34]

According to Ramashia, a black candidate attorney with superior academic record to his white counterpart who, unlike the white counterpart, does not have a car, may find it challenging to cope within a big law firm.[35] He explains that a black candidate attorney will be provided several tasks, including servicing documents at other locations away from the offices of his or her law firm.[36] Ordinarily, without having to serve these documents or, at the very least, having access to a reliable transport which could be used to serve these documents and return back to the firm on time, he or she would stand a better chance of completing all the tasks given to him or her.[37] Unfortunately, usually the mode of transport that the black candidate attorney must utilise to serve documents is a taxi, whereas the white candidate attorney has a car and is able to serve and return to the office on time to complete all the tasks given to her.[38]

It is true that not all black candidate attorneys do not have cars and that not all white candidate attorneys have cars. The point here is that there will be an underprivileged candidate who has to compete with a privileged one, and mostly, black candidates of African descent complete university without cars. This forces them, at times, to work overnight at the office in order to make up time which was lost while using public transport to serve documents. Further, that personal circumstances of candidates who are forced to spend more time servicing documents may deliver substandard work which will ordinarily be criticised by their supervisors who often fail to take into account their personal circumstances. Ramashia explains that this practice can break underprivileged candidate attorneys to an extent of thinking that they are intellectually inferior to privileged candidates who had more time to do their work at the office.[39]

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33 CALS (n 23 above). See also Ramashia MG 'Law firm racism' *Culture Review* (2019) <https://bit.ly/3AAuZsH> accessed 10 April 2020.

34 *Ibid.*

35 *Ibid.*

36 *Ibid.*

37 *Ibid.*

38 *Ibid.*

39 *Ibid*. The Constitutional Court has reflected on negative perception against black people in *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016 (6) SA 279 (CC) para 2 where it stated that 'South Africa is literally the last African country to be liberated from the system that found nothing wrong with the institutionalised oppression of one racial group by another for no other reason but the colour of their skin, shape of their nose and the length or texture of their hair. The underlying reason advanced for this irrational differentiation was that African people in particular and black people in general, were intellectually inferior, lazy and lesser beings in every respect of consequence'.

Ramashia's account demonstrates the need for appreciation of diversity and recognition that, for underprivileged candidates to perform at the required level, their personal circumstances, which have the effect of preventing them from providing the expected quality of work which they are capable of producing, must always be taken into account. Legal practitioners who are supervisors at law firms with adequate financial and human resources should have human conversation with their underprivileged candidate attorneys to assess how such candidates could be assisted to perform at the required level. For instance, big law firms have messengers who could easily serve whatever needs to be served to allow candidate attorneys the time to deliver the required tasks.

While there are those who might argue that Ramashia's experience amounts to an isolated experience and that this is not a general trend in big law firms, nonetheless, it is concerning that such practices are possible within law firms regardless of their size. It is concerning that there are members of the legal profession who are tasked with the training of future legal practitioners who are oblivious of the practical realities of underprivileged law graduates that they are tasked to empower. These experiences are usually not recorded in academic research. In fact, '[a] dearth of published information and analytical literature exist on the South African legal profession. There is also a real scarcity of data on its demographics and other features'.[40] Notwithstanding, the lack of research on this topic, more underprivileged persons continue to express their unfortunate experiences that demonstrate total lack understanding of social justice within the legal profession.[41] Social justice requires all members of the legal profession to invest time and understand the circumstances of those that they have been called upon to train to become legal practitioners. Awareness of social justice would enable members of the profession who are tasked with training future legal practitioners to understand that their duty is to the profession. In other words, they have the duty not to burden the legal profession with half cooked legal practitioners but to ensure that they employ their knowledge and experience to transfer the relevant skills without regard to artificial considerations such as race, gender or class. These artificial considerations have the effect of making access to the legal profession unduly difficult and at times impossible.[42]

South African government issued another document titled 'Transformation of the Legal Profession: Discussion Paper'[43] (hereinafter "discussion paper"). The discussion paper started with a concession that a number of challenges relating to the legal profession that were identified in the Justice Vision 2000 document still exist. The discussion paper, amongst others, highlighted that the legal profession does not represent the diversity of the

40 Pruitt, LR 'No black names on the letterhead? Efficient discrimination and the South African Legal profession' (2002) 23(2) *Michigan Journal of International Law* 545, 549.

41 See Hlongwane, BH 'Plight of a black law graduate' *GoLegal* (2016). <https://bit.ly/2XIIOHp> accessed 20 April 2020. He reflects on his personal experience and states that '[n]ow, in the field where black graduates hardly get a nod, it becomes impossible to have a large pool of practicing black lawyers. Thus it will always be dominated by whites if the status quo remains unchanged. As it stands it's a slippery slope for black graduates. Start at the bottom, not enough black Law graduates secure articles let alone get admitted as lawyers'.

42 Ministry of Justice (note 25 above) 108.

43 South African Government 'Transformation of the legal profession: Discussion Paper' <https://bit.ly/3xNqqcj> accessed 20 April 2020.

South African society and disadvantaged graduates experience difficulty in entering the legal profession and establishing themselves as successful lawyers.[44] Surprisingly, unlike Justice Vision 2000 document, the discussion document does not call upon members of the legal profession to self-evaluate with a view of doing their part to transform the legal profession. In fact, the stated purpose of the discussion document is to stimulate debates of these issues.

I am of the view that no amount of consultation and debates would encourage anyone who is not committed to social justice to be party to the project of transforming the legal profession. There is a need for government working together with the regulator of the legal profession, the Legal Practice Council to deal decisively with all those who are committed to delaying the project of transformation. Conduct that is intended to delay the national project of transforming the legal profession clearly reflected by various law firms in South Africa who continuously impose artificial requirements when inviting law graduates to apply for practical vocational training. As it will be shown below, these artificial requirement cannot be regarded as inherent requirements of the process of legal training. All these practices are a clear indication of lack of appreciation of the dictates of social justice in a democratic country which requires opportunities to be equitably distributed.

3. Practical vocational training contracts

Legal practitioners have a right to decide to train law graduates that they believe will add economic value and efficiency to their firms. It cannot be denied that practical vocational training is an important step in the overall picture of access to the legal profession. The process of training mostly include provision of personal services in exchange for remuneration. Section 1 of the repealed Attorneys Act[45] used the phrase 'articles of clerkship', which was defined as 'any contract in writing under which any person is bound to serve an attorney for a specified period in accordance with this Act'. This definition only referred to the duty of the candidate to serve and did not refer to any duty that the legal practitioner had towards the candidate legal practitioner.

In *Ex parte Natal Law Society*,[46] it was held that '[t]he object of articles is to provide a clerk with the legal training and experience to carry on his proposed profession of attorney'. It has always been accepted that the legal practitioner has a duty to train the candidate and expose such candidate to the process of lawyering as much as possible. The definition also did not provide for the legal practitioner's duty to provide remuneration. However, most law firms do remunerate their candidate legal practitioners for their services. Zondo J (as he then was) was convinced that articles of clerkship amounted to employment contract. It cannot be denied that if articles of clerkship are regarded as employment, the 'employer' must derive economic value from 'employed' candidates.

44 *Ibid.*
45 53 of 1979.
46 1989 (2) SA 461 (N) 464.

Zondo J (as he then was) held that

> [i]n fact [a]nyone who is familiar with the side bar will know that the reality is that many attorneys take on candidate attorneys primarily because they need the services of someone in their firms who will do a lot of the work which the attorney would have had to do himself – of course after some training.[47]

While it is accepted that, generally, legal practitioners train candidate legal practitioners by exposing them to legal work, nonetheless, there have been allegations that some law firms have made their candidate legal practitioners messengers without providing them with contextual legal training.[48] It is worth noting that the LPA does not use the phrase 'articles of clerkship'. It has adopted the phrase 'practical vocational training' which is defined as the 'training required … to Act to qualify as a candidate attorney or pupil in order to be admitted and enrolled as an attorney or advocate'.[49] Regulation 6(5) of the regulations to the LPA provides that '[a] candidate attorney may be engaged or retained under a practical vocational training contract by an attorney'. The legal practitioners and the candidate legal practitioners enter into a practical vocational training contracts. Regulations 6(1) and 7(1) of the regulations to the LPA stipulate that the duration of the practical vocational training should be an uninterrupted period of 24 months (for attorneys) and 12 months (pupils). While LPA and its regulations clearly define the practical vocational training as training as opposed to employment, they nonetheless do recognise that candidate legal practitioners will be rendering services to the law firms that offer them training.[50]

Some legal practitioners are themselves not adequately trained and thus lack the capacity to provide adequate practical vocational training to candidate legal practitioners. Unfortunately, there are no initiatives that provide ongoing training to legal practitioners that would assist them to develop the necessary training skills which will capacitate them to adequately transfer skills to candidate legal practitioners. There is no requirement of competency or capacity when legal practitioners decide to train candidate legal practitioners. All that practitioners need is to comply with the requirement provided for in Regulation 6(6) of the regulations to the LPA which provides that '[an] attorney engaging a candidate attorney … must have practised as an attorney for a period of not less than three years in aggregate, during the preceding four years'.

This demonstrated that the only important requirement for training candidate legal practitioners is for the legal practitioner to have been in legal practice for at least the period of three years. The assumption appears to be that during the prescribed period,

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47 *Mashaba v Cuzen and Woods* (J236/97) [1998] ZALC (26 June 1998) para 19.

48 See Marumoagae, M 'The role of candidate attorneys in the legal profession' (2014) Jul *De Rebus* 54, who argues that 'even though administrative work is part of the candidate attorney's learning process, it should nonetheless not be seen as the most decisive part of it. This perpetuates a stereotype that there are law firms that are not particularly interested in adequately training candidate attorneys, but rather use them as part of their administration work system. Candidate attorneys at these law firms become masters of photocopying machines. They run around serving and collecting documents without any real practical legal training. Further, these candidate attorneys are employed to boost these law firms' BEE ratings'.

49 Section 1 of the LPA.

50 See Regulations 6(5), 6(7) and 7 of the regulations to the LPA.

legal practitioners would have acquired the necessary knowledge that they can pass to future legal practitioners. Which is not necessarily the case in all cases.

4. Artificial requirements for articles of clerkship

It is beyond doubt that social justice demands transformative leadership from law firm directors and supervising legal practitioners that explicitly focuses on inclusion, equity and excellence without regard to exclusionary considerations such as race, gender and class. Transformative leadership is conscious and intolerant of inequitable practices and strives to contribute to the development of individual candidate legal practitioners by equipping them with the necessary skills that they can use to better themselves and contribute positively to society.[51] While the rhetoric of transformation has been on the agenda in the legal fraternity since South Africa embraced democratic ideals, nonetheless, there are exclusionary practices within the legal profession that do not take into account the need to achieve social justice through transformative leadership. Some law firms continue to conduct themselves in a manner that seek to perpetuate the culture of exclusion when inviting law graduate to apply for articles of clerkship.

4.1 Soft barriers

Before addressing this exclusionary conduct, it is perhaps fitting to first outline the requirements that law graduates are expected to meet for them to be trained to become legal practitioners. In terms of section 26(1)(a) of the LPA, to be trained to become a legal practitioner, the candidate must possess an LLB degree. This is the only substantive requirement that any person who wishes to become a legal practitioner needs to meet in order for an admitted legal practitioner to provide him or her with practical vocational training.[52] It is, however, customary within the legal profession to class or categorise law graduates in terms of what is usually perceived as their quality or lack thereof through unwritten requirements which are often decisive on whether they will be offered or denied practical vocational training.

Law graduates' quality is usually assessed in relation to the grades that they attained at university, as well as the university that they attained their degree from. There is a general perception within the legal fraternity that big law firms, in particular, are sceptical to provide training opportunities to candidates who graduated from previously disadvantaged universities because their education is viewed as inferior to that of those who graduated from previously English and Afrikaans universities.[53] This is an effective barrier for graduates who are denied training based on where they obtained their

51 Shield, CM and Hesbol, KA 'Transformative leadership approaches to inclusion, equity, social justice' (2020) 30(1) *Journal of Social Leadership* 3, 5.

52 See sections 26 and 27 of the LPA read with Regulations 6 and 7 of the regulations issued in terms of section 109 of the LPA. A thorough discussion of the contents of these regulations is beyond the scope of this article. It suffices to merely indicate that the Legal Practice Council, which is the body that is authorised by this Act to regulate the legal profession in South Africa, has the power to determine the conditions and procedures for the registration and administration of the practical vocational training.

53 Pruitt (n 39 above) 616.

education. The perception creates an unfortunate stereotype that the university that you went to will determine your success in the legal profession.

Another important criteria which is usually adopted by law firms to determine the quality of the graduate is the academic record of the graduate. Law graduates who attained what is perceived as 'good marks' stand a better chance of attaining practical vocational training with big law firms than those who are viewed as having obtained 'bad marks'. The obsession with marks when the graduate who is thought to have performed well at university does not perform as expected within the law firm, leads to the obvious scapegoat of questioning of the quality of the law curriculum generally.[54] The quality of teaching at university is also put on the spotlight with no one addressing the quality of training that law firms (and advocate bars) provide to candidate legal practitioners. There appears to be no debate on the quality of legal practitioners that are entrusted with the training of candidate legal practitioners. While this is definitely not applicable to all law firms, nonetheless, the issue of discrimination based on the university where the candidate attained the degree and the candidate's academic performance are indeed factors that are considered when decisions are taken to train candidate attorneys.

Sometimes, those who feel like they were discriminated based on these grounds start discriminating against candidates with perceived good marks who are from white and former Afrikaans universities. They start giving opportunities to those that they perceive to be like them, those from previously disadvantaged universities. All these prejudices are totally unacceptable in a democratic society. There are candidates with perceived bad grades who were provided opportunities and went on to become leaders in their fields. It is submitted that these discriminatory practices should be discouraged, and applications should be assessed on their merits. Interviews, even though they are far from perfect themselves, should nonetheless be used to meet those who have applied so that they can be fairly and equitably assessed.

4.2 Automatically unlawful barriers

The ability to respond to the demands of the law firm and the requirements of the clients of the firm usually necessitate the imposition of requirements such as the need to possess drivers' licences and the ability to speak a particular language, most notably Afrikaans. A typical invitation in a form of an advert either in the law firm's website, newspaper, notice board in court or attorneys' magazine would read as follows:

> Criteria:
>
> - LLB degree or final year LLB and sound knowledge of the law.
> - Hardworking, self-motivated and able to work independently.
> - Valid drivers' licence and own vehicle (or own reliable transport).
> - Speak fluent Afrikaans (sometimes they include English).[55]

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54 See Sedutla, M 'LLB Summit: Legal Education in Crisis?' (2013) 8 *De Rebus* 113, for arguments for and against the need to retain the four-year LLB curriculum, the discussion of which is beyond the scope of this article.

55 See De Rebus 'classified' <https://bit.ly/3AyV3o7> accessed 20 April 2020. See also Job Placements 'Candidate attorney (Afrikaans speaking)' <https://bit.ly/3nZJhzE> accessed 20 April 2020.

The first two listed requirements are uncontroversial. The only challenge with these requirements is that they may attract discrimination based on the university where the candidate graduated and grades that he or she attained when determining whether such candidate is hardworking. The last two requirements are controversial and merits critical discussion. The most concerning conduct of some law firms which is an effective barrier for underprivileged students, irrespective of their race, to access the legal profession is the requirement that applicants should possess drivers' licences and in certain instances a car. Another equally concerning requirement that has gained popularity is the requirement that the candidate should be fluent in a particular language, especially Afrikaans. The justification is always that there are good economic reasons for imposing these requirements, which are at times taken as fundamental to the training that candidate legal practitioners will receive.

4.2.1 Drivers licences

With regards to the drivers' licence, this requirement effectively prevents law graduates who do not have drivers' licences from attaining practical vocational training. Practitioners from time to time attempt to provide what they regard as a practical and rational justification for imposing this requirement. According to Aupiais:

> [O]wn transport does not necessarily need to be a car, it can be a motorcycle, etc. The fact is, many candidate attorneys are required to act as messengers, serve, file, arrive at courts timeously and predictably, and to even be involved in evictions, etc. Without reliable, efficient, transport you cannot do the job of the average candidate attorney. It is of course possible to be a candidate attorney and not own or rent a vehicle, I know many who are in just that predicament. They use public transport to get by, and take the bus or taxi to and from courts etc. It is possible, but it is a whole lot more difficult.[56]

It is unfortunate that when this debate arises, it is normally engaged from the point of view of the immediate structural and economic needs of law firms, simply because they offer practical vocational training and are expected to remunerate candidate legal practitioners. The hidden argument here is, when hiring candidate legal practitioners, law firms generally look at the economy of scale and hire candidates who will advance their economic efficiency. As such, one should be reluctant to unfairly criticise law firms which simply wish to become efficient when serving their clients.

However, South African society is not a normal society, and this economic efficiency model is oblivious to the fact that this approach is not only exclusionary but has the effect of denying talented and worthy candidates an equitable opportunity to be trained to be legal practitioners. I concede that this economy of scale model does not expect candidates to have licences and cars, but merely provides opportunities to those that possess these enablers to access the profession. Prospective candidate legal practitioners with reliable transport who come from former English or Afrikaans universities have an economic urge

56 Aupiais ME 'A considered reply to a "Plight of a Black Law Graduate" who spent unlucky "years" seeking after articles of clerkship' (2017) <https://bit.ly/3i0PUh9> accessed 20 April 2020.

over their counterparts that come from same universities with no cars and those that come from previously disadvantaged universities.

The difficulty with this approach is lack of appreciation that practical vocational training is an initiative that can transform candidate legal practitioners' lives who have worked hard at university and hope to change their lives and those of people who contributed to the attainment of their degrees. Unfortunately, invitations for training that are similar to the above advert automatically disqualified them, not because they are bad candidates but on the basis of not having cars. While it is true that law firms are not welfare institutions and do not have to take on candidate legal practitioners as charity cases, nonetheless, South African law firms are constitutionally required to empathise with the less fortunate and desist from placing requirements that make it difficult for them to access the legal profession. It is disheartening for any law graduate who comes from a poor family, economically struggled through university and at times slept in libraries and computer laboratories, that when he or she conquers the challenges of his or her degree, probably still owing those that financially assisted him or her, to realise that he cannot get training simply because he or she does not have a licence, let alone a car. This requirement denies the legal profession of future lawyers who can contribute positively to humanity.

I am of the view that all legal practitioners should have a contextual understanding of social justice in order not to ignore transformative needs of the South African society. This will assist in ensuring that law firms' economic imperatives do not blind practitioners to the real challenges that some of the candidate legal practitioners have to endure in order to become legal practitioners. The drivers' licence requirement does not only affect black students of African descent, but also poor students from all other races.

However, while it is true that not all white people in South Africa are rich or have their own transport, nonetheless, the reality is that the majority of them drive cars, even those who are not rich. Indeed, there are black law graduates who come from rich or middle class families who also have their own transport. They too should never be treated more favourably than underprivileged law graduates from all the races. Having said that, the incontestable reality is that the drivers' licence requirement is more likely to exclude more black students of African descent than any other race from being trained to become lawyers because of their socio-economic conditions. It is difficult not to view the drivers' licence requirement with a racial glance. Available empirical research clearly demonstrates that

> … difficulties persons of colour … have experienced in obtaining articles of clerkship are often attributed to racism and sexism of admitted attorneys, upon whom the opportunity to qualify for admission as an attorney has typically depended. White attorneys have usually trained white candidates, while black attorneys have trained black candidates. Because relatively few black attorneys were admitted to practice at any given time … the number of blacks being admitted to practice was naturally limited.[57]

57 Pruitt (n 39 above) 549.

Surely, a racialised situation where legal practitioners resort to training candidates from their own races is unsustainable in a constitutional democracy. However, by requiring drivers' licences, which are mostly required by white established law firms, this will result in legal training being provided on racial basis. To some extent this does exist, *albeit* not openly. Given the socio-economic disparities between those who graduate with law degrees, it is clear that South Africa is not ready for an artificial requirement of a drivers' licence because of the potential or real impact that it would have on those who are equally deserving but underprivileged. It is also clear that the drivers' licence requirement has the effect of discriminating unfairly against underprivileged law graduates who neither possess licences nor cars. It is difficult to see how, if this requirement is challenged, it can pass the constitutional muster.[58]

The drivers' licence requirement for practical vocational training does not only discriminate against those who do not have cars, but also insensitively directly discriminates against those who cannot drive, not because they do not have drivers' licences but because of their disability. It is absolutely clear that with this requirement, people who cannot see and those whose bodies are such that they cannot drive will be permanently excluded from joining all the firms that consistently rely on this requirement. While these firms have a right to appoint whoever they feel will advance their economic agenda, they certainly do not have a right to discriminate on the basis of disability in South Africa.

It has been argued that 'discrimination against people with disabilities is one of the worst social stigmas that society has not been able to overcome'.[59] Section 9(4) of the Constitution clearly provides that '[n]o one may unfairly discriminate directly or indirectly against anyone on the basis of disability'. Section 6 of the Employment Equity Act[60] also prohibits unfair discrimination against employees on the basis of disability. The South African Labour Court has defined an employee to also include potential or prospective employees. The court has held that the employer should not have practices and policies that discriminates unfairly against job applicants.[61] Given the rich equality jurisprudence in South Africa, it is difficult to see how the drivers' licence requirement can be justified.[62]

I am of the view that the inability to recognise what is required by social justice by making drivers' licences a requirement for attaining practical vocational training lead some legal practitioners to act in manner that unfairly discriminates against law graduates from under privileged backgrounds and disabled candidates. This conduct is clearly

58 See Marumoagae, C 'Driver's licence: A barrier preventing entry into the attorneys' profession' (2017) (November) *De Rebus* 42.

59 Marumoagae C 'Disability discrimination and the rights of disabled persons to access the labour market' (2012) 15(1) *PER/PELJ* 345, 346.

60 55 of 1998.

61 *Mahwanga v South African Human Rights Commission* (11208/2014) [2019] ZAGPJHC 125 (21 February 2019) para 20.

62 See generally *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 53 and *Prinsloo v Van der Linde and Another* 1997(4) SA 1 (CC) paras 28-31. See also Smith, A 'Equality constitutional adjudication in South Africa' (2014) 14 *AHRLJ* 609, 616.

invalid and unlawful. Drivers' licences have been turned into an effective requirement which is not prescribed by the LPA for attaining practical vocational training. The LPC has also cautioned legal practitioners against making drivers' licences the requirement for attaining practical vocational training.[63] However, it does not appear as if all the legal practitioners that run law firms have heeded the call because invitations for training which include this requirement continue to be issued.

It must be noted, however, that the LPC has attempted to address the issue of law firms requesting law graduates to have drivers' licences when calling upon them to apply for practical vocational training (PVT). On 15 January 2021, the LPC published a notice in the Government Gazette[64] to amend its rules by inserting rule 22.1.11 which, amongst others, makes it misconduct for any attorney that seeks to enter into a PVT contract with a candidate legal practitioner to enquire whether such candidate is in possession of a driver's licence or own a vehicle.[65] This rule further makes it misconduct for attorneys to enquire whether candidates have access to vehicles which could be used to render services once contracted for PVT.[66] This appears to be a positive initiative which would lead to the LPC taking disciplinary action against any attorney who infringes this rule. To prove whether this rule has been infringed, one would merely look at the contents of the advertisement.

It is submitted that this is not enough to prevent attorneys who wish to offer PVT from enquiring whether prospective candidate have drivers' licences or have access to vehicles which they could use to carry out their work once contracted. It is however, comforting that the LPC in its rules has made it a misconduct for any attorney who enters into a PVT contract with any candidate to incorporate the requirement that such candidate must have a driver's licence, own a vehicle or have access to a vehicle during the period of his or her PVT period in that contract.[67] In fact, the LPC has declared these requirements to be 'unreasonable or unusual terms'.[68] In my view, these requirements are not only unreasonable, but they are also indicative of the ahistorical approach by some within the legal profession who choose to 'pretend' that the playing fields have been levelled and that opportunities in law are equitably available to all graduates, irrespective of their backgrounds.

While advertisements may be silent on drivers' licences and vehicles, there is nothing preventing such enquiries from being made during interviews which are held in private. To address this potential challenge, rule 22.2.9 was also inserted into the LPC rules. This rule makes it a misconduct for attorneys during interviews to enquire whether candidates possess drivers' licences, own or have access to vehicles which they could use during their

63 See Legal Practice Council 'The Legal Practice Council concerned with barriers to the legal profession' <https://bit.ly/3iKEVcw> accessed 21 April 2020, where the regulator stated that it 'has noted with concern that it is now becoming a trend that some law firms are making a driver's license and or ownership of a motor vehicle as one of the key requirements for graduates to be considered for practical vocational training (PVT) contracts. A driver's license and or ownership of a motor vehicle is and cannot be an inherent requirement for attaining a PVT contract'.

64 Notice No. 44068.

65 Rule 22.1.11.1 of the Legal Practice Council Rules.

66 *Ibid*.

67 Rule 22.1.11.2 of the Legal Practice Council Rules.

68 *Ibid*.

PVT period.[69] Thus, candidates asked by attorneys whether they have drivers' licence, own vehicles or have access to vehicles can report these matters to the LPC to investigate the extent to which such questions played a role in not being provided PVT.

Even though these rules will, to some extent, play a role in addressing the challenge identified by the LPC, they will not adequately prevent attorneys from rejecting candidates' applications based on lack of drivers' licence or possession of vehicles. For instance, when a candidate arrives without a vehicle at the interview, it may be an indication that he or she may not have a vehicle. That candidate could be treated differently from those who arrive with vehicles at the same interviews even where no questions are put to the candidate without a vehicle regarding drivers' licences and vehicles.

This challenge can effectively only be addressed when all attorneys recognise these requirements as barriers to the transformation of the legal profession and commit themselves to ensuring that they are not used to deny underprivileged graduate opportunities to be trained as legal practitioners. On 2 February 2021, on its official twitter account '[t]he LPC … noted with concern that some law firms have continued to make a driver's licence & or ownership of a vehicle as one of the key requirements for graduates to be considered for PVT contracts, despite the publication of the amendment to the Rules'.[70] This indicates that some legal practitioners either wish to preserve the status core where underprivileged law graduates continue to be faced with unnecessary barriers that unfairly prevent them from accessing the legal profession, or they are totally oblivious of the social justice imperatives that requires the eradication of these barriers.

4.2.2 Language preferences

In terms of section 6(1) of the Constitution, the official languages in South Africa are Setswana, Sepedi, Sesotho, isiSwati, Tshivenda, Xitsonga, Afrikaans, English, isiXhosa and isiZulu. In terms of section 6(5)(b) of the Constitution, all languages commonly used within South African communities must be promoted and respected. Every law firm in South Africa has a right to adopt any of the official languages as its official language which they intend to use to conduct their business. In principle, there is no hierarchy of languages in South Africa. The law firm's location and the type of clients it serves may induce those running that firm to seek out human capital that is able to speak the languages which are mostly spoken by their clients. It will be difficult to criticise such a decision which is taken having regard to genuine operational needs of the firm.

However, irrespective of how genuine the decision to adopt a particular language is, it may have severe discriminatory repercussions. If an organisation like Legal Aid South Africa takes a policy decision that it will recruit candidate legal practitioners on the basis of the languages that are commonly spoken where the positions arise, this will result in most of the Afrikaans and English speaking law graduates being automatically prevented from accessing the vocational practical training that is offered by Legal Aid South Africa. Because there is no such policy consideration, any law graduate in South

69 Rule 22.2.9.1 of the Legal Practice Council Rules.

70 Legal Practice Council (@CouncilPractice) Twitter (2 February 2021) <https://bit.ly/3u1iDax> accessed 23 May 2021.

Africa, irrespective of their race, gender and class has a chance of being provided practical vocational training by Legal Aid South Africa. It does not matter which language they speak and the place where training space arose.

For instance, a Setswana speaking law graduate can be trained in the Legal Aid South Africa local centre that is based at Durban, where isiZulu is the predominant language. Equally so, an Afrikaans speaking law graduate may be placed at Legal Aid South Africa centre that is based at Soweto were different African languages are spoken, even if that graduate cannot speak any of those languages.

As the biggest law firm in South Africa which is established as one of the institutions of social justice, Legal Aid South Africa cannot have policies that discriminate against any law graduate in South Africa who meets the requirements to be contracted for practical vocational training. Legal Aid South Africa does not use the fact that the majority of the clients that they serve speak African languages as a way to exclude law graduates who do not speak African languages from their practical vocational training. Such a policy would amount to unfair discrimination based on language. However, it cannot be guaranteed that all Legal Aid South Africa managers at local level do not have personal biases that have the effect of discriminating on racial and tribal basis by denying law graduates, who speak languages other than those that are dominant were their offices are situated, the opportunity to be trained. Nonetheless, this is something which Legal Aid South Africa does not subscribe to.

It appears as if it is only private law firms that seem to believe that they have a right to explicitly impose language restrictions when inviting law graduates to apply for practical vocational training. Most of the firms that impose language restrictions make it absolutely clear that any law graduate that applies must be able to speak the identified language. In most instances, the required language is Afrikaans. Other firms have also insisted on isiZulu and English, the implementation of which can also amount to unfair discrimination. Most law firms are conscious of the fact that they cannot, in South Africa, require that only white law graduates should apply. As such, they have resorted to use language to exclude black people. While there are black law graduates that can speak Afrikaans, in most instances, invitations that require fluency in Afrikaans have the practical effect of restricting training opportunities to only white law graduates who can speak Afrikaans. This renders such invitation to be discriminatory to the extent that it excludes other law graduates based on language.

While Afrikaans is one of the official languages which those who speak it cannot be blamed for ensuring that it is preserved, it is nonetheless seen by some South Africans as a language of oppression. The Constitutional Court has also indicated the need to preserve Afrikaans which is a South African cultural treasure with outstanding literature, as well as rich scientific and legal vocabulary.[71] In order for Afrikaans to be viewed as a cultural treasure by all South Africans without negative perceptions that are generally associated

71 *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) para 49. The Constitutional court further held that 'Its protection and development is therefore the concern not only of its speakers but of the whole South African nation. In approaching the question of the future of the Afrikaans

with it based on historical events, it will depend on how those who speak it continue to use it in the legal profession. It cannot be denied that if those who speak Afrikaans can strip this language of racial, economic and political dominance, it will be easy for those who have oppressive scars of this language to relate with and advocate for its protection.[72]

Such advocacy will be difficult when legal practitioners are using Afrikaans as a means of denying underprivileged law graduates, with the legacy of being oppressed through the use of Afrikaans, the opportunity to economically emancipate themselves when they are denied practical vocational training on the basis that they cannot speak Afrikaans.[73] Imposing Afrikaans as a requirement for attaining practical vocational training resembles colonialism and apartheid attitudes which are divisive and '… harmful and continue to plague us and retard our progress as a nation more than two decades into our hard-earned constitutional democracy'.[74] The unfortunate history is that 'Afrikaans was being used as an instrument of control, exploitation and systematic humiliation'.[75]

Seen in this context, an obsession with the requirement of Afrikaans for the purposes of training candidate legal practitioners can be seen not only as a sign of exclusionary racial economic dominance, but also a humiliating conduct which is unacceptable in a democratic society that is conscious of social justice. It can be argued that this conduct limits opportunities for underprivileged law graduates to be trained so that they can economically emancipate themselves and their loved ones. To the extent that Afrikaans is used to deny underprivileged law graduates an equitable opportunity to be trained to become legal practitioners, its usage as a requirement for practical vocational training amounts to an invalid and unlawful artificial requirement to access the legal profession.

Finally, the LPA is an instrument of social justice that the South African legislature has promulgated to ensure, amongst others, the transformations of the legal profession. It is important to note that the preamble to the LPA recognises the need for the legal profession to transform and restructure in line with the constitutional principles. This preamble further notes that the LPA envisages a legal profession that is reflective of the diversity and the demographics of South Africa. Most importantly, the preamble to LPA also recognises the need to remove any unnecessary or artificial barriers that prohibit law graduates from entering the legal profession. In particular, section 3 of the LPA states that one of the purposes of this Act is to 'provide a legislative framework for

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language, then the issue should not be regarded as simply one of satisfying the self-centred wishes, legitimate or otherwise, of a particular group, but as a question of promoting the rich development of an integral part of the variegated South African national character contemplated by the Constitution' (para 49). <https://bit.ly/3lMM0cV>.

72 *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) para 49. <https://bit.ly/3CE7Cik>.

73 *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) para 45, where it was held that 'Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain'.

74 *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016 (6) SA 279 (CC) para 4.

75 *AfriForum and Another v University of the Free State* 2018 (2) SA 185 (CC) para 5.

the transformation and restructuring of the legal profession that embraces the values underpinning the Constitution and ensures that the rule of law is upheld'. I am of the view that the imposition of artificial requirements discussed in this article runs contrary to this purpose and have the practical effect of delaying the process of the transformation of the legal profession.

5. Conclusion

This article highlighted the plight of underprivileged law graduates in South Africa in relation to the difficulties they experience when they attempt to access the legal profession. It was argued that, in addition to legislated requirements that they need to meet, they are also met with artificial requirements which are meant to effectively prevent them from accessing the legal profession. While underprivileged law graduates are not entitled to receive practical vocational training by merely having graduated with a law degree, they are, nonetheless, entitled to be treated equitably when responding to invitations from law firms that aim to train candidate legal practitioners.[76] Law graduates are aware that even though they have a right to apply for practical vocational training, this is not a claim that they can directly enforce against law firms. In other words, they are conscious of the fact that they cannot force any law firm to train them to become legal practitioners.

However, when law firms declare that they have capacity to train candidate legal practitioners and invite law graduates to apply to be trained, then law graduates have a legitimate claim towards those law firms to be treated equitably without regard to their race, gender and class. While law firm owners do not owe law graduates practical vocational training, they nonetheless owe them a conducive environment where they can equitably have access to such training as and when positions become available. The legal profession at large owes all law graduates a transformed legal profession that considers not only unfortunate historical reasons that led to their underprivileged status but also their current circumstances.

How to cite:

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76 See Honore, AM 'Social Justice' (1962) 8(2) *McGill Law Journal* 77, 59 who adequately explains the principle of entitlement.

The Right of a Child to Care and the Involvement of the Family Advocate in the Sentencing of a Child's Primary Caregiver

Bongani Nkosi*

Abstract

The landmark dictum *in* S v M *has set a precedent that the sentencing of a child's caregiver must consider his or her caregiving responsibilities. Amongst others, the guidelines require the court to take into account the care of the child in the event it imposes a custodial sentence on the child's primary caregiver. One of the options available to the court is to place the child in alternative care. While caregiving responsibilities of the caregiver is mostly considered in sentencing, it appears that the court often assigns the care of the child, post-sentencing, to the Department of Social Development. Such an assignment has the potential of infringing the right of the child to alternative care. In the event that social welfare agencies have to put a child of an imprisoned caregiver in alternative care, the procedure is uncongenial for such a child. There is currently no established procedure for placing a child in alternative care. While the Children's Act makes provision for alternative care, it does not make any specific stipulation regarding the placement of the child in alternative care. The survey of the orders made in some of the cases covered in this contribution shows that the care of the children involved was allocated to the Department of Social Development and none of the children were placed in alternative care. This contribution argues that the sentencing of a child's caregiver still does not consider options available for the care of the child created by the Children's Act adequately.*

Keywords

best interests of the child; care; caregiver; court; family advocate; sentence

1. Introduction

In the groundbreaking judgment of *S v M* (Centre for Child Law as *Amicus Curiae*)[1] (hereinafter "*S v M*"), guidelines for the sentencing of a child's caregiver were established. The guidelines require a sentencing court to find out whether a convicted person is a primary caregiver wherever there are indications that this might be so:

1 2008 (3) SA 232 (CC).

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(a) a probation officer's report is not needed to determine this in each case. The convicted person can be asked for the information and if the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact. The prosecution should also contribute to what information it can; its normal adversarial posture should be relaxed when the interests of children are involved. The court should ascertain the effect on the children of a custodial sentence if such a sentence is being considered;

(b) if on the *Zinn*[2] triad approach, the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated;

(c) if the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children; and

(d) if there is a range of appropriate sentences on the *Zinn* approach, the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.

The guidelines in *S v M* impose an obligation on the court to take steps to ensure that the child will be sadequately cared for while the caregiver is imprisoned. The sentencing court must be able to sufficiently balance all the varied interests involved, including those of the child placed at risk.[3] The court must diligently seek, wherever possible, to avoid conduct which may have the effect of placing the child in peril.[4]

The guidelines for the sentencing of a child's caregiver are the manifestation of a duty that South Africa incurred when ratifying the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). The CRC and the ACRWC are binding international children's rights instruments that direct state parties to align domestic provisions concerned with children in their footing. Article 3(1) of the CRC makes provision that, in all actions concerning children – whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies – the best interests of the child shall be a primary consideration.[5]

The adoption of the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution") and the Children's Act[6] (CA) are responsive measures towards placing

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2 *S v Zinn* 1969 (2) SA 537 (A). In this case, a 58-year-old adult male was convicted of several counts of fraud, theft and a count of contravening the Insolvency Act. He pleaded guilty to all the counts and was sentenced to 15 years imprisonment. On appeal, the sentence of 15 years imprisonment was reduced to 12 years. It was held that the sentence imposed by the court *aquo* failed to put equal weight to the offence, the offender and to the protection of the society.

3 *S v M* para 33.

4 *S v M* para 20.

5 Article 4(1) of the CRC.

6 38 of 2005.

the rights of children on a par with international children's rights instruments. Section 28(1)(b) of the Constitution confers to a child the right to family, parental or alternative care. The child's right to care is to be comprehended within the context of section 28(2) of the Constitution that makes provision for the paramountcy of the best interests of the child in every matter that concerns the child.

While the family environment is preferred for the care of the child, circumstances necessitating separation of a child from his or her family or parents may exist. A child may be separated from his or her family or parents as a result of action by the state. An example of this separation, which falls to be considered in this article, is the imposition of a custodial sentence on the child's primary caregiver. The separation, as shall become apparent in the discussion that follows, is especially significant in instances where there is no one within the family of the caregiver to care for the child. The sentencing of the child's primary caregiver is *holus-bolus* a matter that involves the child and that requires his or her right to care to be considered.

2. Convention on the Rights of the Child

2.1 Family/parental care

Amongst others, the CRC gives recognition to the role played by the family in rearing a child. The family component is responsible for securing proper nurturing of the child and must be supported in raising the child. The right to a family allows children to be connected to their history and offers a protective perimeter against violation of their rights.[7] The healthy development of children is crucial to the future well-being of any society.[8] John F. Kennedy, for instance, sums up the importance of children in a community when he states that 'children are the world's most valuable resource and its best hope for the future'.[9]

The right of the child to care is not specifically mentioned in the CRC. Rather, it could be derived from various provisions of the CRC. Article 7 of the CRC states that the child has the right to know and to be cared for by his or her parents. Article 8 of the CRC complements Article 7 by obligating the state to respect the right of the child to, amongst others, preserve his or her family relations[10] as recognised by law without unlawful interference.[11] The child has the right not to be separated from his or her parents against his or her will, except when competent authorities subject to judicial review determine in accordance with applicable law and procedures that such separation is necessary[12] for

7 Humanium 'Family and Children's Rights' (n.d.). <https://bit.ly/3ik6JEb> accessed 21 August 2020.

8 UNICEF 'Child Rights and Why They Matter, Every Right for Every Child' (n.d.) <https://uni.cf/3CD1jf0> accessed 21 August 2020.

9 AZ Quotes 'Children Quotes' (n.d.) <https://bit.ly/39vXw6I> accessed 22 August 2020.

10 Wolf, GI 'Preserving Family Unit: The Right of Children to Maintain the Companionship of their Parents and to Remain in their Country of Birth' (1996) 4(1) *Indiana Journal of Global Studies* 213.

11 Imprisonment of the child's caregiver on the basis of committing an offence or offences is lawful action by the state that may require the preservation of the family.

12 Abuse or neglect of the child and the incarceration of the caregiver of the child are examples of actions that may result in the child being separated from his or her parents against his or her will.

his or her best interests.[13] Even in instances where the child is separated from his or her parents, the child retains the right to maintain personal relations and direct contact with both parents on regular basis except if it is contrary to his or her best interests.[14]

State parties to the CRC undertake to recognise the right of the child to a standard of living adequate for his or her physical, mental, spiritual, moral and social development.[15] In addition, parents or other persons responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, conditions of living necessary for his or her development.[16] Parental care enables the cognitive, socio-cultural, physical, mental and spiritual development of a child.[17] The phrase 'family environment' is not expressly used in the CRC. However, the author suggests that conditions of living necessary for the child's development as set out in the preamble imply a nurturing family environment.

The state has a duty to respect the rights and duties of parents and, where applicable, legal guardians, to provide direction to the child in the exercise of his or her right to freedom of thought, conscience and religion in a manner consistent with his or her evolving capacities.[18] No child shall be subjected to arbitrary or unlawful interference with his or her privacy or family home, or to unlawful attacks on his or her honour or reputation.[19] The child shall have the right to protection of the law against such interference or attacks.[20]

Duties of parents or legal guardians or members of the extended family towards the child are dealt with in Articles 5 and 18 of the CRC. Article 5 of the CRC provides that state parties must respect the responsibilities, rights and duties of parents,[21] or where applicable, the members of the extended family or community as provided for by local custom. Legal guardians or other persons legally responsible for the child have the duty to provide guidance to the child in regard to his or her exercise of rights that are entrenched in the CRC. According to the United Nations Children's Fund, state parties to the CRC must use their best efforts to ensure the recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents, or legal guardians, have the primary responsibility for the upbringing and development of

13 Article 9(1) of the CRC. See also Wolff, MJ 'Fact Sheet: The Trauma of Childhood Separation' (2018) <https://bit.ly/3lXFLD2> accessed 21 August 2020.

14 Article 9(3) of the CRC.

15 Article 27(1) of the CRC.

16 Article 27(2) of the CRC.

17 Nair, A 2018 'Roles of Parents in Child Development' <https://bit.ly/3APQXaY> accessed 21 August 2020.

18 Article 14(2) of the CRC.

19 Article 16(1) of the CRC.

20 Article 16(2) of the CRC.

21 S. De Figueiredo Attorneys (SDFA) 'Parental Rights and Responsibilities over a Child in South Africa' (n.d.) <https://bit.ly/3kDQ5Ru> accessed 21 August 2020. See also Guyana Chronicle 'What are the Duties of Parents Towards their Children, and Vice Versa?' (2015) <https://bit.ly/3lYA2gr> accessed 21 August 2020.

the child; and the best interests of the child are their basic concern.[22] State parties must render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and must ensure the development of institutions, facilities and services for the care of the child.[23]

2.2 Alternative care

Provision for alternative care in the CRC is influenced by three of its four themes, namely: survival, development[24] and protection.[25] Article 20 of the CRC gives recognition to the right of the child to alternative care. It provides as follows:

> (i) A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the state.
>
> (ii) State parties shall in accordance with their national laws ensure alternative care for such a child.
>
> (iii) Such care could include among others, foster placement, *kafalah* of Islamic law, adoption or if necessary, placement in suitable institutions for the care of children. When considering solutions due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

The child's right to alternative care has, since 2010, received international attention and Guidelines for the Alternative Care of Children (hereinafter "Guidelines") were adopted on 24 February 2010. Though the Guidelines are not binding on state parties to the CRC, their implementation is monitored by the Convention on the Right of the Child Committee (hereinafter "CRC Committee") and state parties are encouraged to adhere to the Guidelines.[26] The CRC Committee has, for instance, in the past ordered jurisdictions such as Norway and El Salvador to incorporate the Guidelines in their domestic provisions concerned with children.[27] The objectives of the Guidelines are:

> (i) enhancement of the implementation of the CRC and of relevant provisions of other international instruments regarding the protection and well-being of children who are deprived of parental care or who are at risk of being so deprived;

22 UNICEF 'Parenting in the Best Interests of the Child and Support to Parents of the Youngest Children' (2010) 16.

23 Articles 18(2) of the CRC and 25(2)(a) of the ACRWC.

24 Skutjye, D Rights of African Children Under the African Charter on the Rights and Welfare of the Child: The Addition to the Universal Protection of a Child' (Master Dissertation, University of Tilburg, 2011) 12-15.

25 The fourth theme is participation.

26 Davidson, J 'Closing the Implementation Gap: Moving Forward with the United Nations Guidelines for the Alternative Care of Children' (2015) *International Journal of Child, Youth and Family Studies* 382.

27 Save the Children 'Guidelines for the Alternative Care of Children. Save the Children Policy Brief' (2012) <https://bit.ly/3u7AEny> accessed 3 June 2020.

(ii) to support efforts to keep children in, or return them to, the care of their family or, failing this, to find another appropriate and permanent solution, including adoption and *kafalah* of Islamic law;

(iii) to ensure that, while such permanent solutions are being sought, or in cases where they are not possible or are not in the best interests of the child, the most suitable forms of alternative care are identified and provided, under conditions that promote the child's full and harmonious development;

(iv) to assist and encourage Governments to better implement their responsibilities and obligations in these respects, bearing in mind the economic, social and cultural conditions prevailing in each state; and

(v) to guide policies, decisions and activities of all concerned with social protection and child welfare in both the public and the private sectors, including civil society.

The Guidelines recognise that, in most countries, the majority of children without parental care are looked after informally by relatives or by others. The Guidelines require states to seek to devise appropriate means to ensure children's welfare and protection while in such informal care arrangements, with due respect for cultural, economic, gender and religious differences and practices that do not conflict with the rights and best interests of the child. Decisions regarding children in alternative care, including those in informal care, should have due regard for the importance of ensuring that children have stable homes that can meet their basic needs for safe and continuous attachment to their caregivers, with permanency generally being a key goal.

3. African Charter on the Rights and Welfare of the Child (ACRWC)

3.1 Family/parental care

Similar to the CRC, the ACRWC acknowledges the unique and privileged position of a child. For the full and harmonious development of his or her personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding.[28] Okon contends that 'the primary responsibility for the protection, upbringing and development of the child rests with the family'.[29] The family is recognised as a basic cell of the society and should enjoy protection and support of the state for its establishment and development.[30] Parents, or legal guardians, have a duty to provide guidance and direction in the exercise of rights of the child and best interests of the child.[31] State parties must respect the duty of parents, or legal guardians, to provide guidance and direction

28 Para 4 of the preamble of the African Charter on the Rights and Welfare of the Child (ACRWC).

29 Okon, E 'Towards Defining 'the Right to a Family for the African Child' (2012) 12 *African Human Right Law Journal* 374.

30 Moja, A 'Concept of Family in Africa' <https://bit.ly/3EQBeuI> accessed 20 August 2020. See also Article 18(1) of the ACRWC.

31 Article 9(2) of the ACRWC.

in the enjoyment of these rights subject to their national laws and policies.[32] Chinyoka and Ganga[33] argue that 'in African tradition the care of the child is typically a communal rather than an individual responsibility'. They support their contention by submitting that 'communal care' of a child resonates with the adage that 'it takes a village to raise a child'.[34] The author, while acknowledging that societal care of a child may emanate from the spirit of *ubuntu*,[35] submits that the notion of a child being 'raised by a village' is a perception that society often serves the best interests of the child. The landscape of poverty and unemployment in South Africa, for example, appears to have resulted in many families relying on state grants for support. Statistics South Africa (Stats SA), for instance, points out that poverty is on the rise and by 2015 more than half South Africans were indigent.[36] In confirming the reliance that people may have on state grants, Skujyte correctly indicates that 'the state has the duty to assist parents or legal guardians who are not capable of providing amenities relating to nutrition, health, education, clothing and housing[37] to their children'.[38]

Parents or legal guardians have the right to exercise reasonable supervision over the conduct of the child.[39] No child shall be subject to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, or to attacks upon his or her honour or reputation.[40] The child has the right to protection of the law against such interferences or attacks.[41] Parents or other persons responsible for the child have the primary responsibility for the upbringing and development of the child.[42] Amongst others, they have the duty to secure, within their abilities and financial capacities, conditions of living necessary for the child's development.[43] Every child is entitled to the enjoyment of parental care and protection and has, wherever possible, the right to reside with his or her parents. No child may be separated from his or her parents unless it is in his or her best interests.[44]

32 Article 9(3) of the ACRWC.

33 Chinyoka, K and Ganga, E 'Brooding Over African Traditional Child-Care in Zimbabwe: From Prenatal to Postnatal' (2017) *Educational Research International* 136.

34 *Ibid* 136.

35 Metz, T 'Ubuntu as a Moral Theory and Human Rights on South Africa' (2011) 11 *African Human Right Law Journal* 532-559. See also Van Niekerk, J *Ubuntu and Moral Value* Doctor of Philosophy Dissertation (University of the Witwatersrand 2013).

36 Stats SA 'Poverty on the Rise in South Africa' (n.d.) <https://bit.ly/39xllen> accessed 22 August 2020.

37 In *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), for instance, parents who were unable to provide their children with shelter (low-cost housing) challenged their eviction from private land earmarked for formal low-cost housing they were illegally occupying. The court found that the state has the duty to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right to access to adequate housing.

38 Skutjye, D '*Rights of African Children Under the African Charter on the Rights and Welfare of the Child*: *The Addition to the Universal Protection of a Child*" (University of Tilburg, June 2011) 28.

39 Article 10 of the ACRWC.

40 Article 10 of the ACRWC.

41 Article 10 of the ACRWC.

42 Article 20(1) of the ACRWC.

43 Article 20(1) (b) of the ACRWC.

44 Article 19(1) of the ACRWC. Acts such as abuse and neglect of the child and the imprisonment of the caregiver of the child may necessitate the separation of the child from a parent.

3.2 Alternative care

In terms of Article 25(2), the state

> (i) shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his family environment, or who in his best interest cannot be brought up or allowed to remain in that environment shall be provided with alternative family care, which could include among others, foster placement, or placement in suitable institutions for the care of children;
>
> (ii) shall take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters; and
>
> (iii) when considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious or linguistic background.

The author submits that provisions of the ACRWC on alternative care are specific in their reference to alternative family care. Article 25(2)(i) and (iii) ensure that a child who is without any form of care should be placed in alternative family care that furthers the child's religion, language, culture and heritage.

4. Children's Act

4.1 Family/parental care

The right of the child to care in the CA is expansive. In terms of section 1 of the CA, care in relation to a child includes, where appropriate,

> (i) within available means, providing the child with:
> - a suitable place to live;[45]
> - living conditions that are conducive to the child's health, well-being and development; and
> - the necessary financial support.
>
> (ii) safeguarding and promoting the well-being of the child;
>
> (iii) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
>
> (iv) respecting, protecting, promoting and securing the fulfilment of and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
>
> (v) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing in a manner appropriate to the child's age, maturity and stage of development;

45 Boezaart, T *Child Law in South Africa* (Juta 2009) 65.

(vi) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;

(vii) guiding the behaviour of the child in a humane manner;

(viii) maintaining a sound relationship with the child;

(ix) accommodating any special needs that the child may have; and

(x) generally, ensuring that the best interests of the child are the paramount concern in all matters affecting the child.

4.2 Alternative care

Even though the CA does not define alternative care, eight sections are specifically and by implication dedicated to such care. These include sections 2(a) and (b), 22(1)(b), 45(1)(h),[46] 46(1)(a),[47] 157(1)(b)(i) and (iii), 159(2)(d),[48] 161(1)(a)(i)[49] and 305(1)(k).[50] Only sections 2(a) and (b) and 22(1)(b) are discussed briefly. The other sections are excluded on the basis that they deal with orders that the Children's Court may grant. Section 2(a) reads that 'the objective of the CA is to preserve and strengthen families'. Section 2(b)(i), amongst others, provides for the child's right to alternative care when removed from the family environment. Section 22(1)(b) creates the platform for the care of the child by a person other than the child's caregiver. A person who has an interest in the care, well-being and development of the child may acquire care of the child through a parental responsibilities and rights agreement. The wide scope of section 22(1)(b) allows for the child to be cared for by family members or by his extramarital father or by persons other than his or her parents.

5. Alternative care settings

A child's alternative care may be formal or informal and may take place in various settings. Alternative care settings are flexible and may be adapted in line with the circumstances of state parties. Formal care is care provided in a family environment that is ordered by a competent administrative body or judicial authority. This includes care provided in residences, including private facilities, regardless of administrative or judicial measures.[51]

46 The Children's Court may adjudicate on alternative care involving the child.

47 The Children's Court may make the following orders:
An alternative care order; which includes an order placing a child
(i) in the care of a person designated by the court to be the foster parent of the child;
(ii) The child may be left in the care of the parent or caregiver under the supervision of a designated social worker; provided that the child's safety and well-being must receive first priority; and
(iii) the child may be placed in alternative care with or without terminating parental responsibilities and rights of the parent or caregiver.

48 Views of an alternative caregiver need to be considered when extending an order of the Children's Court.

49 The Children's Court may make a contributory order of maintenance or treatment costs in favour of a child in alternative care.

50 It is an offence to aid or induce a child in alternative care to abscond from alternative care or to prevent the child from returning to alternative care.

51 Section 45(1)(h) of the CA empowers the court to make an order for the alternative care of the child.

Informal care (kinship care) is a private arrangement in a family environment whereby the child is cared for on an indefinite basis by relatives or friends.[52] The initiative is that of the child, the child's parents or another relevant person. The arrangement is not ordered by an administrative or judicial authority or a duly accredited body.[53] The settings within which alternative care may take place includes kinship care, foster care, institutional care, *kafalah* or adoption.[54] The various forms of alternative care are discussed briefly hereunder. *Kafalah* and adoption are not discussed in detail by reason that they are permanent placement that the child of a primary caregiver may not require.

5.1 Kinship care

Kinship care is family-based care within the child's extended family or with persons who are known to the child, whether formal or informal in nature.[55] Informal kinship care refers to arrangements made by parents and other family members without any involvement from either a child welfare agency or the court.[56] The child may be left in the care of a grandparent, aunt, neighbour, nephew, uncle, relative or extramarital father.[57] In formal kinship care the child is placed in the legal custody of the state through a court order where after the particular child welfare agency then puts the child with kin. In this situation, the child welfare agency acting on behalf of the state has legal custody of the child and relatives have physical custody. The child welfare agency, in collaboration with the family, makes legal decisions about the child, including deciding where he or she must live. The child welfare agency is also responsible for ensuring that the child receives medical care and attends school regularly.[58]

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52 Save the Children 'Guidelines for the Alternative Care of Children' Policy Brief (2012) 3.

53 United Nation's Children's Fund and Kenya Government *Guidelines for the Alternative Family Care of Children in Kenya* (UNICEF 2014) 45.

54 Section 229 of the CA states that the purpose of adoption is to protect and nurture the child by providing a safe, healthy environment with positive support and promote the goals of permanency planning by connecting the child to other safe and nurturing family relationships intended to last a lifetime. See also Boezaart (2009) 133. It is a legal process that creates a legal relationship between the adoptive parents and the adopted child in the interests of the child. Adoption terminates parental responsibilities and rights of the parents of the adopted child and confer them to the adopting parents.

55 Centre for Law and Policy Research 'Foster Care in India: Policy Brief' (2014) 8. The Delhi Rules list out the criteria by which foster families must be selected. The criteria encompass the health, income, standard of living, physical, mental and emotional stability, as well as willingness of the foster family to work towards providing an environment conducive to the overall well-being of the child. See also Child Welfare Information Gateway 'Placement of Children with Relatives' (Children's Bureau 2013) 7. In the state of Alaska, for example, the placement of the child in foster care considers the following, such as the restrictiveness of the setting. It must be most closely approximate to a family environment and must meet the child's special needs, if any, it must be within reasonable proximity to the child's home, taking into account any special needs of the child and the preferences of the child or parent. The order of preference in awarding foster care is as follows: (i) an adult family member; (ii) a family friend who meets the foster care licensing requirements established by the department and (iii) a licensed foster home.

56 UNICEF 'Alternative Care for Children in South Africa: Progress; Challenges and Future Directions' (Gigiri 2008) v.

57 Child Welfare Information Gateway 'Kinship Caregivers and the Child Welfare System' (Children's Bureau 2016) '5.

58 *Ibid* 6.

Benefits of kinship care may include that it:

- is a setting that preserves continuity of the family;[59]
- is a setting that is preferred by children rights instruments such as the CRC and the ACRWC;[60]
- decreases the trauma and stress of relocation as well as grief from separation from parents;
- reduces the likelihood of multiple placements;
- expands self-sufficiency ongoing support;[61]
- secures mutual care and support of the child by family members and relatives;[62]
- is the most culturally appropriate and understood form of alternative care as it is based on community mechanisms and processes;[63]
- provides great benefits to the child and typically children prefer this type of arrangement;[64]
- allows the child to maintain cultural, religious and linguistic links with his or her family and community and enables continuity, stability and a sense of identity and self-esteem;[65] and
- is more cost-effective than institutional care. During instances of family separation, kinship care can be an important temporary arrangement until the child's family has been traced and he or she can be reunified with them.[66]

Potential risks of kinship care may include that:

- it is not regulated and not supported by government or external agencies;[67]
- due to poverty levels, caring for an extra child may become increasingly difficult for many families;[68]

59 Nandy, S and Vaisey, P 'Spotlight on Kinship Care: Using Census Microdata to Examine the Extent and Nature of Kinship Care in the UK at the Turn of the Twentieth Century' (2011) <https://bit.ly/2W6XGhV> accessed 22 August 2020..

60 Article 20(3) of the CRC.

61 UNICEF 'Guidelines for Early Child Development Department of Social Development Republic of South Africa' (New York 2006) 13.

62 Meinjes, B, Budlender, D, Giese, S and Johnson, L 'Children in Need of Care or in Need of Cash? Questioning Social Security Provisions for Orphans in the Context of the South African AIDS Pandemic' (Centre for Actuarial Research University of Cape Town 2003) 10.

63 Roby, JL 'Children in Informal Alternative Care: Discussion Paper: Child Protection Section' (UNICEF 2011) 21.

64 Chaitkin, S, Cantwell, N, Gale, C, Milligan, I, Glagotheir, C, O'Kane, C and Connelly, G 'Towards the Right Care for Children: Orientations for Reforming Alternative Care Systems Africa; Asia and Latin America European Union' (European Commission 2017) 9.

65 UNICEF (see n 55 above) 82.

66 Roby, JL 'Children in Informal Alternative Care: Discussion Paper: Child Protection Section' (UNICEF 2011) 12.

67 Ansah-Koi, AA 'Care of Orphans: Fostering Interventions for Children Whose Parents Die of AIDS in Ghana' (Families in Society 2006) 557.

68 Ainsworth, M and Semali, I 'The Impact of Adult Deaths on Children's Health in Northwestern Tanzania' World Bank Policy Research Working Paper No. 2266 (January 2000) 3.

- lack of monitoring and families' inability to access support services are leading to children experiencing abuse, violence, neglect and exploitation;[69] and
- children are moved around from household to another and the family taking in the child may be the only one willing to do so, rather than the most suitable in the best interests of the child.[70]

Kinship care, either informal or formal, it is argued, is congenial for a child whose caregiver stands to be sentenced to a custodial sentence. Firstly, kinship care is supported by the CRC and the ACRWC because the child is placed with a family known to the child or in a setting that resembles a family setup and that can continue the child's culture, religion and language. Secondly and lastly, kinship care conforms to the guidelines for the sentencing of a child's primary caregiver established in *S v M*. If arrangements, formal or informal, have been made for the care of the child of a caregiver that stands to be sentenced to imprisonment, a caregiver may inform the court of such arrangements. Arrangements for the care of the child may, for example be made with the child's grandparent, aunt, niece, nephew, neighbour, uncle or the child's unmarried father.

5.2 Foster care

According to Breen, foster care occurs when a competent authority places the child with a family other than his or her own family.[71] The family that offers foster care must ideally be selected, qualified, approved and supervised for providing such care.[72] Benefits of foster care may include that a child is removed from a dangerous and harmful environment[73] and that it allows the child to recover and thrive in a supportive, safe living situation.[74] However, risks potentially associated with foster care include, amongst others, children developing new behavioural problems due to not being used to new daily programmes when they are in foster care.

Placement of a child in foster care must be in the best interests of the child and must be capable of continuing the child's culture, language, religion and heritage. The author submits that securing foster care placement that is aligned with a child's language, religion, culture and heritage may not be a simple task. Though section 7(1)(f)(ii) of the CA recognises the right of the child to maintain a connection with his or her family or extended family, culture or tradition, the procedure followed in placing a child in foster care does not acknowledge the perpetuation of a child's religion, language, culture

69 Varnis, SL 'Promoting Child Protection Through Community Resources: Care Arrangement for Ethiopian AIDS Orphans' (2011) *Northeast African Studies* 144.

70 UNICEF (see n 61 above) 21.

71 Breen, N 'Policy Brief: Foster Care in South Africa: Where to From Here?' (Child Welfare Johannesburg 2015) 1.

72 Child Welfare Information Gateway (n 57 above) 7.

73 Family for Every Child 'Strategies for Delivering Safe and Effective Foster Care: A Review of the Evidence for Those Designing and Delivering Foster Care Programs Family for Every Child' (London 2015) 4.

74 Johnson, H 'Literature Review of Foster Care' (Mkombozi Centre for Street Children (2005) 20; Durant, BK 'The Support and Training of Foster Parents' Master of Laws dissertation (University of Stellenbosch 2007) 23.

and heritage. A child must be found to be in need of care and protection in terms of section 150 before referral to the Children's Court may be made and section 155 makes no stipulation regarding consideration of a child's culture, language, religion and heritage in placement in foster care.

5.2.1 Institutional care

Miles and Stephenson define institutional or residential as care that is provided in a non-family-based group setting. It is a group-living arrangement for children by means of which care is provided by remunerated adults who would not be regarded as traditional carers within the wider society.[75] According to McLean, today, the definition of residential care is more inclusive. It encompasses children's homes that are run as family-type group homes and accommodate several children of no relation to the person running the home. The staff may be volunteers or related to the person in charge. It is a setting that may be used as a measure of last resort[76] when other settings, such as foster and kinship care have failed.[77] In institutional care a child is placed in the care of persons who are not of his or her family or who are related to him or her.

Benefits of institutional care may include that:

- the needs of the child are met when he or she cannot live with his or her own family;[78]
- the homes are a place for children to develop and grow, as well as providing food, shelter and space for play and leisure in a caring environment;[79]
- children with different needs are being looked after; and[80]
- the child attends school regularly.[81]

Potential risks of institutional care may include that:

- it is non-therapeutic;[82]
- care of the child is often not exercised in the best interests of the child;[83]

75 Miles, G and Stephenson, P 'Children in Residential Care and Alternatives: Children at Risk Guidelines' (Tearfund Teddington 2001) 8.

76 UNICEF 'Children in Alternative Care' (2017) <https://bit.ly/3shvBzR> accessed 23 August 2020.

77 McLean, S, Price-Robertson, R and Robinson, E 'Therapeutic Residential Care in Australia: Taking Stock and Looking Forward' (National Child Protection Clearing House 2011) 2.

78 Child Welfare Information Gateway (see n 59 above) 7.

79 Durant (see n 74 above) 30.

80 Such as neglected and abused children; orphaned children, street children and children affected by HIV AIDS.

81 Bedford Borough Council 'Residential Care for Children' (n.d.) <http://www.bedford.gov.uk> accessed 3 June 2020.

82 McLean (see n 77 above) 1-24. Therapeutic Residential Care is intensive and time-limited care for a child or young person in statutory care that responds to the complex impacts of abuse, neglect and separation from family. This is achieved through the creation of positive, safe, healing relationships and experiences informed by a sound understanding of trauma, damaged attachment and developmental needs.

83 Hart, D, La Valle, I and Holmes, L 'The Place of Residential Care in the English Child Welfare System' (London Department of Education 2015) 33.

- some of these homes are not registered with a government department;[84]
- it accommodates children from various backgrounds such as disabled, street and homeless children;[85]
- children in institutional care facilities often have developmental damage and are abused and exploited;[86] and
- the damage caused by institutional care on children also affects physical and motor skills of the children.[87] The damage caused to the physical and motor skills of the child may be attributed to the fact that children below the age of six are not offered the same care as other children above the age of six years.[88]

It is submitted that the CRC appears to least support institutional or residential care. The framing of the text of Article 20(3), amongst others, suggests that other forms of alternative care must be exhausted before regard may be had to residential care. Article 20(3), amongst others, makes use of the words 'if necessary, placement in a suitable institution for the care of children' and 'due regard shall be paid to the desirability of continuing in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.'[89] The provisions of Article 20(3) direct states to consider alternative care options that are able to perpetuate the child's culture, religion, language and heritage. With regard to other alternative care options, it makes it undesirable to resort to institutional care.

5.3 *Kafalah*

Kafalah is of Islamic origin. It is informal care[90] of the child deprived of his or her family environment[91] that is also recognised by the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Child.[92] Under *kafalah*, a family may take a child to live with them on a permanent and legal basis, but the child is not entitled to use the family's name or to inherit from the family.[93]

5.4 Adoption

'Adoption is a judicial process that conforms to statute in which the legal obligations and rights of a child toward the biological parents are terminated and new rights and

84 Csaky, C 'Keeping Children Out of Harmful Institutions: Why we Should be Investing in Family-Based Care' (Save the Children 2009) 3.
85 Miles (see n 77 above) 11.
86 Csaky (see n 86 above) 6-10.
87 Browne, K 'The Risk of Harm to Young Children in Institutional Care' (Save the Children 2009) 9.
88 Durant (see n 76 above) 16.
89 Section 25(3) of the ACRWC also refers to the desirability of continuing in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background when considering placement of a child in alternative care.
90 Article 20(3) of the CRC.
91 Assam, UM and Sloth-Nielsen, J 'Islamic Kafalah as an Alternative Care Option for Children Deprived of a Family Environment' (2014) *African Human Rights Law Journal* 324.
92 *Ibid*.
93 UNICEF (see n 58 above) vi.

responsibilities are created between the child and the adoptive parents.'[94] Adoption involves the creation of the parent-child relationship between individuals who usually are not naturally related.[95] Under the draft United Nations Guidelines on Alternative Care, adoption is understood as permanent care.[96]

6. Analysis

While the trend in sentencing caregivers of children shows courts' awareness of their duty to act in the best interests of the child, it would appear that courts often do not pursue the placement of the child in alternative care. Some of the cases discussed below demonstrate that the responsibility of securing the care of the children of imprisoned primary caregivers was allocated to the Department of Social Development (DSD). Though the children in the cases discussed were not placed in alternative care, it is argued that had it became necessary for them to be put in alternative care, the procedure could have been extraordinary and not suitable for such children. Failure by the court to pursue placement of children of incarcerated caregivers in alternative care, if needs be, may result in the court infringing the right of the child to alternative care. The guidelines for the sentencing of a primary caregiver established in *S v M*, amongst others, direct the sentencing court to take steps to secure the care of the child in the event it imposes a custodial sentence on the child's caregiver.

In *Piater v S*[97] (hereinafter "*Piater*"), the appellant, a caregiver to minor children aged 12 and 15 respectively, was convicted of fraud and theft and was sentenced to seven years imprisonment. She appealed against the sentence only. The probation officer who prepared the pre-sentence report contended that there was no one to care for the appellant's minor children if a custodial sentence was imposed. The appellant's husband arrived at home late, the appellant's mother was going blind and the paternal grandparents were sickly.[98] The appeal succeeded partially. The sentence of seven years' imprisonment was reduced to four years' imprisonment and the National Commissioner for Correctional Services (NCSS) was directed to ensure that a social worker in the employ of the Department of Correctional Services (DCS) visits the children at least once every month during the first three months of the appellant's imprisonment.

The circumstances of this case made it necessary for the court to make provision for the care of the children. The court order did not provide specifications regarding the care of the children upon the expiry of the three months. The children of the appellant would have respectively required care during the incarceration of the appellant. The manner in which the children of the appellant were cared for was not clarified. The DSD was not even ordered to provide a report to either the NCCS or to the court on the care the children were receiving or likely to receive.

94 The Free Dictionary (n.d.) <https://legal-dictionary.thefreedictionary.com/Adopted+child> accessed 25 August 2021.

95 Chapter 16 of the CA.

96 Bartholet, E 'Child Adoption: Trends and Policies' (n.d.) <https://bit.ly/3iN1f5u> accessed 3 June 2020.

97 *Piater v S* unreported case number A411/2011 of 7 December 2012 <https://bit.ly/3ENkG6R> accessed 23 August 2020.

98 *Ibid* para 43.

In *Noorman v S*[99] (hereinafter "*Noorman*"), the appellant, a primary caregiver to a three-year-old daughter, was convicted with the murder of her partner who was the father to her minor child. She was sentenced to 13 years' imprisonment and appealed against the sentence only. The basis for her appeal were, amongst others, that the court paid inadequate attention to her primary caregiving responsibilities. Though the death of the child's father was caused by the appellant,[100] the result was that the incarceration of the caregiver will inevitably leave the child with no one to care for her. The sentence was reduced to four years' imprisonment and the DSD was ordered to investigate the actual circumstances of the appellant's minor child and to take necessary steps to ensure that the minor child is cared for by a responsible adult and that provision of care to the minor child is monitored. The responsibility of securing the care of the child and its supervision was entirely left to the DSD.

In *Langa v The State*[101] (hereinafter "*Langa*"), the appellant and a primary caregiver to six minor children whose ages were not specified, was convicted for murder, kidnapping, theft and malicious damage to property. She was sentenced to life imprisonment for the murder and to 30 years' imprisonment for the other offences. She appealed against the sentences. Her grounds of appeal were, amongst others, that the court should have taken into account that she was a caregiver. The appeal was dismissed and the court emphasised that primary caregiving responsibilities do not afford convicted primary caregivers an escape route. Appropriate custodial sentences may still be imposed even to caregivers. The offences for which the appellant was convicted were serious and the sentences imposed were commensurate with the offences.[102]

Though the sentencing court was found to have given due regard to the appellant's caregiving status, the High Court went a step further to make provision for the care of the appellant's minor children during their caregiver's incarceration. It ordered the DSD to investigate the circumstances of the appellant's minor children without delay and to take all necessary steps[103] to ensure that they are properly cared for in all respects,[104] and that they remain in contact with the appellant during her period of imprisonment and to have contact with her, insofar as it is permitted by the DCS.[105]

6.1 Child in need of care and protection

While the CA makes provisions for alternative care, it does not specify the procedure for placing a child in alternative care. In the event that a child must be put in alternative care, it would appear that the following steps would have to be taken:

99 Unreported case number A532/10 of 27 January 2011 <https://bit.ly/3AG1vJI> accessed 21 August 2020.
100 *Noorman* para 47.
101 2010 (2) SACR 289 (KZP).
102 *Langa* paras 10 and 11.
103 *Ibid* para 2.1.
104 *Ibid* para 2.1.1.
105 *Ibid* para 2.1.2.

(a) the circumstances of the child should be investigated by a social worker[106] and the maximum period for such investigation is 90 days; and [107]

(b) a hearing should be conducted to determine[108] if the child is in need of care and protection.[109]

A child in need of care is defined in section 150 of the CA as a child who

(i) has been abandoned or orphaned and is without any visible means of support;

(ii) displays behaviour which cannot be controlled by the parent or caregiver;

(iii) lives or works on the streets or begs for a living;

(iv) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;

(v) has been exploited or lives in circumstances that expose the child to exploitation;

(vi) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;

(vii) may be at risk if returned to the custody of the parent, guardian or caregiver of the child as there is reason to believe that he will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;

(viii) is in a state of physical or mental neglect; or

(ix) is being maltreated, abused, deliberately neglected or degraded by a parent, a caregiver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is.

It is worth noting that section 150 makes specific reference to circumstances that may qualify a child to be in need of care and protection. The following cases demonstrate the definite application of section 150. In *SS v The Presiding Officer of the Children's Court, District of Krugersdorp and Others*,[110] (hereinafter "*SS*"), an appeal against the refusal to declare an orphan child who was in the foster care of the appellants eligible for a foster care grant was lodged. At court *aquo*, the Child Commissioner made an order that the child did not meet the requirements to receive a foster grant. According to the Child

106 Section 151(1) of the CA. The investigation of the circumstances of the child is initiated by a social worker. It would appear that the probe is instituted when a social worker suspects that the child falls into any of the category of children listed in section 150. A social worker may remove the child from an environment where the child appears to be violated with or without a court order.

107 Section 155(2) of the CA.

108 Section 156(1)(i) of the CA.

109 Section 155 of the CA.

110 Unreported case no A3056/11 of 29 August 2012 <https://bit.ly/3zB5Hta>; *NM and Others v The Presiding Officer of the Children's Court, District of Krugersdorp and Others* unreported case no A3075/2011 of 12 April 2013 <https://bit.ly/3CFs8PI> accessed 26 August 2020.

Commissioner, the appellants had assumed responsibility for the care of the child, the child had visible means of care and support and was not entitled to a foster grant.[111] The Child Commissioner was found to have erred in declaring the orphan child not to be in need of care and protection and to have visible means of care and support. The child had been cared for by his foster parents from a tender age and by reason that his foster parents were no longer able to continue caring for him from their meagre means, the child lacked visible means of care and support.[112] An order was therefore made for the child to receive a foster grant until he reached the age of 18 years.

In *R v A and Another*,[113] the court had to determine whether an eight-month-old child was in need of care, and protection and whether he should rather be removed from the care of his parents and placed in the care of the applicant. Prior to the parents relocating to Benoni, Gauteng with the minor child, the child was on occasions cared for by the applicant. The application for removal of the child was based on alleged abuse of the child by his parents. The court declined to make an order relating to the care of the child, instead, it directed that the circumstances of the child be investigated and a report concerning his welfare be filed.

In *V v V*,[114] the court, amongst others, had to decide whether a child was in need of care and protection and whether her father was liable to maintain her at an additional cost. The child was living or exposed to circumstances which could seriously harm her physical, mental or social well-being. A contributory order against the father was in force and he sought to challenge the additional sum he had to pay for the maintenance of the child. The court found that the father of the child was liable to pay the supplementary amount. The fact that the child was attending a boarding school did not extinguish his obligation to support the child.

In *Jonker v The Manager, Gali Thembani JJ Serfontein School and Others*,[115] the court was seized with the question whether children in need of care and protection (with behavioural, psychological and emotional difficulties) placed in a school by order of the Children's Court could be relocated to a Child and Youth Care Centre without ratification by the Children's Court. The court held that the children could not be relocated to a Child and Youth Care Centre, unless so ratified by the Children's Court. In *Steward obo A.S v The Member of the Executive Council, Department for Social Development Eastern Cape*,[116] the court had to determine whether a person vested with the care of a child may compel the DSD to investigate and compile a report on the care and circumstances of a minor child for purposes of determining whether the child was in need of care and protection. The court found that instituting action to compel an arm of the state to investigate and compile a report on whether a child is in need of care and protection is enforcement of a constitutional right.

111 *Ibid* para 12.
112 *Ibid* para 9.
113 Unreported case no A3446/2017 of 2 November 2017 <https://bit.ly/3u6aXnv> accessed 25 August 2020.
114 Unreported case no A100/2004 of 2 March 2015 <https://bit.ly/3ohYhsT> accessed 24 August 2020.
115 Unreported case no 94/2011 of 19 March 2012 <https://bit.ly/3lTvoAc> accessed 20 August 2020.
116 Unreported case no 628/2013 of 4 October 2015 <https://bit.ly/3AD8jrz> accessed 17 August 2020.

6.2 Care of the child after the sentencing of the caregiver

The prescript of the best interests of the child direct the sentencing court to act in the best interests of the child in every matter that concerns the child and the sentencing of the child's primary caregiver is *holus-bolus* a matter that involves the child. The sentencing court should always be alive to its duty to secure the care of the child post sentencing. It should therefore take into account all the forms of alternative care available and make a determination on the one that serves the best interests of the child.

Kafalah and adoption are permanent placement that are uncongenial for a child of a caregiver that stands to be sentenced. These options do not allow the child to maintain contact with his or her caregiver and to be reunited with her or him upon release from jail. In view of the permanency of *kafalah* and adoption, alternative care options for consideration in respect of a child whose caregiver that stands to be sentenced are foster, institutional and kinship care. The suitability of the alternative care option to a child of a primary caregiver that stands to be sentenced must, amongst others, be informed by the prescript of the best interests of the child and the continuation of the child's culture, religion, language and heritage.

It is argued that foster care and institutional care are incompatible for a child of a caregiver that stands to be sentenced. Firstly, foster care results in the placement of the child with a person or persons that he or she is not familiar with and the perpetuation of the child's culture, religion, heritage, language and religion may not be attained. The foster carer may, for example, be aligned to a religion, culture and language different from that of the child and the process of placement does not establish this aspect. Secondly, the procedure that may be adopted for a placement is not apt. The ambit of section 150 does not extend to a child of a caregiver that stands to be sentenced and pays no regard to other alternative care options as the placement of a child in need of care and protection in foster care is a foregone conclusion. Section 156(1)(ii) of the CA unequivocally stipulates that a child that is found to be in need of care and protection may be placed with a suitable foster parent or in foster care with a group of persons or an organisation operating a cluster foster care scheme.[117] Placement of a child in foster care without having regard to other alternative care options amounts to disregard of the fact that children may require care and protection in varying degrees and that the state should provide a broad range of support to children.[118]

The posture of the CRC and ACRWC on foster care is that the placement of the child should be in a setting that is within a family or that resembles a family setting and that promote the cultural, religious and linguistic rights of the child. The author submits that foster care placement may translate to good policy if children are placed with a person or persons they are familiar with and who are able to further the children's religion, culture, language and heritage. However, according to Carter and Van Breda, there are no set of objectives and contextually-relevant criteria for the assessment of prospective foster

117 Section 156(1)(ii) of the CA.

118 Nonyana-Mokabane, M 'Children in Need of Care and Protection and Their Rights to Family Life' Doctor of Law Dissertation (University of Pretoria 2012).

parents in South Africa[119] and this has the potential of compromising the right of the child to be cared for in a nurturing environment.[120]

Institutional or residential care is a form of alternative care that is not supported by international children's rights instruments. It is non-therapeutic;[121] it does not consider the best interests of the child;[122] it accommodates children from various backgrounds such as disabled, street and homeless children;[123] and its facilities often have developmental damage and children are abused and exploited.[124]

In view of the unsuitability of *kafalah*, adoption, foster and residential care to cater for the care of a child of a primary caregiver, it is argued that kinship care is the only option that a sentencing court may utilise to put a child of a caregiver that stands to be sentenced in alternative care. Firstly, kinship care is supported by international children's rights instruments such as the CRC and the ACRWC. Secondly and lastly, kinship care resonates with section 22 of the CA. Section 22 makes provision that a caregiver of a child may enter into a parental responsibilities and rights agreement with a person who has an interest in the care, well-being and development of the child.[125]

The parental responsibilities and rights agreement concluded between the child's primary caregiver and the person who has an interest in caring for the child must be registered with the Family Advocate.[126] The broadened scope for the care of the child means that a child may be cared for by persons such as his or her extramarital father, uncle, nephew, aunt, grandparent or neighbour. It is in the best interests of the child to continue to be cared for even when his or her caregiver is imprisoned.[127] According to Mia,[128] the exercise of parental responsibilities and rights by people other than the parents of the child reverberates with the development of the concept of a family.

The role of the Family Advocate of registering a parental responsibilities and rights agreement concluded between a child's caregiver and a person with an interest in the care of the child is acknowledged in the CA. It is submitted that conclusion of a parental responsibilities and rights agreement between a child's caregiver and a person who will care for the child is formal kinship care.

For kinship care to accommodate the needs of a child of a primary caregiver to care effectively and efficiently, it is significant that the risks associated with it be minimised. It is suggested that the Family Advocate should be an integral part of the sentencing of a child's caregiver. When imposing a custodial sentence on the child's primary caregiver, the court should order the Family Advocate to assist a caregiver to identify and enter into a

119 Carter, J and Van Breda, A 'The Design of a Protocol for Assessing Prospective Foster Parents in South Africa' (2016) 52(2) *Social Work* 208.
120 *Ibid* 210.
121 McLean (see n 79 above) 1-24.
122 Hart (see n 86 above) 3.
123 Csaky (see n 68 above) 6-10.
124 *Ibid.*
125 Section 22(1)(b) of the CA.
126 Section 224(a) of the CA.
127 *L v Lukoto* 2007 (3) SA 569 (T).
128 Mia, N 'An Exploratory Study of Grandparent-Grandchild Relationships from the Perspectives of Adolescents' Honours in Psychology Thesis (University of Cape Town n.d.) 7.

parental responsibilities and rights agreement with a person who will care for her child. At present, placement of children in need of care and protection in foster care is mandated by section 156 of the CA. Provisions of section 150 of the CA are inappropriate for a child of caregiver that stands to be sentenced to a term of imprisonment. A child of a caregiver that is to be sentenced to a custodial sentence requires continuation of care. The fact that the CA is silent on the precise procedure to be pursued for putting a child of a caregiver that stands to be sentenced to imprisonment in alternative care makes it inevitable for social welfare agencies to resort to section 150 to place such a child alternative care.

The involvement of the Family Advocate in the sentencing of the child's caregiver, it is argued, is aligned with kinship care. The Family Advocate's role will be to assist the child's caregiver to identify and to conclude a parental responsibilities and rights agreement with the person who has an interest in the care, well-being and development of the child. The parental responsibilities and rights agreement entered into between the caregiver of the child and the person who will care for the child will formalise the care of the child and will have to be monitored by the Family Advocate, for instance, to avoid abuse and neglect of the child. The advantages flowing from an official parental responsibilities and rights agreement made an order of court is that the risk of the child being moved from one household to another will be reduced and the child's culture, religion, language and heritage will be perpetuated.

The Family Advocate is a legal representative of children[129] and deals with matters such as parental responsibilities and rights, albeit in private family law. In order for the Family Advocate to be part of the sentencing of a child's primary caregiver, it is suggested that section 22 of the CA be amended to incorporate some of the provisions of section 4(1) of the Mediation in Certain Divorce Matters Act (MCDMA). Section 4(1)(b) of the MCMDA currently stipulates that the Family Advocate, if so, requested by any party to such proceedings or the court concerned, may institute an enquiry to enable him or her to furnish the court at the trial of such action or the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage concerned or regarding such matter as is referred to him by the court. When considering an application contemplated in subsection (i), the court must take into account the best interests of the child; the relationship between the applicant and the child and the relation between the child and persons other than the applicant, and any other fact that should, in the opinion of the court, be taken into account. It is argued that the amendment of section 22 by provisions of section 4(1)(b) of the MDCMA should only exclude 'any party to such proceedings or and of the marriage'.

7. Conclusion

Courts have an obligation to act in the best interests of a child in every matter that involves a child. The sentencing of the caregiver of a child is *holus-bolus* a matter that concerns the child and that require furtherance of his or her right to care. Imposition of a

129 Department of Justice and Constitutional, 'The Office of the Family Advocate Development' n.d. <https://bit.ly/3o4k0Ew> accessed 3 June 2020.

custodial sanction on the child's caregiver does not terminate the child's right to care. The prescript of the best interests of the child direct courts to take steps to ensure that the child continues to receive care even though his or her caregiver is incarcerated. The dictum in *S v M* has set precedent that the care of the child should be the primary preoccupation of the sentencing court when it imposes a term of imprisonment on the child's caregiver. Amongst others, the guidelines require the court to avoid conduct that places the right of the child to care at risk of infringement or that violates the right of the child to care.

This article has been able to show that sentencing courts often do not pursue the placement of the child of a caregiver in alternative care. Instead, the responsibility of securing the care of the child post-sentencing appears to be vested to the DSD and is not monitored by the court. Assigning of the care of the child to the DSD, this contribution has demonstrated, has the potential of placing the care of the child of an imprisoned primary caregiver at risk of infringement. Though in the cases surveyed the children were not put in alternative care, the article has been able to argue for consideration of the options for care of the child created by section 22 of the CA. Section 22 has widened the scope for the care of the child and the child may be cared for by his or her grandparent, extramarital father, niece, uncle or neighbour. The provisions of section 22 resonate with the posture of international children's rights instruments. Both the CRC and the ACRWC that South Africa has ratified require that the placement of children who are deprived of family or parental care in alternative care that promote their culture, religion, language and heritage.

The contribution has been capable of arguing that kinship care remains the only viable form of alternative care for a child of an incarcerated primary caregiver. *Kafalah* and adoption are discounted as forms of alternative care for a child of caregiver that stands to be sentenced to a custodial sentence. They are permanent placements that sever the relationship between the child and his or her caregiver. Even though the child's primary caregiver may be sentenced to a term of imprisonment, there has to be hope that she or he will be reunited with his or her child upon discharge from prison. Residential and foster care are also opted out as forms of alternative care. The placement of the child in such settings is with persons that the child is unfamiliar with and the advancement of the child's culture, religion, language and heritage may not be realised.

The recommendation that the Family Advocate should be an integral part of the sentencing of a child's caregiver is plausible. The Family Advocate deals with matters such as parental responsibilities and rights, albeit in private family law. The role of the Family Advocate should be to assist the primary caregiver of the child who stands to be sentenced to a term of imprisonment to identify and to conclude a parental responsibilities and rights agreement with a person that has an interest in the care, well-being and development of the child. The involvement of the Family Advocate in the sentencing of a child's primary caregiver will not only enable the court to oversee the placement of the child in alternative family care but will also dispense with the apparent assigning of the child's placement to the DSD. It has been shown that section 150 of the CA does not cater for a child whose caregiver is to be sentenced to a custodial sentence and that placement of a child in foster care is a foregone conclusion.

Placement of a child in foster care in the absence of empowering provisions and lack of a definite criterion for assessment of a foster caregiver has the potential of infringing the child's right to alternative care. The procedure that the DSD may have to pursue to put a child of a primary caregiver that stands to be sentenced to a term of imprisonment in alternative care is not only uncongenial for such a child but has the potential of not securing continuation of the child's culture, religion, language and heritage. The child of an incarcerated caregiver is not a child in need of care and protection as defined in section 150 of the CA. The amendment of section 22 through insertion of provisions of section 4(1)(a) of the MDCMA as recommended, will ensure that the child is cared for by a person he or she is familiar with; that his or her right to language, culture, religion and heritage remains intact and that he or she continues to be cared for and that such care is monitored by the Family Advocate. The parental responsibilities and rights agreement concluded by the child's caregiver and the person who has an interest in the care, well-being and development of the child will be an order of the court and in the best interests of the child.

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The Vicissitudes of Constitutional Interpretation in Zambia

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Abstract

The Constitution of Zambia (Amendment) Act 2 of 2016, provides for, inter alia, the establishment of a Constitutional Court with original and final jurisdiction in constitutional litigation. Simply put, this means that the Court is a court of first instance and of last resort in Constitutional matters. There can be no appeal from its decisions. However, within months of the Court's creation, it was embroiled in controversy in respect of the presidential election petition of 2016, resulting in the court being severely criticised as being incompetent and corrupt and in perpetrating a monstrous miscarriage of justice. This article interrogates two of the Court's most controversial decisions and draws on the rich experience in respect of constitutional interpretation in comparable jurisdictions. The main thrust of this article is that courts should be impartial and should uphold the solemn oath of dispensing justice to all in a manner that protects and promotes the values and principles embedded in the Constitution. Given the huge disappointment with the Court's performance to date, a lot remains to be done in restoring the confidence of the citizenry in the courts as bulwarks or sentinels of individual liberties.

Keywords

accountable; constitutional democracy; constitutionalism; *nolle prosequi*; vicissitudes

1. Introduction

Zambia is a constitutional democracy with a written constitution. The Constitution is the supreme law of the country. Any other written law, customary law and customary practice inconsistent with the Constitution is invalid.[1] The Constitution also enshrines a Bill of Rights[2] and a set of national values and principles, namely morality and ethics; patriotism and national unity; democracy and constitutionalism; human dignity equity, social justice, equality and non-discrimination; good governance and integrity; as well as sustainable development.[3] This normative value system is to be observed in

1 Article 1(1) of the Constitution of Zambia (Amendment) Act 2 of 2016.

2 The Bill of Rights is enshrined in Part III of the Constitution of Zambia, 1991, as amended. It was not affected by the 1996 and 2016 constitutional amendments.

3 The constitutional values and principles are enacted in Article 8 of the Constitution.

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interpreting the Constitution; enactment and interpretation of the law and development and implementation of state policy.[4] Moreover, the Constitution imposes an interpretive injunction in Article 267(1) as follows:

> This Constitution shall be interpreted in accordance with the Bill of Rights and in a manner that:
>
> (a) promotes its purposes, values and principles;
>
> (b) permits the development of the law; and
>
> (c) contributes to good governance.

This constitutional imperative was at the heart of litigation in the cases of *Hakainde Hichilema and Another v Edgar Chagwa Lungu and Others*[5] and *Milford Maambo and Others v The People*.[6] In these cases, the Constitutional Court of Zambia has had opportunities to quieten doubts and make definitive pronouncements on the question of interpreting constitutional provisions involving the Bill of Rights.[7] Regrettably, in both cases, the Court lamentably failed to live up to expectations.

Before plunging into a discussion of these two decisions, it is instructive to note that there is a long list of authorities laid down by the Supreme Court of Zambia, the highest court in the country before the establishment of the Constitutional Court in 2016, with respect to statutory interpretation. The approach of the Supreme Court has been that where words of a statute are in themselves precise and unambiguous, then no more can be necessary than to expound these words in their natural and ordinary sense. However, when a strict interpretation of a statute gives rise to an absurdity and an unjust situation, the judges can and should use their good sense to remedy it by reading words in it, if necessary, so as to do what parliament would have done had they had the situation in mind.[8]

These two well-known approaches to statutory interpretation, namely the literal and golden rules, were neatly summarised in the case of the *General Nursing Council of Zambia v Ing'utu Milambo Mbangweta* in these words: 'The primary rule of construction or interpretation of statues is that enactments must be construed according to the plain and ordinary meaning of the words used, unless such construction would lead to some unreasonable result, or be inconsistent with, or contrary to the declared or implied intention of the framers of the law, in which case the grammatical sense of the words may be extended or modified.'[9]

4 See Article 9 of the Constitution, 2016.

5 2016/CC/0031.

6 2016/CC/R001.

7 Davis D 'The role of Constitutional interpretation' in *Rights and Constitutionalism: The New South African Legal Order* (1996) edited by Van Wyk D, Dugard J, de Villiers B and Davis D. Clarendon Press, Virginia; Tribe, L 'Taking Text and Structure seriously: Reflections on free from method in constitutional interpretation' (1995) (108) *Harvard Law Review* 1223.

8 *The Minister of Information and Broadcasting Services and Attorney- General v Fanwell Chembo and Others*, Selected Judgments of Zambia, No 11 of 2007 and *Matilda Mutale v Emmanuel Munaile*, Selected Judgments of Zambia, No-14 of 2007.

9 (2008) Z R 105 (SC). Cf Scott, LJ in *Croxford and Others v Universal automobile Insurance Co and Others*, (1936)2 K b 253, 281; *Lord Watson in Salomon v Salomon & Co Ltd*, 1897 AC 22.

In so far as interpreting constitutional provisions is concerned, the Constitutional Court, in the earlier case of *Noel Siamondo and Others v The Electoral Commission of Zambia and Another*,[10] purporting to rely on the Supreme Court authorities cited above and those of the English Courts, appeared to conflate the approaches to interpreting ordinary Acts of Parliament with that demanded in cases of constitutional interpretation by holding that

> … the provisions of the Constitution must be construed according to the plain and ordinary meaning of the words and they must be in consonance with other related provisions in the Constitution when read as a whole. It is only when the plain or literal meaning is not clear that the purposive approach should be used.[11]

While these common law rules are well established, it is argued below that when a court is called upon to interpret the meaning of a provision in a written constitution, moreover one affecting the Bill of Rights of subjects, the court ought to proceed from the fundamental premise that the Constitution is a sacred document with a soul of its own to be read as whole and bearing in mind the purpose and the values underpinning such a constitution.[12]

It is against this background that the cases of *Hakainde Hichilema* and *Milford Milambo* will now fall to be discussed. In *Hakainde Hichilema and Another v Edgar Chagwa Lungu and Others*,[13] the Court was called upon to hear an election petition brought by the losing candidate in the presidential elections held on 11 August 2016.[14]

Under the Constitution of Zambia 2016, that petition was supposed to be heard within a period of 14 days. A divided court (3-2) decided to dismiss the petition for want of prosecution upon the expiry of the 14-day period without hearing the merits of the petition. It is argued herein that by construing the 14-day period in its ordinary meaning, the majority of the Court carried out a monstrous miscarriage of justice for, as will be shown below, a constitution is not an ordinary piece of legislation.

As a supreme law of the land, it is a sacred document or covenant which binds all people and holds the government accountable. It is *sui generis*. Its provisions cannot be read in isolation. It calls for interpretation of its own, suitable to its character, it calls for a generous, contextual interpretation in order to give to individuals the full measure of the fundamental rights protected by the Constitution and so that it plays a creative and dynamic role in the expression and the achievement of the ideas and aspirations of the nation.[15]

10 2016/CC/0009.

11 *Noel Siamondo and Others v Electoral Commission of Zambia and Another*, 2016/CC/0009 27.

12 *S v Makwanyane and Another*, 1995 (3) SA 391 (CC).

13 *Hakainde Hichilema and Another v Edgar Chagwa Lungu and Others*, 2016/CC/0031.

14 *Hichilema and Another v Lungu and Othersr*, (2016/CC/0031).

15 Per Mahomed J, as he then was, in the Matter between the *Government of Namibia and Another v Cultura 2000 and Another*, 1994 (1) SA 407 (NMSC). See also *Mwandingi V Minister of Defence*, 1992 (2) SA 355, NMSC 361, 362

In the second case of *Milford Maambo and Others v The People*,[16] the question was whether the Director of Public Prosecutions (DPP) was obliged to furnish reasons before entering a *nolle prosequi* to discontinue the criminal proceedings. As in the first case, the majority of the Court adopted the literal and ordinary meaning of the words used in the statute, and in the process, missed a golden opportunity to settle the law. It will be argued throughout this article that construing a constitution calls for a nuanced, contextual and purposive approach, for as Lord Diplock reminded us many years ago:

> A Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction.[17]

2. Presidential petition misconstrued

In the case of *Hakainde Hichilema and Another v Edgar Chagwa Lungu and Others* that dealt with the validity of the first defendant's election as President, the Constitutional Court was called upon to interpret the meaning of Article 101(5) read together with Article 103(2) of the Constitution. Article 101(5) is deceptively clear and straightforward:

> The Constitutional Court shall hear an election petition filed in accordance with clause (4) within fourteen days of the petition.[18]

The facts of the case were not difficult. Hakainde Hichilema and his running mate sought to challenge the outcome of the presidential election aforesaid. The petition was filed on 19 August 2016, and in terms of the rules governing the computation of time, the petition should have been heard from 20 August to 2 September 2016.[19] Crucially, the drafters of the Constitution omitted the words 'determine' in that Article.[20] Further, the Court never got a chance to 'hear' the petition on its merits. Instead, an ordinate amount of time was wasted on interlocutory applications with the result that on the penultimate day of the hearing, that is 1 September 2016, a single judge informed the parties that the hearing would commence and conclude on 2 September 2016, being the last day of the hearing.

On 2 September 2016, the Court again did not hear the merits of the petition but continued to entertain motions from the petitioners' counsel until late in the evening, with only four hours left of the nine set aside for the hearing. At that juncture, each side had two hours left within which to present their cases. At that time, the petitioners' lawyers sought leave

16 2016/CC/R000 selected judgment No 31 of 2017.

17 AG of *Gambia v Jobe* [1984] A.C 689 700.

18 Article 101(5) should be read in conjunction with Article 101(6) which reads as follows: 'The Constitutional Court may, after hearing an election petition
(a) declare the election of the president elect as valid;
(b) nullify the election of the president elect and Vice President; or
(c) disqualify the presidential candidate from being a candidate in the second ballot.' See Articles 103(2) and (3).'

19 Article 269(a) of the Constitution on the computation of time provides that the time begins to run on the day following the doing of action and in that petition, the 14 days began to run on 20 August 2016. See also Constitutional Court Rules, 2016.

20 Ndulo, M 'The judicial crisis in Zambia: And A Flawed Election' 2016 Unpublished Memo. See further M Ndulo in *SAIPAR Case Review* (2017) 1(1).

of the Court to withdraw from representing their clients, citing time constraints. Leave was granted with the result that the petitioners, now representing themselves in person, sought an adjournment to engage new counsel. Although their application was opposed by counsel for the respondents, the Court granted the application and set Monday, 5 September to Thursday, 8 September 2016 as the days for continued trial.

However, before the proceedings of that day were adjourned, the Attorney General submitted that, in terms of Article 101(5) of the Constitution, the time limited for the hearing of the petition was 14 days from the date of filing of the petition and that once the prescribed period had lapsed, the Court would not have jurisdiction to hear the petition and that any further proceedings that would be entertained by the Court would be nullity. The Court did not address that submission on that day.

The heightened sense of anticipation over the weekend of 3-5 September 2016 evoked the immortal words of Sir Winston Churchill at the height of the battle of London before the British Parliament on 20 August 1940 to wit: '[N]ever in the field of human conflict was so much owed by so many to so few.' However, the fervent hopes of millions of Zambians were dashed when the Court, acting ex *mero motu*, decided to discontinue the hearing on technicality.

When the Court reconvened on 5 September 2016 as earlier agreed by the full bench of five judges, three of the judges (Justices Sitali, Mulenga and Mulonda) decided to revert to the learned Attorney General's submissions, claiming that it was trite that whenever the jurisdiction of the Court to hear a matter was raised, that issue had to be addressed and determined before hearing the matter on its merits. The question that Justice Sitali, for the majority, raised was whether the Court had jurisdiction to hear the petition after the expiry of the 14 days prescribed by the Constitution. The Constitution is silent on that issue. Sitali J opined that Article 101(5), quoted earlier in this article was 'clear and unambiguous'. It is couched in mandatory terms thus giving the Court no discretion to enlarge the time for hearing the Petition.

In interpreting the provisions of Article 101(5) of the Constitution, the words used by the legislature should be given their ordinary meaning and only if the ordinary meaning results in an absurd meaning should the purposive interpretation be resorted to. In the present case, no absurdity results from the interpretation of the provision in its ordinary sense.[21] The learned Judge went on to observe that where the time for hearing the petition was limited by the Constitution, the Court was bound to enforce that time limit and then went on to hold that if the petition were to be heard outside the 14-days period, the proceedings would be nullified, and that there would be no benefit to any party in breaching the constitutional provision of the 14-days period set aside for the hearing, apart from wastage of money and other resources.[22]

In the premises, by upholding the literal meaning of 14 days, the majority rejected the purposive approach to the interpretation of the Constitution. The majority went on to point out that since their hands were tied, its earlier order granted on 2 September 2016 giving the parties more time to present their cases from 5-8 September 2016 was untenable.

21 See the majority opinion, 6.

22 Per Sitali J writing for the majority with Mulenga and Mulonda JJ's concurring.

As indicated in the discussion below, this judicial somersault by the three Justices without the benefit of counsel's argument is one of the most disturbing aspects of this judgment. Furthermore, it is apparent that, in computing the prescribed time within which to hear the petition, the majority ignored the provisions of Article 269 of the Constitution, 2016, and of Order XV (6) of the Constitutional Court Rules, 2016, by not excluding weekends and public holidays in the computation of time.[23] Even more serious, this literalist approach to constitutional interpretation is not supported by the weight of authority, for as Schutz JA cogently observed in the South African case of *Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism*,[24] the literal meaning of an Act (in the sense of strict literalism) is not always the true one.[25] This is more so in the case of a written constitution. As Chief Justice Marshall aptly observed: '[W]e must never forget that it is a constitution we are expounding … intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.'[26]

In the same vein, Lord Wright has succinctly observed that,

> It is true that a constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of words change, but the changing circumstances illustrate and illuminate the full import of that meaning.[27]

Lord Wilberforce underscored this approach in the case of *Minister of Home Affairs and Another v Fisher and Another*,[28] to the effect that a constitutional instrument calls for principles of interpretation of its own, suitable to its character, namely that a broad and liberal spirit should inspire those whose duty it is to interpret the Constitution. Lord Wilberforce also opined that regard must be had to the historical antecedents, the traditions and usages which have given meaning to the language in question – and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.[29] This observation is very critical especially in a case like Hichilema's where the petitioner's right to be heard, which right is enshrined in the Bill of Rights, was directly in issue.[30]

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23 Constitutional Court Rules Act No 8 of 2016, Statutory Instrument No 37 of 2016.

24 2001(3) SAC 582.

25 *Poswa v MEC for Economic Affairs Environment and Tourism, Eastern Cape* 2001 (3) SA 582 (SCA) para 10.

26 *McCulloch v The State of Maryland et al* 1819 [4 Wheaton 316] 314, 323.

27 Lord Wright in *James v Commonwealth of Australia*, 1936 A.C 357 b614.

28 *Minister of Home Affairs and Another v Fisher and another*, 1980 AC 319.

29 *Minister of Home Affairs v Fisher* 1980 A.C 319, 328.

30 Article 18(9) of the Bill of Rights states that any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be independent and impartial, and where proceedings for such determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

This point brings us to the dissenting opinion of Justice Munalula. In her very well-reasoned judgment, Munalula J proceeded from the cardinal principle that the Constitution must be read as a whole. In her view, '[n]o one word or phrase in a provision, no one clause or certainly no one provision should be read in a manner that alienates it from the rest of the provisions or the rest of the Constitution. The common and ordinary meaning of words is the starting point to bringing life to a clause, provision and indeed the Constitution as a whole.'[31]

She went on to observe that an unrelieved focus on the words 'within fourteen days of the filing of the petition' could not give the Court the correct and sensible meaning of the Article in question.[32] She went on to opine that a constitution should be interpreted in accordance with the Bill of Rights and in a manner that promoted the purposes, values and principles of the Constitution and in a manner that contributed to good governance.[33]

On the question of inordinate delays in hearing petitions in the past, a mischief alluded to by the majority, Munalula J was of the view that the need for speedy resolution had to be tempered with the need for actually hearing the petition in line with the purports of the Constitution. She reasoned that the primary purpose of Article 101(5) was for the Court to hear the petition and to make a decision as laid down in the Constitution based on a solid finding of both fact and law, noting that if the process of the hearing had not been conducted, the stated purpose had not been achieved and complying to a deadline without the intended event having taken place was an absurdity.[34]

She went on to conclude that a purposive approach to interpreting the Article in question was the most appropriate approach, pointing out that the parties to the case working with the Court would have helped the country by allowing a hearing to take place rather than make a pronouncement based on technicality and that the issue of the presidential petition was too heavy for a mechanical response by the Court and a well-reasoned decision would have helped to heal the nation.[35] As discussed below, Munalula J's point about the perceived bias and lack of independence of the Constitutional Court in particular, are some of the core points thrown into sharper relief by the decision of the majority.

In the common law tradition, if a provision in an Act of Parliament when interpreted in its ordinary, literally or grammatical sense leads to a manifest absurdity, the so- called Golden Rule of interpretation allows judges to construe such a provision in such a way that such an absurd meaning or effect is avoided.[36] Thus, in the old English case of *Becken v Smith* (1836), it was said that it is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature to be collected from the

31 Munalula, 5 of the dissenting judgment.
32 Munalula 2016/CC/0031, dated 5 September 2016.
33 Munalula, 6.
34 *ibid* 7.
35 *Ibid* 7-8.
36 See Heydon's case 1584, *16 E R 637*. See also *Adler V George*, 1964 2 Q B 7

statute itself or leads to any manifest absurdity or repugnance in which case the language may be varied or modified so as to avoid such inconvenience, but no further.[37]

With reference to the proper approach for interpreting the constitutional provisions, the approach from comparable jurisdictions indicate that interpreting a written constitution calls for an approach of its own, suitable to its character. A few examples here will suffice. In the Indian case of *Jugal Kishore Dhoot and others v The State and others*,[38] the court made this very instructive observation:

> The Constitution of India is a paramount law which represents the will of the people and is a mechanism under which laws are framed. In interpreting the Constitution, the Court has to see that it is a documentation of the founding face of a nation and the fundamental directions for its fulfillment, whereas in interpreting a statute, its pith and substance has to be looked into and the duty of the Court is to find the legislative intent. The general principle of interpretation and construction of statutes is that a Court presumes its constitutionality and prefers an interpretation in favour of competency of the legislature. It is only when two meanings are inferred, whereby one results into the view of the legislature in effective result and the other results into manifest absurdity or futility or palpable injustice or anomaly, the Court should adopt the second view.[39]

This *dictum* is quoted *extensu* to show what should be done when a literal reading of an enactment leads to a 'palpable injustice' as in the *Hichilema* case. In the Commonwealth of Australia, the approach is that the Constitution must be read as a whole, and the whole Constitution has to be examined without giving undue weight to any part. Thus, in *Tasmania v Commonwealth*, on the question as to the meaning of the Constitution of the Australian Commonwealth, O'Conner J said:

> I do not think that it can be too strongly stated that our duty in interpreting a statue is to declare and administer the law according to the intention expressed in the statute itself. In this respect the Constitution differs in no way from any Act of the Commonwealth or a statute. The Constitution has to be looked at as a whole to see the scope of provisions. It is necessary to consider the extent in which a particular provision appears and why it was framed.[40]

The learned judge emphasised the importance of a contextual, purposive approach especially in cases impacting on basic human rights and fundamental freedoms protected by the Constitution. This approach is supported by almost all jurisdictions in the common

37 *Becken v Smith* 1836 2 M.8W.191, 195. In the South African case of *Bhyatt v Commissioner of Immigration* 1932 AD 125 129, Stratford JA opined that 'in construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the legislature could not have intended'.

38 CW case NO 4733 of 2004 (2007) INRJHC 5718.

39 See n 14 above.

40 1904 1 CCR 329.

law world. For example, Chief Justice Dickson in the famous Canadian case of *R v Big M Drug Mart Ltd*[41] was of the view that the proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one, pointing out the Charter was not enacted in a vacuum. It had to be placed in its proper linguistic, philosophic and historic context and that the interpretation should be generous, rather than legalistic one, aimed at fulfilling the purpose of the guarantee securing for the individuals the full benefit of the Charter's protection.

Finally, much closer to home, the South African Constitutional Court has emphasised and re-emphasised the purposive approach to constitutional construction in a number of landmark decisions.[42] In the specific circumstances of South Africa with its painful history, the Court admonished as follows:

> Our Constitution embodies the basic and fundamental objectives of our Constitutional democracy. Like the German Constitution it has "an inner unity and the meaning of any one part is linked to that of other provisions. Taken as a unit [our] Constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate". Individual provisions of the Constitution cannot therefore be considered and construed in isolation. They must be construed in a manner that is compatible with those basic and fundamental principles of our democracy. Constitutional provisions must be construed purposively and in the light of the Constitution as a whole.[43]

These foreign case laws show that, in a case such as that of Hichilema where a fundamental right to be heard by an impartial court was implicated, it was monumentally wrong for the majority of the Court to dismiss the petition in any case after sitting for only ten court days, if weekends are excluded.[44] The material conditions referred to by Munalula J made it clear that such an important case could not have been set down and argued in 14 days. The importance of these historical antecedents referred to earlier by Lord Wilberforce and of the context implicated cannot be over-emphasised.

In that context, the South African Constitutional Court could not have been more apt when it intoned that

> … the Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises

41 1985 1 SCR 295.

42 *S v Mkwanyane and Another* 1995 (3) SA 39 para 266; Investigative Directorate; Serious *Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 para 2.

43 *Matatiele Municipality v President of the Republic of South Africa* 2007 (6) SA 477 para 36.

44 The computation of time under Article 269 of the Constitution and Order XV of the Rules of the Constitutional Court 2016 exclude public holidays and weekends.

> the constitutional enterprise as a whole. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of the Act and to read the provisions of the legislation, so far as possible, in conformity with the Constitution.[45]

The process of constitutional interpretation must therefore be context-sensitive instead of focussing on the so-called intention of the legislature. In construing the provisions of a constitution, it is not sufficient to focus only on the ordinary or contextual meaning of a phrase. The proper approach to constitutional interpretation involves a combination of textual approach and structural approach. Any construction of a provision in a constitution must be consistent with the structure or scheme of the Constitution. This provides the context within which a provision in a constitution must be construed.[46] In similar vein, in the matter between the *Government of the Republic of Namibia and Another v Cultura 2000 and another*,[47] the Court of Appeal for Namibia quite correctly opined that a court called upon to interpret a constitutional instrument should avoid giving a narrow, mechanistic, rigid and artificial interpretation to such an instrument. Mahomed J, in his characteristic grandiloquent style, emphasised this:

> A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must be broadly, liberally and purposively be interpreted so as to avoid the austerity of tabulated legalism and so to enable it to contribute to play a creative and dynamic role in the expression and the achievement of the ideas and aspirations of the nation, in the articulation of the values bonding its people and disciplining its government.[48]

As pointed out in the introductory section, the decision of the majority of the Court in upholding the literal meaning of 14 days and rejecting the purposive approach to constitutional interpretation has been severely criticised by academic commentators and laypersons alike. One of the most acerbic criticisms has been penned down by Prof. Muna Ndulo, the doyen of Zambian law. In an article titled 'The Judicial Crisis in Zambia: And a flawed Election,'[49] the learned scholar opined that 'there is no denying that Zambia's judicial system, especially the Constitutional Court, is in a crisis. It has failed its constitutional role', and he went on to say that the Court has displayed 'unbelievable mediocrity and is an embarrassment to Africa and the rest of the world.'[50] He submitted that the September 5

45 In Investigating Directorate: *Serious Economic Offences and Others V Hyundai Motor Distributors (Pty) Ltd and Others* in *Re Hyundai Motor Distributors (Pty) and others v Smit NO and Others* 2001 (1) SA 545 (CC) 21-22. See also quoted in *Juleiga Daniels v Robin Grieve Campbell No and Others*, 2003 case CCT40/03 21-22

46 *Matatiele*, para 37.

47 1994 (1) SA 407 (NMSC).

48 Mahomed J, as he then was; paras 20-21.

49 Ndulo, *op cit* note 20 1.

50 *Ibid.*

decision to dismiss the petition was illegal, irregular and unprofessional and has no legal effect. 'It must pass as the worst spectacle of judicial rascality anywhere in the world.'[51]

In condemning the Constitutional Court, in particular the majority decision, Ndulo asks a number of telling questions: 'When did the Judges' conference to arrive at a new decision take place? Who called this meeting and in what context? How do three judges overrule a full bench properly constituted at what is a clearly irregular meeting? Who re-opened the issue? When was the application for reopening made and to whom and where? When was the application heard?'[52]

Ndulo concludes his series of questions by positing that the only logical conclusion was that the three judges (Mulonda J, Mulenga J and Sitali J) caucused on their own over the weekend and decided to overrule the subsisting ruling of the full bench.[53] Ndulo's strong condemnation must be understood in the context of immense implications of the presidential election petition to the country's nascent constitutionalism, particularly as the petition implicated the petitioners' fundamental right to have the petition heard and adjudicated upon by a fair and impartial tribunal.[54] That is what the constitution of Zambia itself demanded with respect to the Court's power to enforce the provisions of the Constitution underlying the constitutional guarantees of basic human rights and fundamental freedoms.[55]

In this respect, Ndulo raises further concerns with huge repercussions to Zambia's constitutional project as follows: the lack of integrity or even active corruption within institutions mandated to enforce and safeguard the rule of law as particularly alarming and destructive to society; that the majority decision completely undermined the integrity of the Court and exposed some of its judges as either incompetent or partial or both; the court made contradictory decisions at least on three occasions culminating in the abrupt termination of the hearing contradictions the earlier commitments that it would not do so because only ten working days lapsed instead of 14 and, lastly, that judicial powers ought to be exercised judiciously. Essentially it must be exercised in the interest of substantial justice and not to defeat the common will of the people on a narrow, mechanistic, rigid, and artificial interpretation of constitutional principles.[56]

Ndulo's criticism of the Court's approach to interpretation is reminiscent of Lord Atkin's famous observation in the wartime case of *Liversidge v Anderson*[57] to wit:

> I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the

51 *Ibid*. In similar vein, another learned commentator, Monyonzwe Hamalengwa has opined that what happened in Zambia will be difficult to live down for decades. 'Was justice served or was this monumental injustice personified?' See 'Gigantic judicial reforms are needed for presidential election petitions' *Zambian Eye* (2016) 2.

52 Ndulo, *op cit*, note 20 2.

53 *Ibid*.

54 Article 18 of the Bill of Rights, 1991 Constitution of Zambia.

55 Constitution of Zambia (Amendment) Act 2 of 2016 in particular Article 118(1) which demands that judicial authority should be exercised in a just manner in order to promote accountability and Article 118(2) on dispensing justice to all without discrimination.

56 Ndulo, *op cit* n 20 4.

57 [1942] A.C 206 (H.L); see also [1941] 3 ALLER 338.

> liberty of the subject show themselves more executive minded than the executive …[58]

Of course, Lord Atkin was protesting against what he perceived to be an abdication of responsibility by the majority of the Law Lords to investigate and control the executive by a strained construction put on words with the effect of giving uncontrolled power of imprisonment to the to the Minister, Sir Anderson. This point is examined in the next section of the article.

3. Are there unreviewable discretionary powers?

in the case of *Milford Maambo and Others v The People*,[59] which came before the Constitutional Court by way of a referral from a Subordinate Court, the question before the Court was whether the DPP had unfettered powers to discontinue criminal proceedings by way of *nolle prosequi.* A related question was whether the DPP was required to give reasons to the court in entering a *nolle prosqui*? At the heart of the dilemma was the proper interpretation of Article 180(4)(c) and (7) of the Constitution as amended which reads as follows:

> (4) The Director of Public Prosecutions may:
>
> (a) discontinue, at any stage before judgment is delivered criminal proceedings instituted or undertaken by the Director of Public Prosecutions or another person or authority.
>
> (7) The Director of Public Prosecutions shall not be subject to the direction or control of a person or an authority in the performance of the functions of that office, except that the Director of Public Prosecutions shall have regard to the public interest, administration of justice, the integrity of the judicial system and the need to prevent and avoid abuse of the legal process.

As will be elucidated below, the same trio of judges – Sitali, Mulenga and Mulonda – now joined by Mulembe J adopted the same literal rule of statutory construction in deciding whether the DPP was obliged to give reasons in deciding to discontinue criminal proceedings by way of *nolle prosequi*.[60]

The material facts in that case were not complicated. The three applicants were charged before a magistrate's court with 25 counts relating to corrupt practices by public officers, corrupt acquisition of public property and revenue and abuse of authority. Before the commencement of the trial, the state prosecutor tendered a *nolle prosequi* to discontinue the proceedings under the authority of the DPP. However, defence counsel objected to the entry of the *nolle prosequi*, averring that the *nolle prosequi* did not meet

58 [1941] 3 ALLER 338, 361-362.
59 2016/CC/R0001, No 31 of 2017.
60 See pages 35-37 where the Court referred to the plain language or clear provisions of Article 180 (4)(c) of the Constitution.

the conditions set out in Article 180(4)(c) and (7) quoted above, as no reasons were given to the court for entering such a *nolle prosequi*. He therefore requested for a constitutional reference to the Constitutional Court, stating that the law governing the tendering of the *nolle prosequi* needed to be interpreted authoritatively by the Constitutional Court so as to quieten doubts and settle the law.

Before the Constitutional Court, counsel for the applicants argued, inter alia, that the usage of the word 'may' in Article 180(4)(c) of the Constitution in place of the word 'shall', as used in the Constitution before the 2016 amendment, should be understood to mean that the DPP had to seek leave of the court before he or she could discontinue criminal proceedings by entering a *nolle prosequi*. Counsel sought to fortify his submissions by relying, inter alia, on the mischief rule as enunciated in the old English case of Heydon,[61] namely that the mischief which the legislature sought to prevent was abuse of process on the part of the DPP by entering indiscriminate *nolle prosequis*. One way of curing that defect in the law was by requiring the DPP to furnish reasons for entering a *nolle prosequi* acceptable to the court.

In reply, learned counsel for the state submitted that relying on ordinary rules of statutory interpretation, the word 'may' was not mandatory but permissive, thus the legislature clearly implied that the DPP had discretion in the use of the *nolle prosequi* and further that Article 180(7) made it clear that in exercising his or her powers, the DPP was not subject to the control of any person or authority including the courts. He referred to other jurisdictions where the word 'may' had been interrupted as conferring discriminatory powers. He concluded his submissions by arguing that, if the legislature had intended that the DPP should give reasons for entering a *nolle prosequi*, the Constitution would expressly have stated that in view of the critical position of the DPP in the criminal justice system.

A divided court (4-1) came down in favour of the literal construction of Article 180(4)(c). Writing for the majority, Sitali J started off by observing that the Constitution was the supreme law of the land and thus ranked above all other laws and that the starting point in interpreting the Constitution was to use the literal rule of interpretation where the words were in the text were clear and unambiguous. She went on to opine that '[i]n interpreting the Constitution, the primary principle of interpretation was that the meaning of the text should be derived from the plain meaning of the language used and that other principles of interpretation should only be resorted to where there was ambiguity or where the literal meaning would lead to an absurdity.'[62] In her considered opinion, the provisions of Article 180(4)(c) were clear and unambiguous in conferring discretionary powers on the DPP to discontinue criminal proceedings at any state before judgment was delivered.

61 Heydon's case (1584) 76 E.R. 637.

62 Milford Mambo case, supra, 21-22 relying on the cases of *Faustine Mwenya Kabwe and Aaron Chungu v Justice Ernest Sakala, Justice Peter Chitengi and the Attorney General*. Selected judgments of Zambia, No 25 of 2012 and *The Attorney General and Another v Akashambatwa Mbikusita Lewanika and Others* (1993/94) ZR 164.

After referring to a few authorities on statutory interpretation and to the legislate history of the Article in question, she held that there was no basis for the Court to hold that Parliament had intended that the DPP should obtain leave of the Court before discontinuing criminal proceedings. Further, that the factors set out in clause 7 of Article 180, quoted above, which the DPP had to consider, were meant to guide the DPP in the performance of the functions of his or her office and not in any way intended to place a fetter on the discretion of the DPP.[63] Thus, with a few strokes of the pen, the majority clothed the DPP with unreviewable discretionary powers.

It is trite that the principle of constitutional supremacy enshrined in Article 1 of the Constitution demands that the powers of governmental functionaries are circumscribed by the Constitution as the supreme law of the land. What is more, the Constitution controls the manner in which repositories of state power should exercise their powers and discharge their functions. In the present case, Article 180(7) has a very important caveat to wit: '…except that the DPP shall have regard to the public interest, administration of justice, the integrity of the judicial system and the need to prevent and avoid abuse of the legal process.'

This entails that the DPP is enjoined to have regard to these four stipulations, namely public interest, administration of justice, the integrity of the judicial process and the need to prevent and avoid abuse of the legal process in deciding whether or not to discontinue criminal proceedings. This point is alluded to later in the concluding section of this article. For now, turn to the dissenting opinion of Munalula J.

The dissenting judgment of Munalula J is very illuminating and is in stark contrast to the arid decision of the majority. Munalula J started off by reiterating that a constitution ought to be interpreted purposively in such a manner that the constitutional text is read as a whole with its provisions understood in their historical context and not in isolation. The central thesis underpinning her judgment is that the DPP's action in entering a *nolle prosequi* was subject to judicial review and that he or she had to give reasons for the decision. She arrived at this conclusion after an erudite and exhaustive review of the authorities, both in Zambia and comparable jurisdictions such as Kenya, South Africa, United Kingdom and Zimbabwe.

In all these countries, the decision to enter a *nolle prosequi* is subject to judicial review in appropriate cases, *albeit* that the power of judicial review is exercised sparingly in such cases. With respect to Zambia's constitutional history since independence in 1964 to the present, Munalula J first referred to Article 267 of the Constitution, 2016 which requires that the Constitution should be interpreted in a manner that broadens rather than narrows fundamental human rights and that which strengthens the democratic tenets of the country's governance system; promotes the purposes, values and principles laid down in the Constitution and permits the development of the law.

Secondly, Munalula J referred to Article 267(4) of the Constitution, 2016 which provides, inter alia, that when the Constitution said a person or authority or institution was not subject to the discretion or control of a person or an authority in the performance of a function, that did not preclude a court from exercising jurisdiction in reaction to a

63 Sitali, J 36.

question as to whether that person, authority or institution had performed the function in accordance with the Constitution. If the powers of the DPP were exempted from the purview of judicial review, the Article would have expressly said so.

Thirdly, the learned judge emphasised the profound effect of a *nolle prosequi* of an accused person's enjoyment of the rights and freedoms and added these seminal observations:

> Prosecution of an individual in our democratic dispensation entails an open and transparent process, throughout which reasons for decisions are apparent. The act of suspending a prosecution, only to have the threat of its reinstitution hanging over a "suspect" indefinitely perhaps for the rest of their life does not fit the ideal in our Bill of Rights that every person is "innocent until proven guilty". It diminishes the right to be heard. To minimize such eventuality, the DPP must exercise the discretion to enter a *nolle prosequi* in accordance with Article 180 and be seen to have so acted.[64]

She concluded by emphasising that the DPP must not only give reasons for entering a *nolle prosequi* but those reasons must satisfy the exception in Article 180(7), namely the public interest, administration of justice, the integrity of the judicial system and the need to prevent and avoid abuse of the legal process and that in appropriate cases judicial review can be invoked to ensure compliance. In her view, clothing the DPP with absolute powers was incongruous with the provisions of the Constitution as a whole and was contrary to the fundamental tenets of checking and balancing power, aspired by the Constitution and constitutionalism.[65]

For the purposes of this article, it is submitted that the minority judgment of Munalula J correctly reflects the position of the law. In country with a written constitution which is supreme, all branches of government including the courts and the DPP are bound by it. Article 118(1) of the Constitution makes it very clear that judicial authority of the Republic derives from the people and should be exercised in a just manner and in such a way as to promote accountability.[66] It goes without saying that the giving of reasons for the DPP's decision to discontinue criminal proceedings is at the heart of an accountable government. In ending this part of the article, it is instructive to recall these seminal words from the Tanzanian Court of Appeal: 'The Constitution is a living document with a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must therefore endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of. A timorous and unimaginable exercise of judicial power of constitutional interpretation leaves the Constitution a stale and sterile document."[67]

64 Munalula, 65.
65 Munalual, 66.
66 See further *Kapoko v The People* No 43 of 2016; *Katuka and Another v Attorney General and others* No-29 of 2016.
67 *Ndyambo v Attorney General* 2011 (2) E A 485 493.

4. Conclusion

This article has been concerned with constitutional interpretation in Zambia. It has been argued that the Constitutional Court as the apex Court in the country has the ultimate authority to say what the law is on any given point. However, in two cases used in this article, the Court has not covered itself in glory, leading to accusations of gross incompetence and grand corruption. Yet, the Constitution is the supreme law of the country, binding all persons, state organs and state institutions. Any law, act or omission inconsistent with the Constitution is invalid. The Constitution further embodies a set of normative values and principles including constitutionalism, good governance and integrity. This normative value system should animate and inform the exercise of state power including decision-making by the courts.[68]

In the case of interpreting a constitutional provision implicating the human rights of the subject, the balance of authority is in the favour of a purposive and generous approach as opposed to a narrow, legalistic interpretation. It is the hope that this article will excite some further thoughts on this very important aspect of Zambia's constitutional trajectory.

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68 Constitution of Zambia (Amendment) Act 2 of 2016, Articles 1 and 8.

Shareholder Activism and Acting in Concert during Takeovers under the Companies Act 71 of 2008

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Abstract

This article discusses the interaction between shareholder activism and the concept of acting in concert as applied under the takeover provisions of the Companies Act 71 of 2008. The takeover provisions are aimed at protecting minority shareholders during takeovers. Shareholder activism is on the increase throughout the world. It is viewed both positively and negatively. Shareholder activism is on a wide spectrum. Shareholder activists may seek to bring about a number of changes in a company, including better performance, change in management or even a takeover. This article discusses shareholder activism, focusing on the change of control transactions in companies – takeovers of companies. This is particularly relevant in view of the assertions that the application of acting in concert rules under the takeover provisions may deter shareholder activism. The article proceeds as follows: it provides an introductory remark on shareholder activism and its interaction with the takeover provisions; briefly deals with takeover transactions and defines the concept of acting in concert; as well as exploring how this concept is applied during takeovers, both in South Africa and in the United Kingdom. The article concludes by highlighting how acting in concert provisions seeks to strike a balance between shareholder activism and the powers of directors to manage the company's affairs. Finally, it makes suggestions on how shareholder activists should proceed so as to avoid falling foul of the takeover provisions.

Keywords

acting in concert; Companies Act 71 of 2008; shareholder activism; takeover provisions; Takeover Regulation Panel

'[T]akeover law is an intensely practical topic.'[1]

1 Payne, J *Takeovers in English and German Law* (1st Ed., Hart Publishing 2002) 6.

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1. Introduction

Globally, shareholder activism is on the rise.[2] In South Africa, 'following global trends attributable to an increasingly internationalised shareholder base […] shareholder activism has been on the rise, and the market has started to take note of the influence shareholders can wield.'[3] A number of companies listed of the JSE Limited have recently experienced this phenomenon.[4] Shareholder activists question managerial decisions and demand corporate accountability.[5] Their motivation and tactics are different. Some are in pursuit of better financial returns from the investee company, while others are motivated by a prospect of achieving objectives that are socially beneficial to the community at large. Shareholder activists who seek increased financial returns may put pressure on directors to sell loss-making divisions to improve the company's financial performance, request directors to increase the dividend payout ratios, or request directors to consider payment of a dividend if a company has a policy of not paying a dividend. On the other hand, social activists seek to influence corporate decision-making to achieve a more just society.[6] Some activists are aggressive, mounting a number of public campaigns that may include hostile press releases. Others may adopt a 'friendly' approach, discreetly approaching companies and putting various proposals for consideration by the board.[7]

Shareholder involvement in corporate affairs can be viewed as a continuum of possibilities.[8] It ranges from those shareholders who invest without involving themselves in the company and those in the middle whose activism try to influence rules of the game (in investing) to those activists at the extreme end who seek to 'take an active role in the day-to-day business of the firm.'[9] The latter are activists who may be aiming to take operational control of a company. They are often motivated by short term financial gains. Such activists seek to take control of a company and are unlikely to declare their intentions at an early stage of a takeover as these could make it difficult to succeed. Hence, in some countries, takeover provisions require disclosures of the acquisition of shares above a certain percentage.[10]

2 Viviers, S 'Executive remuneration in South Africa: Key Issues Highlighted by Shareholder Activists' (2015) *African Journal of Business Ethics* 6.

3 Davids, E and Ntamane, X 'Shareholder Rights and Activism Review-South Africa' (2017) *The Law Reviews* 100.

4 Paxton S 'Shareholder Activism and the Role of the Company Secretary' (2020) 6-11 <https://bit.ly/3EN45jG> accessed 3 September 2021. In the guide, the author discusses a number of instances where shareholder activists raised their displeasure against companies. The issues raised are varied. They include climate change, as in the case of *Standard Bank of SA Limited*, and directors' remuneration policies in the case of *Tongaat Hulett Limited*.

5 Viviers (n 2) 5.

6 *Ibid* 6.

7 Davids and Ntamane (n 3) 109, indicate that one of the large asset managers, as part of shareholder activism, suggested that shareholders must approve certain payments, such as golden handshakes of a regulated listed company.

8 Nili, Y 'Missing the Forest for the Trees: A New Approach to Shareholder Activism' (2014) 4 *Harvard Business Law Review* 169.

9 *Ibid* 169-170.

10 Section 122 of the Act requires disclosures of acquisitions of 5% or more of shares of a regulated company. Such disclosures assist in revealing any potential stake building at an early stage of a transaction.

It appears that takeover regulators regard activists who aim to take control of a company with suspicion. Regulators suspect that an activist who wants to take control of a company is likely to attempt to avoid compliance with the takeover provisions as compliance with these provisions may cost a substantial amount of money and reduce the financial gains from the takeover.[11] Some takeover provisions have been put in place to regulate the conduct of this type of activist. This article focuses on shareholder activism aimed at acquiring control of a regulated company. It also provides advice on how some of the actions of shareholders activists may be affected by the takeover provisions.

An overview of research suggests that there is a dearth of scholarly articles on shareholder activism and its interaction with the takeover provisions of Chapter 5 of the Companies Act 71 of 2008 (hereinafter "the Act"), and the regulations in Chapter 5 of the Companies Regulations 2011 (hereinafter "the Regulations"). The purpose of this article is to add research to this area of corporate law. The article provides a highlight of some of the issues involved in shareholder activism and the supervision of takeovers under the Act.

For the sake of brevity, in this article, the provisions of Chapter 5 of the Act and the Regulations are jointly referred to as the 'takeover provisions'. The takeover provisions and the Regulations govern how affected transactions should be undertaken. And 'affected transactions', as defined in the Act, are referred to as 'takeovers'. The article is structured as follows: it provides a brief overview of the takeover provisions and the concept of acting in concert during a takeover. The article then discusses how the concept is applied, both in South African and in the United Kingdom. Finally, the article concludes with suggestions as to how shareholder activists should proceed during takeovers to avoid breaching the takeover provisions.

2. An overview of the takeover provisions

The takeover provisions apply to regulated companies when these companies undertake affected transactions. These are public companies, state-owned companies unless exempted, and private companies which had 10% or more of their issued securities transferred between unrelated parties within a period of 24 months immediately prior to the date of the particular affected transaction or offer, or if the memorandum of incorporation of a private company provides that the company is subject to the takeover provisions.[12] Affected transactions include a transaction or series of transactions amounting to the disposal of all or the greater part of the assets or undertaking; amalgamations or mergers; a scheme of arrangement between a regulated company and its shareholders; the acquisition of, or announced intention to acquire a beneficial interest in any voting securities; the announced intention to acquire a beneficial interest in the remaining voting securities of a regulated company not already held by a person or persons acting in concert; a mandatory offer; as well as the compulsory acquisition of shares.[13]

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11 See discussions under para 3.2 below and the extract from the United Kingdom Panel Statement 1989/13 3.

12 Sections 118 (1) and (2) of the Act.

13 Section 117(1)(c) of the Act.

The takeover provisions are enforced by the Takeover Regulation Panel (the Panel) that is has been established in terms of section 196 of the Act. Affected transactions give rise to a number of potential conflicts.[14] Hence the need for supervision. Conflicts include the fact that the offeror may want to pay the lowest price to buy the shares while existing shareholders want to sell at the highest price.[15] Conflicts could also arise between the major shareholder and minority shareholders.[16] The main aim of the regulatory activity of the Panel is to protect minority shareholders during a takeover. This is done by enforcing a number of provisions, including disclosures during a takeover, thereby enabling shareholders to make an informed decision about a takeover. The Panel seek to foster fairness, equity and orderly takeovers.[17]

The takeover provisions are based on the United Kingdom Takeovers Code (commonly referred to as the City Code),[18] and therefore, a brief excursion into the application of the concept of 'acting in concert' is undertaken in paragraph 4.2 underneath. As indicated on the United Kingdom Takeovers and Mergers' Panel website:

> The City Code on Takeovers and Mergers (the "Code") has been developed since 1968 to reflect the collective opinion of those professionally involved in the field of takeovers as to appropriate business standards and as to how fairness to shareholders and an orderly framework for takeovers can be achieved.[19]

It is generally accepted that takeover provisions are important and are necessary to foster investment on the stock markets.[20] The takeover provisions, amongst others, promote integrity in financial markets and fairness to shareholders.[21] They also ensure transparency, provision of relevant information to shareholders and equality of treatment between shareholders.[22] The takeover provisions also set out certain conduct which may not be undertaken during a takeover, unless shareholders have approved the transactions and the Panel has approved such a transaction.[23]

In addition, certain dealings between shareholders are not allowed during a takeover or prior to a takeover, unless certain prerequisites are met.[24] In this manner, minority shareholders are protected because activists aiming for short term gains are not without any restrictions where these gains are to be realised through a takeover. Fair treatment

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14 Luiz, S 'Protection of Holders of Securities in the Offeree Regulated Company During Affected Transactions: General Offers and Schemes of Arrangements' (2014) 26 *SA MERC LJ* 560.

15 *Ibid* 560.

16 *Ibid*.

17 Section 119(1) and 119(2) of the Act.

18 Luiz, S *An evaluation of the South African Securities Regulation Code on Takeovers and Mergers* LLD Thesis (Unisa 2003) 573-1022. Luiz, in the thesis, comprehensively traces the development of takeover laws in South Africa.

19 The Takeover Panel 'The Takeover Code' (n.d.) <https://bit.ly/2XLbWNy> accessed 13 August 2020.

20 Stein, C *The New Companies Act Unlocked* (2011) 23.

21 Section 119(1) (a) of the Act.

22 Section 119(1) (b) of the Act.

23 Section 126 of the Act.

24 Section 127 of the Act.

of shareholders translates into equal treatment or equitable treatment of shareholders.[25] The Panel is limited in what it must regulate. In terms of section 119(1) of the Act, when regulating affected transactions, the Panel must not have regard to commercial advantages or disadvantages of any transaction or the proposed transaction. Further, section 201(3) of the Act provides that, in exercising its powers and performing its functions, the Panel must not express any view or opinion on the commercial advantages or disadvantages of any transaction or proposed transaction.

3. Acting in concert during takeovers

Rules dealing with parties that act in concert to acquire control of a company are necessary to protect minority shareholders against abuse. These rules are in accordance with the principles of takeover laws that seek to protect minority shareholders during a takeover. It is suggested that the rules dealing with acting in concert are intended to curb the actions of shareholders who want to acquire or assist in acquiring control of a regulated company without adhering to the takeover provisions.

For the purposes of the takeover provisions, control of a company is defined with reference to a holding of 35% or more of the voting securities of a regulated company.[26] Parties acting in concert who acquire this threshold may be obliged to acquire the shares of the remaining shareholders, even if they did not want to acquire all the shares of the regulated company, as provided for, in terms of the mandatory offer section.[27] In terms of section 115(4) of the Act, parties acting in concert may be precluded from voting when a regulated company proposes a fundamental transaction.[28]

Under section 117(1)(b) of the Act, to act in concert refers to any action pursuant to an agreement between or amongst two or more persons, in terms of which any of them cooperate for the purpose of entering into or proposing a takeover. The section must be read with sections 117(2) and 118(5) of the Act, as well as with Regulation 84, dealing with presumptions that certain persons act in concert during takeovers. During a proposal for a takeover, the definition of parties acting in concert should closely be considered. This is because a declaration by the Panel that parties acting in concert may have adverse financial consequences for the parties. The phrase ‘acting in concert’ is used to describe parties who co-operate or act together to achieve a particular end or object.[29] Therefore, there must be an understanding or agreement between the parties as to their common purpose and, pursuant to which they so cooperate.[30] The separate shareholdings of parties

25 Luiz, S ‘Protection of Holders of Securities in the Offeree Regulated Company During Affected Transactions: General Offers and Schemes of Arrangements’ (2014) 26 *SA MERC LJ* 564.

26 Sections 123(1) and 123(5) read with Regulation 86(1).

27 Section 123 of the Act.

28 Fundamental transactions are dealt with under Part A of Chapter 5 of the Act. These transactions are: a transaction or series of transactions amounting to the disposal of all or the greater part of the assets or undertaking under section 112, amalgamations or mergers under section 113 and a scheme of arrangement between a regulated company and its shareholders under section 114.

29 Yeats, J et al *Commentary on the Companies Act of 2008* (Juta 2018) 5-47.

30 *Ibid*.

who are considered to be acting in concert in relation to a takeover are aggregated.[31] Not all parties acting in concert have to be shareholders for the concept to apply to them.[32] In this context, it is not surprising that advisers may be included as parties acting in concert.[33] Henochsberg indicates as follows:

> Three or more persons act in concert with one another, operate with any of the others for stated purposes; thus, e.g., where A, B, C and D agree with one another to propose an affected transaction, D will act in concert, in this context, with A, B and C notwithstanding that he is to remain entirely passive in relation to the actual proposal or the entering into such in this context, even if one (or more) of them in fact is (are) not to co-transact.[34]

According to Henoschberg,[35] acting in concert has two distinct parts based on the definition. First, the cooperation between the parties must be pursuant to an agreement. Secondly, the cooperation between the parties, or any of them, must have as its purpose the entering into or proposal of an affected transaction or offer.

It appears that the legislature sought to expand the application of acting in concert. The takeover provisions intend to make the category of parties who may act in concert to be broad.[36] Section 117(2) of the Act adds that for the purpose of the takeover provisions, two or more related or inter-related persons are regarded to have acted in concert unless there is satisfactory evidence that they acted independently in any particular matter. In addition, section 118(5) provides that a person who has been granted an option to acquire shares that have voting rights in a regulated company is presumed to have acted in concert with the grantor of the option, unless the grantor retains the voting rights.

The Regulations also provide that certain persons are presumed to be acting in concert with one another in addition to those referred to in section 118(5). It is presumed that a company is acting in concert with any of its directors.[37] Further, it is presumed that a company is acting in concert with any company controlled by one or more of its directors.[38] In addition, it is presumed that a company is acting in concert with any trust of which any one or more of its directors is a beneficiary or a trustee.[39] The final presumption is that any of the company's pension funds, provident funds or benefit funds and share incentive schemes are acting in concert with one another.[40]

It is notable that the takeover provisions create presumptions about parties acting in concert. This suggests that the drafters created the presumptions to assist in the enforce-

31 Ryde, A and Turnbill, R 'Share Dealings: Restrictions and Disclosure Requirements' *in* Button, M (ed) *A Practitioner's Guide to The City Code on Takeovers and Mergers* (City & Financial Planning [2006/2007]) 78.
32 Yeats et al. (n 29) 5-50.
33 *Securities Regulation Panel v MGX Limited*, (WLD) Case Number 16026/03, 23 June 2004 (Unreported), para 17.
34 Delport, PA and Vorster, O *Henochsberg on the Companies Act 71 of 2008* (2012) 426(4).
35 *Ibid*.
36 *Ibid*.
37 Regulation 84(1)(a)(i).
38 Regulation 84(1)(a)(ii).
39 Regulation 84(1)(a)(iii).
40 Regulation 84(1)(b).

ment of this concept and reduce avoidance of the takeover provisions by persons acting in concert. It is arguable that the presumptions may make it easier for regulators to prove that certain persons are acting in concert for the purposes of a takeover. Parties who are said to be acting in concert would then have an obligation to prove that their actions do not fall within the meaning intended by the takeover provisions.

Shareholder activists are often concerned (in my view, rightly so) that they may be declared to be acting in concert when pursuing shareholder activism in a regulated company.[41] According to the activists, the acting in concert provisions makes it difficult to cooperate with other shareholders to initiate some actions or transactions in regulated companies.[42] It appears that these concerns are not limited to shareholder activists in South Africa, as indicated above in paragraph 4.2.

However, it should be noted that acting in concert on its own does not necessarily mean that such parties will be required to make a mandatory offer to other shareholders. It is suggested that the actions of parties acting in concert, and the consequences thereof, if any, should be considered on a case-by-case basis. In some instances, the obligation of parties who acted in concert may be to disclose the concert party relationship in the appropriate form and file it with the Panel.[43] Persons acting in concert are also required to notify the Panel that they have ceased to act in concert within five days of such arrangement or agreement.[44] The notification assists the Panel in monitoring and regulating the conduct of such persons, including any acquisition of further securities by any of the concert parties.[45] This may result in enforcement action by the Panel of the relevant takeover provision. In serious cases, parties acting in concert may be required to make a mandatory offer,[46] or the voting rights of parties acting in concert may be restricted when a regulated company undertakes relevant transactions.[47]

It is submitted that in the main, the concept of acting in concert is aimed at activists who seek to acquire control and not those shareholders who may want to dispose of their shares. For instance, a major shareholder indicating that it proposes to accept an offer does not act in concert with the offeror.[48] It is suggested that even if such a person signs an undertaking to accept an offer, it does not act in concert with the offeror unless the undertaking goes beyond a mere acceptance of the offer. The purpose of signing the undertaking to accept an offer is to facilitate the offer to purchase the shares. It provides assurance to the offeror and a shareholder that, if and when the offer is made, the sale of the shares will be achieved between the parties, in accordance with the terms of the undertaking. Such an undertaking facilitates the disposal of the shares to the new

41 Mans-Kemp, N and Van Zyl, M 'Reflecting on the Changing Landscape of Shareholder Activism in South Africa (2021) *The South African Journal of Economic and Management Sciences* 24(1) 8 <https://doi.org/10.4102/sajems.v24i1.3711> accessed 25 June 2021.

42 *Ibid* 8.

43 Regulation 84(5).

44 Regulation 86(5). The reporting is done on Form TRP 84.

45 Section 119(1) of the Act provides, amongst others, that the Panel must regulate affected transaction as defined in the Act, which includes disclosures relating to such transactions.

46 Section 123 of the Act.

47 Section 115(4) of the Act.

48 Yeats et al. (n 29).

shareholder even if by so doing, the new shareholder may obtain control of a company. Similarly, an undertaking to vote in favour of a resolution proposing a takeover does not make the parties to act in concert for the purposes of a takeover.

The Regulations explain some instances where acting in concert on its own does not lead to an obligation to make a mandatory offer.[49] These include where: (a) at the time of coming into concert, each of the concert parties was entitled to exercise voting rights which were less than the prescribed percentage; (b) as a result of coming into concert, they are entitled, in aggregate, to exercise voting rights exceeding the prescribed percentage and (c) none of them has acquired any further voting securities in the regulated company. In these instances, shareholder activists need not be concerned that their collective actions, such as voting together to remove a director or to propose a value-enhancing transaction in a regulated company, may lead to unfavourable consequences under the takeover provisions. Provided the activists adhere to the takeover provisions, such actions should not have major consequences.

4. Application of acting in concert to shareholder activism

4.1 Introductory comments

Shareholders are likely to be deterred from collective action to influence the board if they fear that they will be required to make a general offer for all the shares of the company.[50] One of the strategies of activists is to acquire shares in the company before they start their activism intervention but after a decision to intervene has been made so that they may benefit since successful activism will increase the share price.[51] Restriction on acquisitions may also have a negative impact on willingness of shareholder activists to engage in value-enhancing activism.[52] Free-riders may benefit from increased share price brought about by the actions of activists.[53]

Comprehensive general rules for application to the concept of acting in concert appears to be futile. It has been pointed out that '[a]n exhaustive definition [of acting in concert] would be difficult'.[54] Perhaps it is for this reason that acting in concert rules include presumptions, as discussed above. The complexity of the acting in concert rules often make them difficult to interpret and apply to the ever-evolving and fast-moving corporate takeover transactions. The Panel may also not be able to immediately issue a ruling as to whether particular conduct and act taken by activists constitutes acting in concert. This is due to the legal implications of such pronouncements. Such rulings may be classified as administrative actions, and, therefore, the rulings must be issued

49 Regulation 84(7).
50 Davies, PL and Worthington, S *Gower's Principles of Modern Company Law* (10th Ed., Sweet & Maxwell 2016) 966.
51 *Ibid*.
52 *Ibid*.
53 *Ibid*.
54 Statement of the United Kingdom Takeover Appeal Board in Rangers International Football Club PLC & Mr David Cunningham King 'Decision of the Takeover Appeal Board' para 103 <https://bit.ly/39z5LyP> accessed 3 September 2019.

lawfully, reasonably and with due regard to procedural fairness, unless they are merely clerical steps.[55]

It is suggested that the impact of collective voting may be influenced by the type of shareholders a company has. Are the shares tightly held or widely held? Shareholders with fewer shares are generally apathetic due to a number of factors, including lack of resources.[56] Apathetic shareholders have also been referred to as 'lazy investors'.[57] It is arguable that because of shareholder apathy, where the company's shares are widely held, fewer voting rights are necessary to influence voting in a particular direction. Therefore, the collective actions of shareholder activists may have a deciding influence under those circumstances. Collective voting may also result in shifting control to the activists. Lack of interest in the governance of the regulated company, as indicated by shareholder apathy at meetings of regulated companies, may inadvertently hand over control of the company to shareholder activists. There is a concern about giving controlling voting power to the chairperson or another party through non-directional proxies at the general meetings of regulated companies. [58]

In takeovers, shareholder activism and acting in concert is of particular importance as few shareholder activists may change the course of a takeover to their advantage. This may be prejudicial to the independent minority shareholder. Some of the important questions for shareholder activists are the circumstances that may support a view that they are acting in concert, and if so, the penalties that they may be liable to, if any. The penalties may be an obligation to make an offer under section 123 of the Act – the mandatory offer[59] or a restriction on their voting right when a regulated company undertakes a fundamental transaction.[60] As discussed underneath, these questions do not have easy answers and depend on each case's facts.

4.2 A brief discussion of acting in concert and shareholder activism in the United Kingdom

As indicated above,[61] the takeover provisions under the Act are based on the City Code. Therefore, a brief excursion into the City Code rules dealing with acting in concert is appropriate at this stage. Acting in concert under the definitions of the City Code is defined in the following way:

> Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), co-operate to obtain or consolidate control (as defined below) of a company or to frustrate the successful outcome of an offer for a company.[62]

55 Yeats et al. (n 29) 8-22.

56 Esser, I & Havenga, M 'Shareholder Participation in Corporate Governance' (2008) *Speculum Juris* (1) 78.

57 Weidemann, R 'Shareholder Activism – The Activist Revolt' *Directorship* (2015) 7.

58 Rayner, KAR & Connellan, RJ *Commentary on South African Takeover Law* (2015) 92.

59 Section 117(1)(c).

60 Section 115(4).

61 See n 16 above.

62 City Code, C1 definitions on Acting in Concert.

The explanatory notes further provide a non-exhaustive list of persons deemed to be acting in concert.[63] These include affiliates and a company, its parent, subsidiaries and fellow subsidiaries and their associated companies. An overview of the United Kingdom Panel on Takeovers and Merger (UK Panel) Practice Statements, based on the City Code and explanatory notes on acting in concert, suggests that applying acting in concert to actions of shareholder activists is not easy. The UK Panel, in an explanatory note to rule 9 of the City Code,[64] states that the majority of questions that arise in the context of rule 9 relates to 'persons acting in concert'.[65] Further, it is indicated that the debates on how to apply acting in concert have a long history.[66] The difficulty in interpreting and applying the acting in concert provisions of the City Code has been aptly indicated in the reasons of the UK Panel in the matter *of Guinness Plc and The Distillers Company Plc.*[67] In its reasons for the ruling, the UK Panel indicated as follows:

> The nature of acting in concert requires that the definition be drawn in deliberately wide terms. It covers an understanding as well as an agreement, and an informal as well as a formal arrangement, which leads to cooperation to purchase shares to acquire control of a company. This is necessary, as such arrangements are often informal, and the understanding may arise from a hint. The understanding may be tacit, and the definition covers situations where the parties act on the basis of a "nod or a wink". Unless persons declare this agreement or understanding, there is rarely direct evidence of action in concert, and the Panel must draw on its experience and common sense to determine whether those involved in any dealings have some form of understanding and are acting in cooperation with each other. In a typical concert party case, both the offeror and the person alleged to be acting in concert with it are declaring that, notwithstanding the circumstances, they have no understanding or agreement. The Panel has to be prepared realistically to recognise that business men may not require much by way of formal expression to create such an understanding. It is unnecessary for the Panel to know everything that actually passed between the parties in a take-over. In addition, the judgment required in an acting in concert issue must usually be made in the context of the assertions and arguments of persons whose interests will not be served by a finding of acting in concert – this is because such a finding inevitably entails consequences under the Code, often to the benefit of offeree company shareholders, which is the object of the concept, with a cost to the offeror.[68]

Guinness Plc appealed against the decision of the Divisional Court of the Queens' Bench Division that dismissed their application for a judicial review of the Panel's decisions. A subsequent appeal to the Court of Appeal, Civil Division, was dismissed.[69] The inter-relationship between shareholder activism and the mandatory bid rule has received

63 *Ibid.*

64 Rule 9 of the City Code deal with mandatory offers in the United Kingdom in a similar manner as section 123 of the Act.

65 City Code (12th Ed., 2016), Notes under rule 9.1 Acting in Concert.

66 United Kingdom Panel 'Panel Statement 1989/13' <https://bit.ly/3o5Kwxg> accessed 3 September 2019.

67 *Ibid* para 3.

68 *Ibid* para 3.

69 *R v Panel on Takeover and Mergers, ex parte Guinness plc.* [1989] 1 All ER 509.

specific attention from UK Panel.[70] The UK Panel does not seek to place obstacles to shareholder activism.[71]

In terms of the City Code, the day-to-day work of takeover supervision and regulation is carried out by the Executive (the Executive).[72] In carrying out these functions, the Executive operates independently of the UK Panel.[73] In this article, reference to the UK Panel refers to the Executive of the UK Panel, unless the context indicates otherwise. To assist in interpreting and applying the concept of acting in concert in the City Code, the UK Panel has issued a Practice Statement.[74] This is in addition to extensive explanatory notes provided under rule 9.1(2) of the City Code to deal with shareholder activism. The Practice Statement is more detailed than the explanatory notes under rule 9.1(2) of the City Code.

The Practice Statement deals with the concerns that the provisions of the City Code, dealing with actions of concert parties and the enforcement of the mandatory rule, act as a barrier to cooperative actions by fund managers and institutional shareholders.[75] The Practice Statement clarifies how the Executive is likely to apply the relevant provisions of the City Code.[76] In the Practice Statement, the Executive indicates that it does not normally regard the action of shareholders voting together on a particular action as an action which itself indicates that parties are acting in concert, but a presumption will be made that parties who requisition a 'board control-seeking' resolution as acting in concert with each other and the proposed directors.[77]

According to the Practice Statement, a mandatory offer may be triggered by shareholder activists if both the following are met: firstly, the concert parties request a general meeting at which meeting a resolution seeking board control is passed or is threatened; secondly, after such an agreement or understanding, is reached between the activists that a resolution for board control should be passed, or making such a threat, the activists acquire interests in shares which shares together carry 30% or more of the voting rights in the company (the threshold at which a mandatory offer is required in terms of the City Code), in the case where the concert parties have less than 30% of the voting rights, or where the concert parties acquire further shares which, if added to the already held shares, carry more than 30% of the voting rights.[78]

A question may be asked as to how one is to determine whether a resolution is 'board control-seeking'. In this regard, the UK Panel has given some indications on certain factors they consider relevant.[79] The factors include whether there is a significant relationship

70 Davies, PL & Worthington, S *Gower's Principles of Modern Company Law* (10th Ed., Sweet & Maxwell 2016) 966.

71 *Ibid*.

72 City Code, para 5 of the Introduction.

73 *Ibid* para 5.

74 Practice Statement No 26 (Practice Statement) (2009) <https://bit.ly/2XYfI6T> accessed 3 September 2019.

75 Practice Statement para 1.1.

76 *Ibid* para 1.2.

77 *Ibid* para 2.3 (b).

78 *Ibid* para 1.3.

79 *Ibid*.

between the activists and the proposed directors such that the activists are likely to control the board.[80] A resolution would not be regarded as seeking to control the board where the board to be appointed is independent of the activists or where the activists seek to appoint additional non-executive directors so as to improve the company's corporate governance.[81]

The UK Panel, in the notes to rule 9.1 of the City Code, provides detailed factors that the UK Panel may take into account before concluding that a proposal by shareholder activists seek to acquire board control.[82] The factors considered by the UK Panel are, by their nature, not exhaustive. They include: (a) significant relationship between the proposed directors and the activist shareholders and supports. It appears that a significant relationship is important in determining whether a proposed resolution seek board control;[83] (b) the number of the proposed directors to be appointed or replaced in comparison to the existing total size of the board. In this instance, the removal of the chief executive does not necessarily support the view that it is a board-seeking resolution.

However, the replacement of the majority board members with the concert party appointees may well support the view that the resolution in question was board control-seeking; (c) the position held by the board members to be replaced and to be held by the proposed directors is also considered. The replacement of the chief executive officer, the financial director, and the chairman is likely to support the view that the resolution in question is a board control-seeking resolution;[84] (d) the nature of a mandate given to the new proposed directors is also considered. Where the new proposed appointees are non-executive directors to improve corporate governance, it will be acceptable;[85] (e) whether the concert parties will benefit from implementing their proposals other than through their shareholding. If so, this may be considered to be a board control-seeking resolution;[86] (f) any relationship between the existing directors and the proposed directors, even if the proposed directors are not in the majority[87] and (g) other proposals relating to the management of the company, including proposals to dispose of the business of the company, are carefully considered by the Executive.

For instance, if shareholder activists indicate that the company's initial proposals do not implement their initial proposals, they will seek board control, then the Executive could determine that a concert party exists between the activists.[88] Therefore, it appears that proposals from shareholder activists on how a company should be managed in addition to the appointment of representatives of shareholder activists on the board of a company should be considered with extra caution. It may raise a concern that parties are acting in concert.

80 *Ibid.*
81 *Ibid.*
82 City Code, rule 9.1.
83 Practice Statement, paras 3.1-3.3. Under these paragraphs, the Executive provide detailed explanations including examples. This suggest that a relationship between parties is one of the most important factors considered by the panel when considering acting in concert.
84 Practice Statement, para 3.7.
85 *Ibid* para 3.8
86 *Ibid* para 3.9.
87 *Ibid* para 3.10
88 *Ibid* paras 3.11-3.12.

Even if, at the end of the enquiry as to whether parties have come together to act in concert and have acquired interests in shares that could oblige parties to make a mandatory offer, it does not necessarily follow that the concert parties must make a mandatory offer. There is still a leeway for concert parties to avoid the obligations to make a mandatory offer as indicated by the Practice Statement. The Executive may dispense with the mandatory offer if the acquisitions were made inadvertently, the interests acquired were disposed of within a limited period after acquisition, and appropriate voting restrictions were put in place pending the completion of the disposals of the interests so acquired.[89] Rule 9.1 further clarifies the consequences of the transfer of the voting rights within members of the concert party.[90]

The UK Panel may in appropriate circumstances waive the requirement to make an offer, taking into consideration a number of factors, including the price paid to acquire the interest; whether the leader of the group or the member with the largest individual interest in shares has changed and whether the balance between the interests in the group has changed significantly; as well as the relationship between the persons acting in concert and how long they have been acting in concert.[91]

Rule 9.1 of the City Code provides that 'any person,' or 'any person, together with persons acting in concert with him' may be obliged to make a mandatory offer. A question may well arise as between the activists as to who must make the mandatory offer. These persons may be seen as lead activists. Rule 9.2 of the City Code refers to 'principal members' [in the concert party relationship], depending on the circumstances. The prime responsibility to make the mandatory offer will be on 'the person who makes the acquisition which imposes the obligation to make an offer'.[92]

The UK Takeover Appeal Board, in the matter of *Rangers International Club PLC & Mr David Cunningham King*,[93] considered an appeal against a ruling of the UK Hearings Committee that certain persons, acting in concert, acquired interests in shares that carried more than 30% of the voting rights in Rangers International Football Club PLC (Rangers).[94] In terms of the ruling of the Hearings Committee, the acquisition of the voting rights triggered an obligation to make a mandatory offer under rule 9.1 of the City Code to the shareholders of Rangers on the same terms and conditions as prescribed by the rules of the City Code.[95] The UK Appeal Board confirmed the ruling of the Hearings Committee.

As indicated in the case heading, the main issue was acting in concert. The announcement in compliance with the ruling of the Hearings Committee indicates that the shareholdings of the concert parties were aggregated as the parties acted in concert.[96]

89 *Ibid* para 4.3.
90 City Code, rule 9.1, para 4.
91 *Ibid* para 4.
92 City Code, rule 9.2, under notes on rule 9.2; Prime responsibility.
93 UK Takeover Appeal Board 'Decision of the Takeover Appeal Board' 2017/1. <https://bit.ly/3AE9nLL> accessed 3 September 2019.
94 *Ibid.*
95 City Code, rules 9.3 and 9.5.
96 Rangers Football Club 'Announcement by Laird Investments (Proprietary) Limited' (28 March 2018) <https://bit.ly/3o0tjVT>accessed 3 September 2019.

The principal concert party complied with the ruling and made a mandatory offer to the shareholders of Rangers through a company.[97]

The Practice Statement indicates that, since 2002, the Executive has not required any person to make a mandatory offer in the context of a 'board control-seeking resolution'.[98] However, it should be noted that the Practice Statement is issued for guidance, and accordingly, is not binding on the Executive and the Panel. As indicated in the above case, it is clear that in certain cases, the Executive of the Panel may make a ruling that parties have acted in concert in the context of a board control-seeking resolution and, therefore, should make an offer to acquire the shares of other shareholders in accordance with the rules of the City Code.

4.3 A brief discussion on acting in concert and shareholder activism in South Africa

Interpreting and applying the concept of acting in concert to shareholder activism is not easy, as indicated by the discussion in respect of the UK City Code in paragraph 4.2 above. These difficulties are also applicable to the takeover provisions. It should be noted that the definition of acting in concert in the takeover provisions under the Act are not identical to those of the Companies Act 61 of 1973 (1973 Act) and Securities Regulation Code (SRP Code).[99] However, it is asserted that the same concerns and difficulties on the interpretation and application of acting concert under the 1973 Act and the SRP Code apply to the takeover provisions under the Act.[100]

Section 123 of the Act, amongst others, provides that persons acting in concert for the purpose of acquiring control of a company (defined as the acquisition of 35% or more of the voting securities of a regulated company) must make a mandatory offer to acquire all the shares of the other shareholders of the regulated company once they cross the prescribed threshold.[101] Therefore, the actions of persons acting in concert may cost activist shareholders a considerable amount of money if their actions fall within the requirements of this section. This brings us to a question of how the takeover regulator is likely to interpret and apply the acting in concert rules found in the takeover provisions in relation to shareholder activism. One needs to consider previous rulings and any practice notes that the Panel may have issued. If any, the rulings or practice notes may guide how the regulator is likely to rule on shareholder activism and acting in concert during a takeover.

In the matter which appeared before the Executive Committee of the Panel (the Committee), in the matter of *Comparex Holdings Limited*, the Committee had to decide whether certain asset managers were 'acting in concert' as defined in the 1973 Act and the SRP Code.[102] After considering the arguments, the Committee indicated that a mere agreement, arrangement or understanding between the parties to vote at a meeting in

97 *Ibid.*

98 Practice Statement para 1.7.

99 Yeats et al. (n 29) 5-50.

100 *Ibid* 5-51.

101 Section 123 of the Act read with the Takeover Regulations, in particular Regulation 111(2).

102 Takeover Regulation Panel Ruling in terms of section 440 of the Companies Act and the rules of the SRP in the matter of Comparex Holdings Limited (The Takeover Regulation Panel, Comparex ruling), dated 3 December 2003. <https://bit.ly/3AFaviq> accessed 10 September 2019.

a particular way does not in itself suffice for the purposes of an affected transaction (in this context, a mandatory offer).[103] The view of the Committee was affirmed by the High Court in the matter of *Randgold & Exploration Company Limited v Fraser Alexander Limited* (*Randgold* case).[104]

In the *Randgold* case, the court also dealt with the affected transaction under the 1973 Act and the SRP Code.[105] Briefly, the applicants brought an urgent application for an interim order to prohibit the holding of a general meeting of the shareholders of Randgold, at which meeting the shareholders were to vote on certain transactions. Prior to approaching the court, the parties had approached the panel to decide whether one of the proposed transactions constituted an affected transaction. Both the Executive Director and Executive Committee of the Panel ruled that it did not.[106] The court had to be satisfied that the proposed transaction was indeed an affected transaction within the meaning of the SRP Code.[107] Before issuing its ruling, the court pointed that it would be absurd to dismiss the matter as lacking urgency after hearing arguments between the parties on the merits of the case for a number of hours.[108] The court dealt with the definition of affected transaction and indicated:

> a transaction is affected if, taking into account any securities held before such transaction, it has or will have the effect of vesting control of any company in any person, or two or more persons acting in concert, in whom control did not vest prior to such transaction.[109]

Further, the court indicated that it is important to appreciate that for the purposes of affected transactions, control means that the collection of shares will be used in a particular way, 'at meetings of that company'.[110] The court then indicated:

> In other words, the present applicants have to satisfy me that there was some agreement, arrangement or understanding between several of the respondents that beyond tomorrow's meeting they would exercise control at future meetings of the company. If they are unable to satisfy me in that regard it is not an affected transaction.[111]

The court concluded:

> The fact that the respondents have formed an alliance in order to achieve a passing of the resolutions tomorrow which will give them management control and which will result in them holding 40% of the shares is not enough. They have to go further … .[112]

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103 The Takeover Regulation Panel, Comparex ruling, para 5.
104 [1994] ZAGPHC1 (17 Aug 1994). <https://bit.ly/3CXzbUf> accessed 10 September 2019.
105 The provisions of the 1973 Act and those of the SRP Code have been replaced by Chapter 5 of the Act and Chapter 5 of the Regulations and in some respect word for word.
106 *Randgold* case, para 4.
107 *Ibid* para 4.
108 *Ibid* para 4.
109 *Randgold* case, para 5.
110 *Ibid* para 5.
111 *Ibid.*
112 *Ibid* para 6.

In another matter of *Securities Regulation Panel v MGX Limited*,[113] the court dealt with the definition of acting in concert. The facts were that the SRP claimed that MGX Limited (the first defendant) and others while acting in concert, acquired more than 35% of the shares of EC-Hold Limited.[114] The parties had acquired the shares at different stages, but their combined acquisitions amounted to more than 35% of the shares of EC-Hold Limited.[115] The SRP contended that the parties acted in concert as defined in section 440A 1(1) of the 1973 Act. Before the court proceedings, the parties had several legal skirmishes before the internal bodies of the SRP, including its Executive Committee and Appeal Committee,[116] where they denied that they acted in concert and contended that no affected transaction had taken place. The parties argued that they are not obliged to make a mandatory offer to the shareholders of EC Hold Limited as asserted by the SRP. The SRP brought an action at the High Court to enforce the obligation of the parties to make a mandatory offer to the shareholders of EC Hold Limited.

The SRP sought an order that an affected transaction occurred and, therefore, the parties are liable to make a mandatory offer to the shareholders of EC Hold in terms of the SRP Code.[117] The parties raised objections against the SRP's particulars of claim on various grounds, including that they: (a) failed to allege the term of the 'agreement, arrangement or understanding' which is necessary to hold the defendants as persons 'acting in concert' in relation to an 'affected transaction'; (b) failed to allege that the defendants acquired shares in or control over the offeree company as contemplated by the definitions of acting in concert and affected transaction in section 440A and (c) the particulars of claims are vague and embarrassing.[118]

In this case, the decision of the court related to an interlocutory application brought by the parties when the SRP sought to amend its particulars of claim. Nevertheless, the court dealt with the relevant provisions of the SRP Code.[119] The court referred to the definition of 'acting in concert' and concluded that it is wide enough to include acts of cooperation that do not entail holding or acquiring shares.[120] The court considered the elements for 'acting in concert'. It indicated that on its face, the act of cooperation is not limited to the acquisition or holding of securities and should not be so restricted. [121] Further, the court indicated that an act of cooperation involved the combination of securities holdings or acquisition of securities and the funding, planning facilitating of the acquisition or the master-minding, initiating, advising and securing the cooperation of others.[122]

The court also indicated that the real issue is whether a party to an agreement, arrangement or understanding' who does not himself acquire shares in the offeree company can

113 Unreported, WLD case no 16026/03, 23 June 2004.
114 *Ibid* paras 9-11.
115 *Ibid* para 10.
116 Ruling of the Securities Regulation Panel 2 March 2002. 20 MGX 2018. <https://bit.ly/3u9Tf2m> accessed 20 June 2021.
117 *Ibid* (n 33) para 2.
118 *Ibid* para 6.
119 Yeats et al. (n 29) 5-50.
120 *Ibid* (n 33) para 18.
121 *Ibid* para 17.
122 *Ibid*.

be a concert party if other parties cooperate to acquire shares.[123] The question depends on the definition of acting in concert.[124] The court also indicated that the agreement, arrangements or understanding covers a whole range of agreements and other acts falling short of legally binding contacts.[125] The court distinguished the decision in the *Randgold* case and pointed that it did not deal with acting in concert.[126] The court indicated that the 'mere voting agreement' does not have the effect of vesting control, and thus, it did not establish an affected transaction *per se*.[127] This is because the voting agreement did not necessarily vest control of the company where it did not previously exist.[128] The court allowed the SRP to amend its particulars of claim.[129] Subsequently, MGX Limited made a mandatory offer to the remaining shareholders of EC-Hold limited in accordance with the ruling of the SRP.[130]

5. Conclusion

In seeking guidance on how the Panel may interpret and apply acting in concert rules in relation to shareholder activism, it may be useful to consider the UK Panel rulings and Practice Statements on the concept. However, the differences between the UK City Code and the takeover provisions must also be considered before relying on such rulings and statements. Notably, the City Code 'is not as precise or legalistic in its language as that of a statute'.[131] The UK Panel applies a purposive approach when it interprets and applies the City Code.[132] It 'has applied the "spirit" principle to cases where any provision in the Code does not specifically cover actions or to apply a general principle where there is no specific rule'.[133]

This overview of shareholder activism and acting in concert during takeovers indicates that where in doubt, shareholder activists should obtain expert advice before embarking on shareholder activism that may expose them to the risk of breaching the takeover provisions. It may also be useful to consult with the Panel.[134] A breach of the takeover provisions may result in an obligation to make a mandatory offer to other shareholders of the relevant company. This may be costly. A concert party relationship may also prevent parties from voting during a fundamental transaction. A perception that shareholder activists are trying to avoid complying with the takeover provisions may provide ammunition to those who view shareholders negatively.

123 *Ibid* para 28.
124 *Ibid*.
125 *Ibid* para 25.
126 *Ibid* para 28.
127 *Ibid*.
128 *Ibid*.
129 *Ibid* para 35.
130 EC Hold Limited. Announcement, dated 20 April 2006, relating to the results of the mandatory offer as reproduced by JSE Limited SENS Department.
131 Palmer, R *Company Law* 6 (2011) 12090 para 12.287.
132 *Ibid* 12.287.
133 *Ibid*.
134 Section 201(2)(a) of the Act provides that the Panel may consult with any person with a view to advising such a person on application of the takeover provisions.

Shareholder activism has an important role to play in the proper governance of companies. Amongst others, it promotes good governance and curbs abuse of director discretion in the management of the affairs of a company. Shareholder activism may also serve as a general protective layer for minority shareholders who may not have readily accessible and effective means to hold directors accountable. It should be encouraged and promoted. However, some actions of shareholder activists are viewed with concerns due to the possible erosion of directors' discretionary powers. There is a concern that giving too much say to shareholders in the running of a company may tip the balance of power in the company's governance structure.[135] Accordingly, a balance is required. Those who are charged with administering a company and are bound by their fiduciary duties should not find their powers negated by shareholder activism.

It is suggested that the takeover provisions on acting in concert should be interpreted and applied to create a balance between shareholder activism and directors' discretionary powers. This would assist in achieving some of the objectives of the Act.[136] However, activists who are intent on acquiring control of a regulated company may be caught by the acting in concert rules and may be required to make a mandatory offer in terms of section 123 of the Act, due to the change of control in the company rather than the activism.[137] Shareholder activists who exercise their voting rights to influence the good governance of the regulated company should not be required to make a mandatory offer. In certain instances, there is a fine line between the actions of those who want to take control of the regulated company and those who seek improvements in the governance of a regulated company.

Takeover laws should not be static but should develop and be adaptable to accommodate new practices, such as the actions of hedge fund activists, who may agitate for better financial performance by regulated companies or changes in the management of companies. Takeover laws should promote good corporate governance and should not be a hindrance to the proper management and oversight of companies. The rules on acting in concert seek to protect the interests of minority shareholders and avoid unfair treatment of minority by majority shareholders. However, the rules should also accommodate the interests of other stakeholders of the company. A balancing of interests is required.

Shareholder activism is growing at a tremendous rate. The issues raised by shareholder activists are becoming more diverse, ranging from climate change to management compensation. It is important that all those charged with the management of companies understand what shareholder activism entails and how to engage with shareholders continuously meaningfully.[138]

135 Weidemann, R 'Shareholder Activism – The Activist revolt' *Directorship* (2015) 7.

136 Section 7(i) of the Act which indicates that one of the objectives of the Act is to balance the rights and obligations of shareholders and directors within companies.

137 Section 123 of the Act.

138 See Paxton (n 4) 25.

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The Political Economy of Land Ownership Rights: Lessons from Nigeria, South Africa and Zimbabwe

Taiwo Ajala*

Abstract

The nature of land ownership rights in pre-colonial African countries implies a myriad of customary land holding systems under which families and communities had collective ownership and equitable access to land use. However, colonialism disrupted the customary systems, confined land ownership rights to privileged minority groups, and established dualistic agrarian systems that discriminated against local populations and impoverished their livelihoods. Since the dawn of post-colonialism, there has been an assortment of policies and laws to either redefine or re-assign land ownership rights in African countries with histories of colonial emasculation of pre-existing land rights and expropriation of native lands. However, there is yet to be a fundamental reform of land ownership rights that clearly shifts access to land use in favour of the poor majority. The legacy of colonialism persists and has been perpetuated in post-colonial land laws and policies, and are further entrenched by contemporary economic ideologies of market capitalism and neo-liberal globalisation. This article examines an aspect of the land question in Africa; how to adequately achieve equity in access to land while resolving colonial legacies which suppressed indigenous land ownership rights, displaced communal land administration structures and marginalised the poor majority in access to land. This article recommends a new policy approach that is driven mainly by the broad imperatives of ensuring equitable access to land for the vulnerable majority group of rural poor, and not influenced by politico-economic considerations that yield narrow outcomes for privileged minority groups.

Keywords

access to land; land ownership rights; Nigeria land reform; political economy; South Africa land reform; Zimbabwe land reform

1. Introduction

Legal and policy frameworks to democratise ownership of land are necessary in post-colonial African states where discriminatory land ownership rights remain an enduring phenomenon. It is now trite that land is central to sustainable livelihoods in Africa, and development initiatives need to take comprehensive account of this reality so as to ensure that land plays its primary role in the development process and, more

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particularly in poverty reduction, enhancing equal economic opportunities, managing the environment and driving agricultural modernisation.[1] Access to land for cultivation, whether subsistence family farms or foreign earning commercial agriculture, including as collateral for credit, depends on secure land ownership rights.

However, a key aspect of the land question in Africa is how to adequately and satisfactorily achieve equity in access to land while resolving colonial legacies that which suppressed indigenous land ownership rights, displaced communal land administration structures and marginalise poor majority in access to land. These legacies have been re-invented in most post-colonial African countries in the forms of nationalisation, class and gender differentiation, as well as elite capture in land ownership.[2] The result is that the privileged minority monopolise land ownership to the exclusion of the poor majority. At the core of the marginalisation of the poor majority in land ownership and access to land, are political considerations that affect the formulation and implementation of land policies in ways that serve minority interests.

Since the dawn of post-colonialism, there has been an assortment of policies and laws either to redefine or re-assign land ownership rights in African countries with histories of colonial emasculation of pre-existing land rights and expropriation of native lands. For example, Zimbabwe and South Africa present a host of land policies, laws and programmes that embrace various land redistribution and tenure reforms, adopting approaches that range from market-led to compulsory acquisition under strong state intervention. However, there is yet to be a fundamental reform of land ownership rights that clearly shifts access to land in favour of the rural poor. The legacy of colonialism persists and has been perpetuated in post-colonial land laws and policies, and are further entrenched by contemporary economic ideologies of market capitalism and neoliberal globalisation[3]. Also, the causes and effects of land reforms are reflected strongly in the political economy of these African countries, and are bound to shape their future policy and legal frameworks in the quest for an equitable land ownership rights.

After decades of land reforms with ambiguous results, it has become even more significant to understand clearly the salient and abiding political and economic considerations that have shaped the patterns and realities of land ownership rights in post-colonial African countries. This article proceeds on the theoretical premise that political forces and economic considerations motivated the displacement of pre-existing customary land rights, expropriation of native lands and the exclusion of the poor majority in access to land during periods of colonialism. These colonial legacies are reincarnated in the regimes of land ownership rights and access to land in post-colonial African countries like Nigeria, South Africa and Zimbabwe.

1 AUC-ECA-AfDB Consortium, Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods (ECA Publications 2010) 7 <https://bit.ly/3kDGGcr> accessed 22 June 2021.

2 Bond, P *Elite Transition: From Apartheid to Neoliberalism in South Africa* (University of Natal Press and Pluto Press, Pietermaritzburg and London 2000) 19.

3 Lahiff, E 'The Politics of Land Reform in Southern Africa' (2003) *Research Paper* 19 <http://www.ids.ac.uk/slsa> accessed 23 June 2021; Bond, P (n 2) 19.

Unlike existing literature that has examined post-colonial land ownership rights and the impact of land reforms in specific African contexts,[4] this article analyses from a broader perspective the political considerations that affect policy formulation and implementation of land reforms and land redistribution programmes across three countries in two regions of Africa. Despite major differences in colonial histories between West and Southern African countries, this article identifies the commonality in how colonial legacies have led to an enduring pattern of land ownership rights and access to land that marginalises the poor majority. For example, Nigeria was colonised by Britain, but unlike Zimbabwe and South Africa, Nigerians were never subjected to racial segregation in land ownership rights and access to land.

However, this article shows that, like Zimbabwe and South Africa, current problems in Nigerian land ownership rights and land administration share similar roots in the political and economic considerations that influenced colonial land policies and land rights. The article is structured into two parts; colonial and post-colonial periods in land ownership rights and land reforms in the three countries. In the analytical discourse, close references are made to these countries for situational context and to exemplify and ground the article's theoretical proposition. The article's conclusion distils the lessons to be learned for policy objectives and approach to reforming land ownership rights in post-colonial Africa.

2. Colonial period: Winner-takes-all in land ownership rights

The nature of land ownership rights in pre-colonial African countries implies a myriad of customary land tenure systems that were firmly established within and across indigenous communities without contestations or adverse claimants. Under the different prevailing customs, land was collectively owned by communities or family members linked together by common ancestry or heritage. Land ownership rights inhered in the native communities and families with the kings and chiefs acting as trustees in the administration of lands for the overall benefits of every member entitled to as much portion as was needed for subsistence agriculture and construction of homesteads.[5] African communities were therefore fully settled with secure collective land ownership rights in the present geographical areas of the respective African countries long before colonialism or the incursions of Western adventurers of fortunes.

4 See, for examples, Moyo, S 'Three decades of agrarian reform in Zimbabwe' (2011) 38(3) *The Journal of Peasant Studies* 493-531; Chaumba, J, Scoones, I and Wolmer, W 'New Politics, New Livelihoods: Changes in the Zimbabwean Lowveld since the Farm Invasions of 2000' (2003) *Research Paper Series* 379 <http://www.ids.ac.uk/slsa> accessed 23 June 2021; Cliffe, L 'Land Reform in South Africa' (2000) (27)84 *Review of African Political Economy* 273-286; Lahiff, E 'Land Reform in the Eastern Cape: The On-Going Struggle for Resources and Secure Rights' (2005) 31 *Social Dynamics* 1; Aliber, M *Land Reform and Livelihoods: Trajectories of Change in Northern Limpopo Province South Africa* (Human Sciences Research Council 2013) 56; Alexander, J 'The unsettled land: the politics of land distribution in Matabeleland, 1980-1990' (1991) 19 *Journal of Southern African Studies* 581-610.

5 See Okoth-Ogendo, HWO 'The nature of land rights' *in* Classens, A and Cousins, B (eds), *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* (University of Cape Town Press 2008) 35.

Claims that some African communities such as in South Africa were largely uninhabited at the time of the arrival of Europeans settlers are therefore not supportable. Rather, historical records show incidents of confrontation (in some cases violent) between the foreign invaders and the indigenous communities.[6] For example, it is recorded that there was confrontation between the first European settlers at the South African Cape and the indigenous Khoi-khoi communities as early as 1655.[7] In Zimbabwe, the indigenous communities of Shona and Ndebele resisted the white Rhodesians in the 1800s long before the liberation struggles against colonialism, effective from 1890.[8] History now shows that Africans were forcefully subdued or violently conquered and colonised as a result of the superior firepower of the invading Europeans, complimented with deceptive treaties under which indigenous communities unknowingly ceded their lands to the colonisers.[9]

The subterfuge of cession treaties was applied in the case of Nigeria in 1861 when the paramount Yoruba king and his chiefs in the first colonial port of settlement ceded to the British crown the ownership rights to all lands in the territories which extended to the Gold Coast (present day Ghana).[10] The dispossession of African lands through conquests and perfidious treaties was consolidated by colonial legislations that completely stripped indigenous communities of land ownership rights and confined them to marginal and less arable lands that could not sustain their livelihoods. Lack of access to productive lands resulted in hunger and poverty and this perfectly served the economic design of the colonisers as Africans became cheap labourers in colonial commercial agricultural farms.[11]

Colonialism in Africa was deliberately orchestrated for the political and economic benefits of the participating European countries. African colonial territories became commercial outposts and major sources of income which strengthened the international political and economic powers of the colonisers.[12] For example, material and human resources from African colonies made significant contributions to British war efforts during the first and second World Wars. But the dispossession of Africans and their confinement to uncultivable fringe lands had devastating social and economic consequences particularly in South Africa and Zimbabwe. The Natives Land Act of 1913 laid the foundation for apartheid system in South Africa as it introduced racial segregation in land ownership rights and access to land through spatial separation of race groups into white, black and coloured.[13]

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6 Rugege, S 'Land Reform in South Africa: An Overview' (2004) 32 *International Journal of Legal Information* 283.

7 *Ibid* 284.

8 Lebert, T *Backgrounder: Land and Agrarian Reform in Zimbabwe* (South Africa National Land Committee 2003) 119.

9 See Rugege, S 'Land Reform in South Africa: An Overview' (n 6) 19.

10 Coker, GBA *Family Property among the Yorubas* (2nd Ed., AUP 1966) 11 <https://bit.ly/2WcK3Oc> accessed 30 December 2018.

11 Hall, R and Cliffe, L 'Introduction' *in* Hall, R (eds), *Another Countryside? Policy Options or Land Agrarian Reform South Africa. Institute for Poverty Land and Agrarian Studies* (UWC 2009) 1-19.

12 See Collins, A and Mitchell, MI 'Revisiting the World Bank's land law reform agenda in Africa: the promise and perils of customary practices' (2017) 18(1) *Journal of Agrarian Change* 113-121.

13 Kloppers, HJ and Pienaar, GJ 'The Historical Context of Land Reform in South Africa and Early Policies' (2014) *PER/PELJ* (17) 2 <https://doi.org/10.4314/pelj.v17i2.03> accessed 13 January 2020.

The subsequent Native Trust and Land Act of 1936 abolished individual land ownership by black people, and the Group Areas Acts of 1950 and 1960 entrenched the racial segregation laws as black and coloured people were evicted and forcibly removed from lands designated as 'white only'.[14] These oppressive legislations confined Africans to only the areas reserved for them under the legislations and prohibited them from accessing lands in any other areas outside the reserves. The legislations stripped Africans of their right to own land such that the land available for use by Africans was only 13% of the total land mass of South Africa, and much of the land remained in the ownership of the apartheid South African Development Trust, supposedly held in trust for the African people; 80% of South Africa population was confined to 13% of the land while less than 20% that made up the white population owned over 80% of the land.[15]

The economic objectives of the apartheid system and racial legislations were to make more land available to the white settlers for commercial agriculture and to impoverish Africans through dispossession and disablement from engaging in productive agriculture for self-sufficiency. Africans therefore became dependent on employment for survival, thus creating a pool of cheap labour for the white settlers' commercial farms. Produce from the white settlers' farms were exported to European markets and the accrued wealth strengthened the political and economic dominance of the colonial powers.[16]

In Zimbabwe, the white settlers, who constituted only about 5% of the population, appropriated 51% of the entire land that was most suitable for agriculture, reserved 20% as Crown Land and conservation areas and left only less than 30% for the natives.[17] Under the Land Apportionment Act of 1930 and the Land Tenure Act of 1969, the white settlers completely dispossessed native Zimbabweans of land ownership rights and classified the lands along racial lines both in terms of quality and size. The laws prohibited natives from owning or occupying lands in designated white areas, and restricted them to less-productive lands on mountainous escarpments and plateaus on the fringes of the Zambezi Valley.[18] The colonial system forced large numbers of families to leave their unproductive lands in search of work on white owned large farms and factories.[19] As Africans lost their lands through dispossession, evictions and forced removals, they lost their source of livelihoods and lived in poverty.

The white settlers, on the other hand, grew stronger in political and economic powers, ably aided by their commercial partners. One significant point that is hardly found in the plethora of literature on colonial dispossession of land ownership rights in Africa is an

14 Hall, R 'A Comparative Analysis of Land Reform in South Africa and Zimbabwe' *in* Margaret, CL and Karen, C (eds), *Unfinished Business: The Land Crisis in Southern Africa* (Africa Institute 2003) 255-285.

15 Kloppers, HJ and Pienaar, GJ 'The Historical Context of Land Reform in South Africa and Early Policies' (n 13) 15.

16 Hall, R 'Land Restitution in South Africa: Rights, Development and the Restrained State' (2004) (38)3 *Canadian Journal of African Studies* 654-671.

17 Chivandi, F Fushai, F and Masaka, J 'Land Ownership and Range Resources Management in Zimbabwe: A Histrorical Review' (2010) 2(1) *Midlands State University Journal of Science, Agriculture and Technology* 112-123.

18 *Ibid* 115.

19 Machingaidze, EM 'Agrarian Change from Above: The Southern Rhodesian Native Land Husbandry Act and African Response' (1991) 24(3) *International Journal of African Historical Studies* 557-589.

examination of the roles of colonial enterprises and home governments of the European settlers.[20] The colonial enterprises traded in African land and mineral resources on behalf of the white settlers, and bridged the mutual economic interests of the settlers and their home governments. These enterprises generated wealth, international political contacts and influence needed by the white settlers to strengthen their dominance and subjugation of their colonial territories in Africa. When the need arose, the white settlers relied on the importations of redundant and retired soldiers from their home governments to quell violent resistance by Africans. This was how the British South Africa Company played a significant role in the process of land dispossession in Zimbabwe and the economic empowerment and international political influence of the colonial Rhodesian regime.[21]

In colonial Nigeria, the British Royal Niger Company played a leading role. It was granted a Royal Charter by Britain to administer the colonies and protectorates in Nigeria until 1900 when Sir Frederick Lugard was appointed as Governor-General.[22] The change in the administrative guard was both economically and politically motivated as it was to curtail the emerging resistance against the Royal Niger Company's monopoly of trade in West African agricultural and mineral resources, and to protect British colonial territories against incursions from other European countries like France. Under the colonial administration in Nigeria, the English freehold system which allows private or individual land rights, was introduced in the Southern colonies to operate alongside communal and family land ownership systems that were in existence. In addition, vast and choice lands were expropriated and designated as Crown Land while others were compulsorily acquired for colonial Government Reservation Areas.

In the Northern protectorates of Nigeria, the colonial administration through the Ordinance of 1910 placed all lands under the control and disposition of the Governor-General without whose consent no title to occupation and use of land was allowed. For the natives, the Ordinance only designated a maximum of 1 200 acres for agricultural grants and 12 500 acres for grazing purposes.[23] The resultant dual systems of land ownership rights both within the Southern colonies and between Northern and Southern Nigeria have had far-reaching and long-lasting consequences. It disrupted the established system of land ownership, made land tenure insecure, caused communal infighting over ownership of land, introduced land speculation and made land susceptible to elite capture. An enduring impact is the exclusion of women and the peri-urban poor from access to land and land use, and its attendant pervasive poverty amongst this vulnerable group.[24]

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20 For example, see SAHO, 'A Land Dispossession History 1600s-1990s' (2011) 39-41 <https://bit.ly/3kFMHoQ> accessed 13 January 2020.

21 Chigora, P 'The Nexus between Equitable Land Distribution and Poverty Reduction: The Zimbabwean Situation' (2010) 12(8) *Journal of Sustainable Development in Africa* 81-92.

22 Elias, TO *The Nature of African Customary Law* (1956) 27 <https://bit.ly/3CGBvPa> accessed 30 December 2018.

23 Mabogunje, AL 'Perspective on Urban Land and Urban Management Policies in sub-Saharan Africa' (1992) *The World Bank Technical Paper* (No. 196) 98.

24 This author has comprehensively examined the emergence and effects of legal pluralism in land ownership rights in post-colonial African countries. See Ajala, T 'Legal Pluralism in Land Ownership and Tenure Systems in Post-Colonial Africa: The Nigerian Experience' (2019) 8(1) *Port Harcourt Law Journal* 44-60.

In Zimbabwe and South Africa, colonialism systematically undermined African agricultural production as white farmers, through substantial state subsidies and availability of cheap labour from African peasants, developed a model of large-scale commercial agriculture. This led to a dualistic agriculture system – a subsistence agriculture by natives in unproductive marginal lands and white settlers' commercial agriculture in productive lands.[25] Through the decades, colonialism therefore produced two economies in Africa; one weak and characterised by low income, massive unemployment and pervasive poverty of the majority, while the other strong, well developed and connected to the international market for minority interests.[26] The European colonisers were therefore the winners in the periods of African colonialism and they accordingly took all the spoils of war in furtherance of their political and economic interests, and as justification for their original motives for their crusades and expeditions in Africa. However, of greatest impact are the political and economic considerations that influenced colonial land ownership and access to land which are re-incarnated in post-colonial land reforms in these Africa countries.

3. Post-colonial period: The era of land reforms

Motivated by narrow political and economic considerations, colonialism confined land ownership rights to a minority group, disrupted communal tenure system and established dualistic systems that discriminated against local populations and impoverished their livelihoods. Thus, questions around land ownership rights in post-colonial Africa are inextricably connected to political and economic considerations, such as indigenous identity or citizenship, as well as productivity and livelihood.[27] Reclaiming land ownership rights for the people in post-colonial African states therefore means reaffirming their sense of belonging in their home lands and reinstating their source of livelihood. Land reform for the purpose of re-assigning land ownership rights and granting access to land to the majority who were dispossessed and marginalised became an urgent necessity at the dawn of independence. The objective of land reform in the emergent states was to ensure equity in right to land for agricultural productivity and economic well-being of the long-disadvantaged majority.

Depending on a country's colonial history, as well as prevailing political and economic ideologies, land reform may be realised either through redistribution, restitution or tenure reform. However, these variants of land reforms are not mutually exclusive as they may be combined to achieve the ultimate objectives of equity and efficiency in access to land. While Zimbabwe's land reform programmes focused entirely on land redistribution, South Africa presents an instructive example of a land reform programme that has encompassed land redistribution, restitution and tenure reform. Under its Reconstruction and Development Programme (RDP), post-apartheid South Africa embarked on land reform

25 Hall, R and Cliffe, L 'Introduction' *in* Hall, R (eds), *Another Countryside? Policy Options or Land Agrarian Reform South Africa* (n 11) 15.

26 *Ibid*.

27 Deininger, K Hilhorst, K and Songwe, V 'Identifying and addressing land governance constraints to support intensification and land market operation: Evidence from 10 African countries' (2014) 48 *Food Policy* 76-87.

with three programmes: (1) restitution to restore land ownership rights to those who were dispossessed of them under racially discriminatory laws; (2) redistribution to make land more accessible to those who had previously been denied access to land use and (3) tenure reform to give security of tenure to labour tenants, farm workers and other rural dwellers who lived on land without secure rights.[28] Political and economic considerations in South Africa necessitated a three-prong land reform programmes to ensure significant land transfers and small scale production units, and would not have been enough to tinker at the margin with only land redistribution as in post-independence Zimbabwe.[29]

However, independence in Zimbabwe and democracy in South Africa were ultimately not won through armed struggle but through negotiated settlements which necessitated political compromises on the issue of land ownership rights and land reform. The negotiated settlements left land reform programmes with minimal effects on access to land by the black majority as ownership of land remain largely unchanged due to the constitutional guarantee of the right to property.[30] Thus, while economic considerations necessitated land reform programmes, these were severely constricted by political negotiations on the type, scope and approach to land reform programmes suitable to the divergent and opposing interests of the minority white settlers and the majority black natives. For instance, under the Lancaster House Agreement and the 1979 pre-independence Constitution of Zimbabwe, approach to land redistribution during the first decade after independence in 1980 was market-led or based on willing-buyer willing-seller principle.[31]

This approach favoured the economic and political interests of the minority white commercial farmers as the Constitution circumscribed government power to undertake compulsory acquisition, required 100% parliamentary approval of any amendments to the Constitution, and reserved 20 Parliamentary seats for the white minority for a period of seven years after independence.[32] In South Africa, pre-democracy political negotiations between the African National Congress (ANC) and the National Party (NP) of the apartheid government culminated in the inclusion of property rights in the interim Constitution of 1993.[33] Thus, in both South Africa and Zimbabwe, political and economic considerations led to existing land ownership rights that emanated from generations of apartheid and dispossession of African lands being legitimised and entrenched in the Constitution.

28 Akinola, AO, Kaseeram, I and Jili, NN 'Expropriation and the Discontent of Land Reform in South Africa: An Introduction *in* Akinola, AO, Kaseeram, I and Jili, NN (eds), *The New Political Economy of Land Reform in South Africa* (Palgrave Macmillan 2021) 4; Rugege, S 'Land Reform in South Africa: An Overview' (n 6) 28.

29 Hall, R and Gavin, W 'Land Reform in South Africa: Problems and Prospects' *in* Baregu, M and Langberg, C (eds), *From Cape to Congo: Southern Africa's Evolving Security Architecture* (Lynne Rienner Publishers 2003) 97-129.

30 Rugege, note 6) 19.

31 *Ibid*.

32 Raftopoulos, B *The Hard Road to Reform: The Politics of Zimbabwe's Global Political Agreement* (Weaver Press) 68.

33 Budlender, G 'The Constitutional Protection of Property Rights' *in* Budlender, G Latsky, J and Roux, T (eds), *Junta's New Land Law* (UWC 2000) 1-3.

Although the South African post-apartheid Constitution of 1996 retains and protects the right of existing land owners against arbitrary deprivation, unlike in Zimbabwe, it provides for the power of the state to expropriate land for public purposes or in the public interest subject to just and equitable compensation.[34] Public interest is defined in the Constitution to include 'the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources'.[35] However, like Zimbabwe, the South Africa land reform under the RDP proceeded on the willing-buyer willing-seller principle, with expropriation only to `be used as an instrument of last resort where urgent land needs cannot be met, for various reasons, through voluntary market transactions'.[36] What emerges therefore is that political and economic considerations influenced a common approach of market-led willing-buyer willing-seller principle to post-colonial land reforms in both Zimbabwe and South Arica.

3.1 Market-led approach to land reform

A model of land reform programme to redistribute land through a market-led approach was recommended by the World Bank in 1993 to the South African ANC Policy Document for land reform.[37] However, more than a decade earlier, in 1979, the Lancaster House Constitutional arrangement for an independent Zimbabwe negotiated a willing-buyer willing-seller approach to redistribute land from the minority white commercial farmers to the majority of land-deprived ordinary Zimbabweans.[38] In a perfect market, the principle of willing-buyer willing-seller implies that resources are optimally allocated through the market forces of demand and supply as buyers and sellers voluntarily meet to haggle prices and settle transactions. Yet, in both Zimbabwe and South Africa, the political causes and contexts of land reform, as well as the economic objectives of land redistribution, did not make for a perfect market therefore the willing-buyer willing-seller process was closely guided by the visible hand of the state.[39]

In Zimbabwe, the process involved the government purchasing land from commercial white farmers who were willing to sell portions of their land. The government thereby acquired farms, mostly consisting of small plots of a hectare or less, to resettle the poor and marginalised families from the congested native reserves. The government was therefore the buyer for the purpose of resettling and distributing to the ultimate beneficiaries, the poor citizens who had been dispossessed of land during colonialism. However, within the ten-year period (1980-1990) for the land redistribution to be carried out through this process, no meaningful land redistribution could be achieved for various reasons that had political and economic undertones on both sides of the supposed seller and buyer.[40]

34 Section 25.
35 Section 25(4).
36 African National Congress, *Reconstruction and Development Programme (RDP): A Policy Framework* (Johannesburg 1994) 93.
37 Hall, R 'The Shifting Terrain of Land Reform in South Africa: The National Land Summit, July 2005' (2005) 32(106) *Review of African Political Economy*) 621-627.
38 Raftopoulos (n 32 above) 81.
39 *Ibid*.
40 Moyo, S 'The land occupation movement and democratisation in Zimbabwe: Contradictions of Neoliberalism' (2001) 30(2) *Millennium: Journal of International Studies* 401-415.

The white commercial farmers eventually became unwilling sellers while the government became a compelled buyer and later, an incapable buyer. The white commercial farmers were unwilling to sell portions of their large farms at reasonable prices to government, and began to offer land at prices far higher than the market value of the land they were willing to sell. This led to inflated land values which made it impossible for the government to sustain funding of land purchases for redistribution and resettlement.[41] Under the Lancaster House Agreement, the British government was to co-fund the land purchases with the Zimbabwean government. But the British government reneged, accusing the Zimbabwean government of corruption. The British government alleged that previous funds were diverted and misused by the Zimbabwean government to purchase land for ZANU-PF political elites, their cronies and supporters, instead of the intended beneficiaries – the rural poor.[42] These were mere ostensible reasons as Britain's withdrawal of funding were actually due to complex political and economic considerations relating to Britain's national interest both at home and in Zimbabwe.[43]

Through the decade after independence, land redistribution according to the willing-seller willing-buyer principle was unduly slow and later completely stalled while the communal areas still remained congested with poor people as it was during colonialism. The net effect of the market-led approach to land redistribution in Zimbabwe was that land supply was grossly inadequate to match demand for land for resettlement and redistribution to millions of poor Zimbabweans who expected that independence of the nation and the resultant land reform would adequately address their land demands. By 1990, the majority of high quality agricultural land, and control of key agricultural markets, especially export markets, remained in the hands of a small number of white owners as it was during the colonial period.[44]

In South Africa, the three-prong land reform programmes of land redistribution, restitution and tenure reform necessitated a multi-faceted approach, but all required the state to provide grants or funds to beneficiaries to acquire land. For example, under the land restitution process, victims of colonial and apartheid dispossession were required to make claims and prove their validity, while the state was responsible for availing the claim settlement funds. However, under the Settlement/Land Acquisition Grant (SLAG) and the Land Redistribution for Agricultural Development (LRAD), beneficiaries were responsible for land identification and making applications, while the state was responsible for provision of funds. The process under the Proactive Land Acquisition Strategy (PLAS) made the state responsible for identifying and buying land while the beneficiaries had to apply for access to and use of the land.[45]

41 *Ibid* 411.

42 Moyo S 'Land Concentration and Accumulation after Redistributive Reform in Post-settler Zimbabwe' (2011) 38(128) *Review of African Political Economy* 257-276.

43 For example, the new Conservative Party-led government of John Major, in 1990, bulked on the funding due to budgetary constraints. Change in government to Labour Party headed by Tony Blair rejected the agreement because; it was contracted by opposition party, not in Britain's national interest, while the new Parliament gave fresh socio-economic conditions for funding, conditions President Mugabe rejected.

44 Lahiff (n 3) 21.

45 Netshipale, AJ 'Land reform in South Africa: Beneficiary participation and impact on land use in the Waterberg District' (2017) 83 *NJAS – Wageningen Journal of Life Sciences* 57-66.

A distinguishing feature of the South African land reform under the LRAD was that it did not mandate redistribution of land from large commercial farmers to land-deprived peasants like the Zimbabwe model, rather it operated more on a willing-buyer willing-seller basis by making land purchase grants to landless farm workers and labour tenants.[46] The programme required beneficiaries to make contributions in addition to the state's grant and priority was given 'to the marginalised and the needs of women in particular'.[47] In reality though, benefits were claimed more by those with 'literacy, money, political contacts and the ability to submit and continue pressing their claims'.[48] The voluntary nature of acquisition of land and the methods of beneficiary selection as influenced by the market-led approach also served to discriminate against the vulnerable group like women and the very poor.

The original model of market-led land reform proposed by the World Bank had political and economic liberalisation as its guiding principle, and it recognised the central tension between the desire to address welfare objectives through the redistribution of land and the need to promote the productive use of agricultural land.[49] However, as a result of political considerations such as the proposed model – `a highly centralised and fragmented bureaucracy' riven by 'poor race relations' and a 'high black staff turnover' – the reviewed model shifted away from alleviating the plight of the rural poor to a new concern to promote agricultural production and commercial farming by establishing a class of black commercial farmers.[50]

Subsequent reviews of the land reform programmes advocated a reversal of policy from a market-led to a supply-side approach where the state could purchase or release land which could be made available in the form of defined projects for the beneficiaries who qualify for them. Land reform with stronger state's intervention was expected to unlock the economic potential of rural communities while simultaneously addressing inequalities in access to commercial agriculture by black farmers.[51] However, what emerges from the market-led land reform programmes in Zimbabwe and South Africa is that political and economic considerations undermined the ultimate objectives of land redistribution – access to land for the poor majority. In the context of post-colonialism, market-led approach to land reform has perpetuated the interests of the fortunate minority instead of redressing colonial injustice of discriminatory land ownership rights and access to land against the majority of native Africans.

46 Keswell, M and Carter, MR 'Poverty and land redistribution' (2014) 110 *Journal of Development Economics* 250-261.

47 Department of Land Affairs (DLA). *White Paper on South African Land Policy* (1997) <https://bit.ly/2XWZbjx> accessed 31 December 2018.

48 Hall (n 37) 623.

49 World Bank 'Options for Land Reform and Rural Restructuring in South Africa' (Land and Agricultural Policy Centre Conference 1993) 41.

50 McIntosh, A 'Review of the Land Reform Pilot Programme (Draft Report)'. Associates for the Department of Land Affairs (1999) *The European Union Department for International Development* 6-38.

51 Hall (n 37) 621.

3.2 State-led approach to land reform

The struggle for liberation from colonial and apartheid domination envisaged that independence and democracy would usher in a new era of equal rights and equitable access to land. Therefore, land reform that ensures equitable redistribution of land resource without class differentiation is a legitimate expectation of citizens of post-colonial African states. The citizens expect the state to utilise the newly found political power to act in their best interest and are inclined to withdraw support, even allegiance, if the state is not perceived to act accordingly. On the other hand, the state is mindful of its legitimacy and conscious of its erosion by inaction or prevarication on such a fundamental resource as land. Thus, as Hammar notes,[52] land is both a pre-eminent political and economic resource and the stage upon which competing assertions of legitimate rule and territoriality are played out.

It is this context of political pressure that calls for a more interventionist state-led approach towards the ultimate objectives of land reform that guarantees equitable redistribution of land and ensures access to land for the poor majority. State-led approach to land reform may involve a pragmatic intervention in the land market whereby the state acquires land for equitable distribution, or the state, exercising its power of eminent domain, undertakes compulsory acquisition from the minority with excess land and redistributes to the majority with limited access. Historical and prevailing contexts of different nations need to determine the most effective means of active state's intervention in land reform. However, as a necessity, the ultimate objective of equitable land redistribution in the interest of the poor majority, has to be the guiding principle so that the end would justify the means. This is not to suggest that the state may employ any means that defy justice in its narrow and broad connotations comparable with colonial acquisition and dispossession, but one with the utilitarian result of serving the interest of the greater number of people.

State-led approach to land reform can avoid the problems with a market-led process and achieve the goal of equitable land redistribution if the most suitable policy and legal frameworks are emplaced and honestly implemented. However, no matter how the state's intervention is initiated it would fail to achieve the expected objectives if its implementation is dictated or influenced by populist political exigencies and parochial economic considerations. Populist considerations dictated Zimbabwe's land reform programmes from the 1990s when veterans of the liberation struggle and rural peasants, frustrated at the slow pace of land redistribution since 1980, invaded and occupied white owned commercial farms. For political expediencies, the government allowed the land invasions and occupations to fester until it gained momentum amongst the ordinary populace.[53]

The ten-year period for the willing-buyer willing-seller principle under the Lancaster House Constitution elapsed in 1990 and it provided an opportunity for the state to review

52 Hammar, A 'The Unsettled Land: State-making and the Politics of Land in Zimbabwe 1983-2003' (2007) 7(3) *Journal of Agrarian Change* 405-423.

53 Raftopoulos, B 'The 2013 Elections in Zimbabwe: The End of an Era' (2013) 39(4) *Journal of Southern African Studies* 971-988.

its land reform policies and laws for a more effective and meaningful land redistribution programme. Rather, the state assumed a radical and populist approach by allowing the land invasions and enacting the Land Acquisition Act in 1992 under which it acquired white owned commercial farms without compensation.[54] The state's acquisition complimented the violent invasions and occupations by the war veterans, and under the 2000 Fast Track Land Reform Programme and subsequent legislations, including amendments to the constitution, the rule of law was set aside in the process of state's land acquisition. The chaotic land invasions and occupations by war veterans and the militant members of the ruling party (ZANU-PF) were touted as the Third Chimurenga (the final liberation struggle), and the state capitalised on it for political mileage.[55]

In spite of any justifications for the post-1990s state-led approach to land redistribution in Zimbabwe, such as the slow and ineffective willing-seller willing-buyer process caused by the sabotage of the white commercial farmers, the chaotic and lawless 'land redistribution' could not have achieved any different result; it was politically instigated and thus compromised the objectives of land redistribution *ab initio*. For instance, there was no clear-cut policy for the equitable and efficient redistribution of land forcibly acquired by the state and invaded by the war veterans and their cohorts. Rather, acquired and seized lands only went to political actors, cronies and the invaders while the majority of poor men and women, not politically active, were marginalised and denied access to land for agricultural productivity. The lack of a systematic and procedural land redistribution policy also compromised the efficient use of land as most of the beneficiaries did not possess the capacity and expertise for productive utilisation of the land they received.[56]

Thus, the aftermath left little or no positive impact on rural livelihoods or the rural economy, rather it triggered monumental socio-economic problems for the national economy. Cliffe has asserted that land redistribution may not merely be constrained by the constitutional settlement and protection of private property, nor the market-led approach to land reform (like in Zimbabwe and South Africa), but more profoundly by the manner in which redistribution process is 'constricted by old-fashioned and often implicitly colonial orthodoxies'.[57] This assertion fits into the point made earlier that state-led approach to land reform should not be comparable with the process of colonial acquisition and dispossession of African lands, rather it should serve the utilitarian purpose – the interest of the greater number of people. Colonial orthodoxies were steeped in political and economic considerations of the interest of the minority and at the expense of the majority. It is this author's submission that, though with different political and economic considerations, land reforms in post-colonial Africa has continued to yield marginalisation and exclusion of the majority of the rural poor.

This enduring colonial legacy is latent in the implementation process and evident in the results of apparently well-managed, more civil and procedural state-led approach to

54 *Ibid* 972.

55 Hammar (n 52) 415.

56 Marongwe, N 'Who was Allocated Fast Track Land, and What Did They Do With It? Selection of A2 Farmers in Goromonzi District, Zimbabwe and its Impacts on Agricultural Production' (2011) 38(5) *Journal of Peasant Studies* 1069-1092.

57 Cliffe, L 'Land Reform in South Africa' (2000) 27(84) *Review of African Political Economy* 273-286.

land reform like that of South Africa. From the year 2000, land redistribution programmes in South Africa shifted away from state-assisted land purchase through grants to a policy which promoted black capitalist farmers, providing larger land purchase subsidies to those with their own means to engage in commercial production.[58] After the Land Summit of 2005 and a host of policies, stronger state interventionist land redistribution policies have, since 2011, conduced to a process where the state purchases land and distributes to black farming households and communities for a lease period of 30 years, renewable for a further 20 years, before the state will consider transferring ownership to beneficiaries.[59]

Under a Recapitalisation and Development Programme, qualification for on-farm infrastructure and production support requires that beneficiaries must have either a strategic partner (to operate the farm on their behalf) or a mentor (to advise them how to do so).[60] However, Hall and Kepe's[61] recent findings have raised questions about the political and economic implications of this incarnation of land reform policy in South Africa. According to the researchers, in the absence of land reform grants, there is huge disparity in who gets what. In some cases, a sizeable community may get a small farm, while in other cases government buys a large farm with substantial infrastructure and even livestock and gives it to a single family. The result is that some beneficiaries receive nothing other than occupation of farms, some of which are dilapidated, while others receive valuable farms as going concerns with infrastructure, equipment and livestock.[62]

In other cases, the state conclude leases with the strategic partners (established farmers or representatives of large agribusinesses who are mostly whites) rather than with beneficiaries themselves, who therefore neither own the land nor lease it, but remain workers on the farms, working for the strategic partners and paid below minimum wage. These cases comprehensively draw into question whether state funds for land redistribution are being used to provide (white) agribusinesses with cheap or free access to land in the name of redistributing land to (black) rural people. When beneficiaries clearly cannot invest in and operate commercial farms, they are to be sidelined in favour of agribusinesses that can do so. The result, as Hall and Kepe's field research found, is a two-tiered land reform in which some (white owned) agribusinesses garner handouts from the state, while poor families and communities who have accessed state land are left with insecure tenure and livelihoods.[63] This has also given rise to two distinctive realities: 'farms without farmers', and 'farmers without farms".[64]

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58 Hall, R 'Who, What, Where, How, Why? The Many Disagreements about Land Redistribution in South Africa' *in* Cousins, B (eds), *Land Divided, Land Restored: Prospects for Land Reform in 21st Century South Africa* (Jacana 2015) 130-148.

59 Department of Rural Development and Land Reform, *Draft Policy Paper: Communal Property Associations and the Rural Economy Transformation Model* (2013) 207 <https://bit.ly/3CPxpvh> accessed 2 January 2019.

60 *Ibid* 209.

61 Hall, R and Kepe, T 'Elite capture and state neglect: New evidence on South Africa's land reform' (2017) 44(151) *Review of African Political Economy* 122-130.

62 *Ibid* 127.

63 *Ibid* 129.

64 Akinola, AO, Kaseeram, I. and Jili, NN 'Globalization of South African Land Reform Scheme: An Interrogation' *in* Akinola, AO, Kaseeram, I and Jili, NN (eds), The New Political Economy of Land Reform in South Africa (Palgrave Macmillan 2021) 37.

State-led land reform may thus have profound threats of official manipulation and elite capture in land ownership and access to land. Indeed, state-led land reform in post-colonial African countries has effectively meant the nationalisation of land with the consequence of elite capture and the marginalisation of the poor majority. For example, land reform in Nigeria to address the problems bequeathed by colonialism in land ownership and access to land led to the enactment of the Land Use Act in 1978. The law effectively nationalised land in the country by vesting title to all land situated in the territory of each state in the Governor of the state.[65] The law thus extinguished all forms of land ownership rights and tenure systems previously enjoyed by Nigerians, particularly family and communal land ownership under which the poor majority had access to land.

However, the provisions of the law that have mostly thrived on political and economic considerations that are not in the interest of the poor majority is the requirement of Governors' consent for the transfer of a statutory right of occupancy through either mortgage or assignment[66] and the power of Governors to revoke any right of occupancy for overriding public interest.[67] Process for obtaining Governor's consent is cumbersome and expensive (has become states' revenue source) except for the elites, middle class and politically connected. Also, Governors' power of compulsory acquisition for public purpose is more often used as a cloak for expropriation of lands for purposes that are less of public and more of private interests of elites, politicians and their patrons. The consequence is that the poor majority particularly in rural and peri-urban settlements do not have land ownership rights or secure access to land.

In comparative terms, one significant theme provides a common context across Nigeria, Zimbabwe and South Africa; the persistence of diverse political and economic considerations that skew land ownership rights and access to land in favour of the minority since colonial period and now in post-colonial land reforms. To almost the same degree, post-colonial land redistribution policies and programmes in Zimbabwe and South Africa have not adequately corrected age-long deprivation and exclusion of majority poor black Africans from land ownership rights and access to land.[68] Also, in Nigeria, land reform necessitated by the negative impact of colonialism has rather ensured and strengthened minority rights to land ownership at the expense of the poor majority.

4. Recommendations

The demands for land and the struggles for rural livelihood in African countries have not fundamentally changed since the periods of colonialism.[69] The system of colonialism in Africa originated from the existence of political forces that were motivated by economic benefits which Africa's land and mineral resources offered. Africa's colonial history, and

65 Section 1.

66 Section 5.

67 Section 28.

68 With particular respect to South Africa, this position is echoed and re-echoed in one latest work; Akinola, AO, Kaseeram, I and Jili, NN (eds), *The New Political Economy of Land Reform in South Africa* (Palgrave Macmillan 2021) 1, 11, 35, 55, 79, 121.

69 This includes political struggles by native Africans to build a nation-state out of the colonial state imposed by white settles. See Mamdani, M *Neither Settler nor Native: The Making and Unmaking of Permanent Minorities* (Harvard University Press 2020) 145-147.

with it, the dispossession and impoverishment of rural people, therefore necessitates suitable land reform towards ensuring equitable land ownership rights and access to land for agricultural and commercial productivity. To different degrees though, post-colonial land reform laws, policies and programmes in Nigeria, South Africa and Zimbabwe have not successfully fulfilled the objectives of democratising land ownership rights, ensuring access to land, alleviating poverty and revitalising the rural economy.

In a reincarnation of colonialism, a variety of political considerations have affected choices and implementation of land reform policies and programmes in these countries in ways that perpetuate racial and class differentiations, elite capture and minority dominance, including the rise of local powers, in land ownership and access to land.[70] One significant lesson that emerges is that almost always the poor majority are the victims of the influence of political forces on the choice of economic policies and programmes. While the motivations and objectives of colonialism (political power and economic benefits) are now clear, post-colonial laws, policies and programmes towards addressing its effects are ensnared in a complex web of political considerations and contestations of public policy choices. The result, as evident in both market and state-led approaches to land reform, is a circle of land redistribution that begins from a privileged minority and end with the same class of minority.

Market-led approach to land reform, as prescribed by Western countries and institutions in the last two decades of the last century, led to the deregulation of the land markets, the withdrawal of state support to agriculture and the reliance on the private sector as the principal agent of development.[71] The consequence was economic crisis in Zimbabwe, accompanied by an equally profound crisis of political legitimacy in the face of popular dissatisfaction of ordinary citizens, and the adoption of a radical state-led approach to land redistribution that excluded the poor majority. In South Africa the market-led approach marginalised the very poor majority and consolidated the impoverishment of this vulnerable group as social class and economic status determined who got what, when and how in land ownership and access to land.

In contemporary time, there is a growing impact of neoliberal globalisation on land laws and policies being promoted by national governments and international agencies. Current policies, such as privatisation of former state agricultural enterprises and the granting of concessions to large scale commercial farmers, continue to place much of the best land in the hands of elite groups, both national and foreign, within a framework of market capitalism.[72] This is the position in the three countries of focus where the governments are now granting transnational investors vast lands for large scale agricultural production.[73] While this is justified as foreign direct investment to create

70 In Mamdani's opinion, colonialism's legacy has also produced a bifurcated power that mediated racial domination through tribally organised local authorities, reproducing racial identity in citizens and ethnic identity in subjects. Mamdani, M *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 2018) 9.

71 Lahiff (n 3) 21.

72 Lahiff (n 3) 21.

73 Chamberlain, W and Rogerson, CM 'Agricultural land grabs in Africa: Scope, patterns and Investors' (2009) 7(48) *African Journal of Agricultural Research* 64-88.

employment and grow the economy, it however prevents pro-poor land policies and the availability of arable land for rural communities.

Arguably, a slow progress has been made in redressing colonial injustices in land ownership and access to land for the poor majority, but it has not fundamentally changed the highly unequal and dualistic nature of property relations, and has not also delivered significant material benefits to the rural population in these African states. Unfortunately, in this era of neoliberal globalisation, there is a strong tendency for African states to ensure or preserve (as the case may be) the fundamental structure of a capitalist economy, including commercial agriculture that is based on large-scale, capital-intensive production, with high export potential. In the years ahead, political pressures on government from players and agents of market capitalism (the minority) would serve to reinforce neo-liberal preferences that are now expressed in macro-economic policies, including in the agriculture sector.

Such policies are likely to leave the structure of the rural economy largely intact and, in the case of liberalisation of agricultural markets and cuts in agricultural support services, contribute to conditions that would remain hostile to the rural poor. In order to ensure equitable land ownership rights and access to land for the majority poor, this article recommends that there is an urgent need to evolve a new policy approach. As noted earlier, the failure of the willing-seller willing-buyer principle in Zimbabwe was not entirely due to the 'unwillingness' of land owners to sell portions of their large holding. It was, as a result of political expediencies, the failure of the state to offer adequate assistance to the landless majority and to actively engage in the land market in order to secure outcomes favourable to the rural poor. Even under active state's intervention in South Africa, the state also failed to secure favourable outcomes due to a top-down implementation process while in Nigeria the land reform places ownership of land at the top of the political class – far removed from the rural poor.

Consequently, this article recommends a new policy approach that has to place the landless majority at the core of land reform policies and programmes; where the rural poor is the focal point with which to closely monitor and evaluate outcomes at every stage of the implementation process. Whether market or state-led, the recommended new policy approach has to be driven mainly by the broad imperatives of ensuring equitable access to land for the vulnerable majority group of rural poor, and not influenced by political considerations that yield narrow outcomes for privileged minority groups.

5. Conclusion

The slow progress in re-assigning land ownership rights and ensuring equitable access to land many decades after colonialism have been due to the existence of diverse political forces that affect policy choices in land redistribution programmes. Under such approach, politicians and bureaucrats act mainly for selfish and narrow interests. This article's recommended approach calls for a new policy shift to where the state and its officials act to maximise access to land resource as a function of social welfare, economic productivity and quality of life for the majority of its vulnerable citizens. Useful details on the new policy approach herein envisaged and advocated may be gleaned from the African Union's

Framework and Guidelines on Land Policy;[74] it provides a process for the development of land policy and land reform in Africa towards strengthening land rights, enhancing productivity and securing livelihoods for the majority of the continent's rural and vulnerable populations.

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74 AUC-ECA-AfDB Consortium (n 1) 9-15.

An Analysis of the Petroleum Industry Governance Bill in Nigeria: Prospects and Challenges

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Abstract

The importance of oil and gas to the growth of the Nigeria's economy cannot be overemphasised. This article appraises the key provisions of the Petroleum Industry Governance Bill (PIGB) and its potential contribution to the Nigerian petroleum industry. The Nigerian government has embarked on policy reforms, which have led to a compilation of the document referred to as Petroleum Industry Bill (PIB). This was presented to the National Assembly in 2012. The PIB was divided into logical smaller pieces amongst which are the Petroleum Industry Governance Bill (hereinafter "the Bill"). The Bill is expected to unbundle the Nigerian National Petroleum Corporation (NNPC) into various independent institutions like the Federal Ministry of Petroleum Incorporated, the Nigerian Petroleum Regulatory Commission (NPRC), Nigerian Petroleum Assets Management Company and National Petroleum Company (NPC). This is to ensure transparency in the administration of petroleum resources. The Bill has been observed to be fraught with some challenges, as the minister still possesses substantial powers. The minister possesses pre-emptive power over all petroleum and related products. He or she may increase the fine imposed by the Bill through regulation. The Bill dispossesses Ministry of Environment of power over environmental affairs which is its area of expertise and gave it to the NPRC. These and other challenges are investigated in this article. The researcher employs qualitative research methods and as well conducted few interviews. The main purpose of the qualitative review was to investigate the prospects and challenges of PIGB a segment of the PIB in Nigeria. The personal interviews were conducted face to face. Purposive sampling technique was used in identifying the interviewees because these are the stakeholders in matters of exploration and exploitation of oil and gas in Nigeria.

Keywords

non-renewable energy; Petroleum Industry Governance Bill (PIGB); regulatory framework; sustainable development

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1. Introduction

Petroleum is an important commodity in Nigeria; it contributes about 90% of its foreign exchange earnings. It is therefore vital to the growth of the economy.[1] The Nigerian Government embarked on policy reforms which culminated into the national policy on oil and gas adopted by the Federal Government in 2004.[2] Thereafter, the government set up Oil and Gas Sector Reforms Implementation Committee (OGIC), in 2007 for the implementation of the policy. The Committee gave cogent recommendations which culminated into the compilation of the document referred to as Petroleum Industry Bill (PIB) which was brought before the legislative arm of government in 2012.

The Bill is novel in many respects, for instance it seeks to establish a commission (the Nigeria Petroleum Regulatory Commission NPRC) responsible for the implementation of government policy in the industry and a body that is independent of the Minister of Petroleum Resources. This is to reduce political interference in the running of the affairs of the industry. It also seeks to transform the Nigerian Oil and Gas industry in order to bring it in line with 21st century petroleum industry by ensuring transparency and accountability. Some of the issues covered by the PIB are as follows: state participation – ownership and control, fiscal matters, institutions and regulatory bodies, safety, health, environmental concerns and one of the knottiest issues – the issue of community relations.

The PIB has, however, suffered some setbacks in the Nigerian National Assembly. Opinions were divided concerning some salient provisions of the Bill. For example, the provision of Petroleum Host community Fund (PHCF) to alleviate the suffering of the host communities caused a sharp division between the law makers from the Northern part of Nigeria and their Southern counterparts; they see the introduction as an attempt to give to the states in the Niger Delta more than 13% oil derivation allowed by the law.[3] In order to avoid further delays, the PIB was split into logical smaller pieces,[4] such as Petroleum Industry (Governance & Institutional Reforms) Bill,[5] Petroleum Industry (Upstream Petroleum Administration Reforms) Bill, Petroleum Industry (Downstream Petroleum Administration Reforms) Bill, Petroleum Industry (Fiscal Framework & Reforms) Bill and Petroleum Industry (Revenue Management Reforms) Bill.

One of the segments of the PIB is the PIGB; it was introduced to the Senate and was passed into law on 25 May 2017, while the House of Representatives passed it in January 2018. In July 2018, a harmonised copy of the proposed law got sent to President Muhammadu Buhari in order to receive his signature. However, the Bill is yet to be endorsed by the President.

1 Onduku, A 'Environmental conflicts: the case of the Niger Delta' (2001) a presentation at the One World Fortnight Programme Organised by the Department of Peace Studies, University of Bradford, United Kingdom <https://bit.ly/39ux8dA> accessed 16 May 2020.

2 Please note that petroleum and oil and gas will be used interchangeably.

3 Personal communication by way of an interview with the Chairman Senate Committee on petroleum resources (Senator Tayo Alasoadura) on 2 March 2017.

4 This statement was volunteered by a senator of the Federal Republic of Nigeria in March 2017 during one of the numerous interviews conducted by the writer of this article while carrying out fieldwork for his LLD thesis at North-West University, Mafikeng campus.

5 This Bill has been passed into law by the Nigerian National Assembly.

The aim of this article is to appraise the key provisions of the PIGB and its potential contribution to the Nigerian petroleum industry. The PIGB is a segment of the PIB; therefore, this article will also discuss other cogent provisions of the PIB. Now that the PIB has been passed into law by the Senate on Thursday, 1 July 2021, this article will assess its prospects and the areas that should be improved upon. The PIB (inclusive of PIGB) became the new Petroleum Act. Therefore, this article will only discuss the grey areas of the Act.[6]

2. Historical background

The Nigerian oil and gas resources are located in the Niger Delta region. The Niger Delta area is a large river delta in a tropical region with coastal ridge barriers, mangroves, freshwater swamp forests.[7] The name 'Niger Delta' is identical with the Riverine people of Nigeria.[8] The Niger Delta Mangrove Forest is 6 000 square kilometres in area and its fresh water swamplands are 11 700 square kilometres. It has many rivers, streams, brooks and canals as over 60% of the region is traversed with creeks and dotted islands while the rest is a low-land rainforest.[9] It comprises nine oil producing states, namely Delta, Bayelsa, Rivers, Akwa Ibom, Cross River, Edo, Abia, Imo and Ondo.[10]

The exploration for oil in Nigeria began before the commencement of the First World War I by a German company called Nigerian Bitumen Company, but the company's activities were stopped because of the war.[11] The German company was succeeded by the Shell D'Arcy Company in 1937.[12] Shell D'Arcy undertook several exploratory activities,[13] but its first commercial discovery was made in 1956 in a location near Oloibiri village in Bayelsa state[14] with 5 100 barrels per day in 1958 when the first consignment of crude oil was exported to Europe.[15]

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6 It is, however, important to say that the Act cannot operate as a law until it has been assented to by the President or in the alternative if the President uses his veto power, the National Assembly can pass it into law after one month by two thirds majority.

7 Niger Delta Environmental Survey: Briefing Note 2 September 1997, 4.

8 Abila, SE 'Historic Philosophical Foundation of Minority Rights Movements in the Niger Delta' *in* Emiri F and G Deinduomo (eds), *Law and Petroleum industry in Nigeria: Current Challenges* (Malthouse Lagos 2009) 175-210.

9 Abibe, E and Essaugh *An Environmental Impact Assessment* (Enugu: Immaculate Publication, 1999) 45-50.

10 Osuigwe, NE 'Crude Oil, Conflict and Christian Witness in Nigeria: Baptist and Pentecostal Perspectives' (Degree of Doctor of Philosophy the University of Edinburgh, 2010) 14 <www.thesis.dislib.info> accessed 18 April 2019.

11 Ebeku, KSA *Oil and the Niger Delta People in International Law: Resources Rights, Environmental and Equity Issues* (Rüdiger Köpper Verlag 2006) 68.

12 Shell D'Arcy Company was the forerunner of Shell Petroleum Development Company of Nigeria (SPDC).

13 For example, it drills its first well in 1951 at a location near Ihuo village, some 16 km north-west of Owerri town. It also drilled another well at Akata-1 well.

14 Bayelsa state is one of the 36 states of Nigeria and remain today one of the largest oil producing states in Nigeria.

15 Inokoba, PK and Imbua, DL 'Vexation and Militancy in the Niger Delta: The Way Forward' (2010) 29(2) *Journal of Human Ecology*, 104; Okonmah, PD 'Right to Clean Environment: The Case for the People of Oil-Producing Communities in the Niger Delta' (1997) *Journal of African Law*, 43.

2.1 Petroleum regulation during the colonial era

The first oil and gas law was promulgated in 1907 and named Mining Regulation (Oil) Ordinance of 1907.[16] This was followed by the Mineral Oil Act which was enacted 'to regulate the right to search for, win and work mineral oils'.[17] The Ordinance vested the entire property in and took control of all minerals and mineral oil in, under or upon any lands in Nigeria, as well as of all rivers, streams and water courses throughout Nigeria on the Crown.[18] This provision was repeated under the 1946 Minerals Ordinance. During this period, the colonial master adopted concessionaire method to allocate hectarage of land for petroleum search as well as utilisation. For instance, the whole of Nigeria was granted to a Shell D'Arcy company, which means that the company was free to explore for oil anywhere in Nigeria, which comprises 924 630 square kilometres without regard to the people and the environment.[19]

The British colonial administration stultified competition against the British owned company (Shell D'Arcy) by providing in section 6(1)(a) of the Mineral Oils Act that no lease should be granted to any other British corporation registered in the United Kingdom or in a British colony having its primary place of business within the Queen's rule. Such a company's chairman and managing director (if any), other directors and the majority shareholders, must be British subjects.[20] With the discovery of oil in commercial quantities, the ban was lifted in 1958 to allow other oil companies to participate in the exploration and development of the resources.[21] Consequently, Shell D'Arcy started laying pipes to convey the crude oil from the oil well to the station and finally to the sea. To regulate these activities the Oil Pipelines Act of 1956 was enacted.[22]

The Act made provisions for licences to be granted for the establishment and maintenance of pipelines which are incidental and supplementary to oilfields and oil mining and for purposes ancillary to such pipelines. Also, in 1959, the Petroleum Profit Tax Act was enacted to separately tax the profits of oil companies from the companies which engaged in other enterprises. There had been no specific regulations put in place, all this until in 1952 when Mineral Oils (Safety) Regulations was enacted to regulate the

16 Sasegbon, F *Energy Law Seminar held at the Banff Centre, Alberta, Canada* Volume 1 (Sweet & Maxwell, 1981) 365.

17 Etikerentse, G *Nigerian Petroleum Law* (2nd Ed., Dredew Publishers, 2004) 6.

18 Section 3(1) of the Mineral Oil Act. The legacy of this law appeared in subsequent legislations in Nigeria like the Section 1 of the Petroleum Act of 1969 (CAP) 350, 1990 Laws of the Federation of Nigeria LFN), also 40 (3) of the 1979 Constitution, Section 44 (3) of the Constitution of the Federal Republic of Nigeria 1999.

19 Nlerum, FE 'Reflections on Participation Regimes in Nigeria's Oil Sector' (2007-2010) *Nigerian Current Law Review* 145, 147.

20 The Mineral Oils Act as contained in Cap. 135 of the 1948 Edition of the Laws of Nigeria.

21 See Section 6(1) (a) of the Mineral Oils Act, Cap 135 of the 1948 Edition of the Laws of Nigeria; Companies of different nationalities, such as Mobil, Gulf, Agip, Safrap (Elf), Tenneco, and Amoseas (Texaco/Chevron). Other Multi-National Oil companies in operation in Nigeria are: Korean oil company, Addax Petroleum Development (Nigeria) Limited, China National Oil Company, Express Petroleum, Cavendish, AENR, Consolidated Oil Limited (Conoil), and AMNI International; S Ariweriokuma *The Political Economy of Oil and Gas in Africa: The Case of Nigeria* (New York: Routledge 2008) 6; See also Y Omorogbe 'Contractual Forms in the Oil Industry: The Nigerian Experience with Production Sharing Contracts' (1986) *20 Journal of World Trade Law* 274.

22 Cap 145 of the 1958 Edition of the Laws of Nigeria.

activities of the company in terms of safety and good oil-field practices.[23] It was amended, and the amendments were contained in the Oil Pipelines Act of 1965. It is important to also mention the enactment of the Petroleum Profit Tax Act passed in 1959 to separately tax the profits of oil companies from the companies which engaged in other enterprises.

It is also pertinent to note that, during the colonial era, the government's role in the oil industry was passive, with its role limited to minor regulatory responsibilities.

2.2 Petroleum regulatory frameworks from 1960 to the introduction of the Petroleum Industry Bill (PIB)

At independence, government maintained its nominal role in regulating the petroleum industry up till 1970 when the Nigerian state became part of the Organisation of Petroleum Exporting Countries (OPEC).[24] The Organisation was set up to participate and gain complete control of the petroleum industry in the members' territories.[25] As a member of OPEC, Nigeria took a more proactive step towards gaining the control of its petroleum industry. This was accompanied by establishing a National Oil Company named the Nigerian National Oil Company (NNOC) to hold Nigerian interests in petroleum production. Nigeria also established the Ministry of Petroleum Resources charged with supervision of the activities in the industry.[26]

2.2.1 Challenges facing the petroleum industry

In 1977, a new National Oil Company was formed named the Nigerian National Petroleum Corporation (NNPC). The NNPC was given the right and responsibilities of the defunct NNOC and the Ministry of Petroleum. By necessary implication, the NNPC carried on the commercial function by holding interests in the joint ventures, holding Oil Prospecting Licence (OPL) and Oil Mining Licence (OML) upon which production sharing contracts are derived and at the same time had the regulatory and policy functions.[27] This state of affairs was unsatisfactory because the NNPC was a commercial entity carrying out commercial functions at the same time acting as a regulator. It was like calling on NNPC to regulate itself because it was involved in Joint venture with major international oil conglomerates like Shell Nigeria, Agip oil, Texaco/Chevron, etc. There were therefore calls for redefining the roles of NNPC, especially separating the regulatory role from its commercial function. However, this state of affairs continued until the eighties when a Ministry for controlling the oil and gas activities was re-established to take charge of policy functions and the new Department of Petroleum Resources (DPR) was also established to perform the regulatory/inspectorate functions previously carried out by the NNPC.[28]

23 Etikerentse (n 16 above) 7.

24 Adefulu, A 'A critical Analysis of Institutional Reforms in Nigeria's Oil and Gas Industry' *Odujinrin and Adefulu Law Firm* 2. OPEC was formed in 1960.

25 *Ibid*.

26 *Ibid*.

27 Adefulu (n 24 above) 3.

28 Adefulu (n 24 above). It should be noted that the responsibilities conveyed upon NNPC, which were now transferred to DPR, were not legally transferred. The legislation which granted those powers

As indicated above, a new DPR was created to see to oversight functions of the industry. Unfortunately, the DPR was placed in a weak position to NNPC and its partners in the joint ventures and production sharing contracts it is supposed to regulate. For example, NNPC and DPR share facilities and the employees of both institutions are often sent on secondment from one to the other.[29] NNPC did fund the operations of DPR, including the payment of staff salaries and the funding of DPR's monitoring functions. The financial dependence of DPR on the NNPC compromises the ability of DPR to monitor the activities of the NNPC effectively and independently, as well as that of its foreign oil company's partners.[30] The NNPC also performed functions that ordinarily could be classified as regulatory functions through its National Petroleum Investment Management Services (NAPIMS) arm.[31]

The NNPC was influential in the petroleum industry because of its vantage position as the one with the monopoly of the right to explore and exploit petroleum in joint venture with multi-national oil companies. The combination of regulatory and commercial functions of the NNPC does not promote efficiency, effectiveness and transparency.[32] The recognition of this dysfunctional arrangement necessitated the proposed institutional framework reform with the aim of unbundling the NNPC and separate roles in the industry.

Another major problem of the NNPC is the funding issues. As noted earlier, the NNPC engages in joint ventures with foreign oil companies which means it must contribute to the funding of the joint venture in proportion of its shares.[33] Presently NNPC's interests in the joint ventures are funded directly from the Federal Government's budget. This has served as a substantial strain on the government as money is diverted away from other areas of infrastructural investment such as power, roads, schools and hospitals to fund joint venture activities. The funding becomes more burdensome on the Federal Government due to the dwindling revenues from sales of crude oil. Aside from the opportunity costs associated with this diversion, the arrangement has proved to be thoroughly inefficient, significantly hampering investment in joint venture projects, with many investments being cancelled or postponed until government funding is arranged.[34] To compound the funding problems, the Supreme Court in *Attorney General of the Federation v Attorney General of the Abia State*[35] declared as unconstitutional the Federal Government funding of the of the NNPC's joint venture business as a first line charge on the Federation Account.[36]

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and functions were not amended to reflect this functional transfer. It can thus be argued that DPR has no legitimate power to carry out those functions validly granted to NNPC's Inspectorate Arm by legislation.

29 Adefulu, A (n 23 above) 4.

30 *Ibid.*

31 *Ibid.*

32 *Ibid.*

33 As the holder of majority interests in these joint ventures, NNPC is required to contribute significantly to the joint venture budget and funding.

34 Adefulu (n 24 above) 5.

35 (No. 2) (2002) 6 NWLR (Pt 7841) 542.

36 See Section 162 of the 1999 Constitution Federal Republic of Nigeria.

Apart from the NNPC, the Ministry of Petroleum Resources was also established to see to the running of the industry, but the ministry remains basically a civil service outfit that is ill-equipped to consider and formulate the essential policies for such a complex and sophisticated industry.[37][38] The most problematic, however, remains the National Oil Company; the Nigerian National Petroleum Corporation (NNPC) which could not stand on its own, it relies on the Federal Government for its finances.[39] It could not honour its obligations for 'cash calls' in the joint venture agreements between it and the multinational oil companies.[40]

NNPC represents the Federal Government in joint ventures (JVs) and it contributes to the funding of operations in the proportion to its equity holding and receives the produced crude oil in the same ratio. The impact of oil joint venture partnerships in oil dependent country like Nigeria cannot be overestimated. JVs produce over 90% of the total petroleum production in the country.[41] In January 2021, the NNPC generated N209.54 billion from oil and gas exports and domestic sales. It spent N83.29 billion on JVs assets and N30.44 billion to the JV cash call payments account as first line charge while N52.85 billion went to JV cost recovery and government priority projects. Out of the export receipts, $28.43 million was remitted to the Federation Account while $80.32 million was remitted to fund the JV cost recovery to guarantee current and future production.[42] The NNPC spent the sum of N21.47 billion (part of its February earnings) through NAPIMS for rehabilitation refineries, funded national domestic gas development, gas infrastructure development, pay its monthly obligation on the Nigeria-Morocco gas pipeline and for oil search in the frontier basins.[43]

3. The Federal Government's reform efforts

3.1 National Oil and Gas policy

For the reasons adduced above, it became imperative for the Federal Government to initiate reform processes. Thus, the Federal Government commenced the reform process in 2000 by setting up OGIC. This process led to the approval of the National Oil and Gas Policy in 2004.[44] The main objective of the policy is to make far reaching changes and ensure the transformation of Nigeria's Oil and Gas industry, to bring it in line with 21st century petroleum industry.[45]

37 Egbogah, EO 'Oil and Gas Sector Reforms in Nigeria: What you should know' *Nigerian Oil and Gas Policy* page unknown <https://bit.ly/3lvYnd7> accessed 4 May 2019.

38 *Ibid*.

39 *Ibid*.

40 Etikerentse (n 17) 40.

41 Ifesinachi K and Aniche ET, 'Oil Joint Venture Partnerships and Nigerian Economy' *University of Nigeria Journal of Political Economy*, 7 (1&2) 1-24.

42 See <https://bit.ly/2VMx1Xm> accessed 6 July 2021.

43 This is contained in a document detailing its February 2021 presentation to the Federation Account Allocation Committee (FAAC) <https://bit.ly/3kijVe7> accessed 6 July 2021.

44 Oladunjoye, OM 'Incorporated Joint Ventures in the Nigerian Petroleum Industry: Examining the Legal Implications & Regulatory Risks' (2013) 11(2) *Oil, Gas & Energy Law Intelligence (OGEL)* 3 <https://bit.ly/3nH566X> accessed 2 May 2019.

45 *Ibid*.

The National Oil and Gas Policy basically provided general guidelines for the development of the new Oil and Gas industry. These guidelines must be transformed into a more practical and concrete legal and institutional framework to effectively transform the Oil and Gas industry as envisaged by the policy. It was in this regard that the Federal Government set up the second version of OGIC in 2007.[46] Some of the terms of reference of the Committee were that the Committee should assume the full mandate for the implementation of the OGIC report, especially as enshrined in the Road Map approved by government; advise on the take-off of the new bodies, institutions, organisations and agencies that would constitute the institutional framework for the restructured oil industry and lastly, to engage, as much as possible, all industry stakeholders in the course of the implementation programme, as well as resource persons, facilitators and consultants where necessary.[47]

So, the PIB was the result of a painstaking effort of the second version of OGIC set up by the Federal Government in 2007. The report of this committee was submitted to government in 2009. The PIB is a comprehensive document covering most of the relevant issues pertaining to oil and gas exploration and exploitation in Nigeria. Other matters covered include issues of state participation – ownership and control, fiscal matters, institutions and regulatory bodies, safety, health, environmental concerns and one of the knottiest issues – the issue of community relations.[48]

4. Controversies surrounding the Petroleum Industry Bill (PIB)

The National Assembly has not been able to pass the Bill due to controversies surrounding it. For instance, the multi-national oil companies have argued that the tax regime is too harsh and may discourage investment in oil and gas. They argued that it will no longer be profitable to invest in the sector because there will be low turn-over on the investment. Another controversy that stemmed from the provisions of the Bill is on the PHCF. The Fund will be utilised for the development of the economic and social infrastructures of the communities within the petroleum producing area.[49]

The law makers from the other parts of the country, especially those from the Northern Nigeria were of the opinion that PCHF is a way of increasing the 13% derivation already granted to the oil-producing states by the Constitution. According to them, the grant of such request will lead to unequal development of the states within the federation. As a result of this, the law makers broke the Bill into segments in order to pass the less controversial segment first and subsequently pass the remaining in piece-meal as matters involved are resolved. The first segment of the PIB which is the PIGB was presented to the Senate. On 25 May 2017, the Nigerian Senate passed the PIGB. The same Bill was passed in January 2018, by the lower chamber of the Nigerian National Assembly (the

46 Egbogah (n 37 above).

47 *Ibid*.

48 *Ibid*.

49 The lawmakers who are from Northern Nigeria were against the proposal saying it will bring unequal development in the country, the Niger Region having 13% derived under the 1999 constitution.

House of Representatives), paving the way for the passage of a synchronised version.[50] On 28 March 2018, the Senate passed the PIGB, having adopted the report of the committee of the PIGB which harmonised the versions earlier passed by both the Senate and House of Representatives.

As noted above,[51] the PIB is a comprehensive document covering most of the relevant issues pertaining to oil and gas exploration and exploitation in Nigeria.[52] These issues are there under discussed.

4.1 Ownership and control

The PIB maintains the status quo in terms of retaining the ownership and control of oil and gas in the Federal Government. Section 2 of the PIB vesting the ownership and control in the Federal Government states as follows:

> The entire property and control of all petroleum in, under or upon any lands within Nigeria, its territorial waters, or which forms part of its Continental Shelf and the Exclusive Economic Zone, is vested in the Government of the Federation.

Allocating oil wells to the state instead of individuals has been a contentious issue in the petroleum industry in Nigeria. The PIB makes no progress in this direction, it left the issue of ownership the way it has been since the colonial era. The failure of the PIB to touch this area means leaving Nigeria to contend with restiveness in the Niger Delta. This article argues that unless this burning issue is addressed, the Nigerian petroleum industry will continue to experience setbacks in terms of exploration and exploitation of the resources.

The government's participation in the extraction of petroleum has made it rather difficult for it to implement policies that can ensure the protection of the environment. Most of the time, the government and its regulatory agencies collaborate and collude with oil companies to trample on the socio-economic and environmental rights of the host communities in the Niger Delta.[53] The participation by government in oil business through the NNPC is like inviting the government to regulate itself especially in the areas of curtaining oil spillage and gas flaring.

Oil exploitation is better controlled by the community under the leadership of its traditional ruler. If this is done, it will be easy for the community to take care of its environment and the people. If the leadership of the community failed to do so, it will

50 The synchronised copy of the Bill is titled 'the Governance and Institutional Framework for the Petroleum Industry and for Other Related Matters'.

51 See para 3 under 3.1 National Oil and Gas Policy above.

52 Egbogah (n 37 above).

53 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (200I) AHRLR 60 (ACHPR200I)* para 1 <https://bit.ly/3xOmhEI> accessed 9 July 2021. At the non-governmental level in 1996 the Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) took the case against Nigeria to the African Commission for breach of human rights and environmental degradation. The group alleged that the military government of Nigeria has been directly involved in oil production through the State Oil Company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations have caused environmental degradation and health problems resulting from the contamination of the environment amongst the Ogoni People.

be easy for the people to accuse the leaders of the community since they are the ones in control. People can easily match against them and demand explanations, but the same thing cannot be said of the Federal Government whose seat of power is in Abuja, several kilometres from the exploration and production sites. Even where the people organise to carry their protest to Abuja, the Federal Government would have heard and will block them before they leave their states.

It is hereby opined that the issue of ownership should be revisited to allow for community participation in the exploration and exploitation of the resources in order to calm fray nerves in the oil producing communities. Mixed ownership should be adopted as it is obtainable in other federal states like United States of America (USA), Canada and Australia. This will allow oil producing communities in Nigeria to directly control the production of oil and gas in their communities. An agreed sharing formula of the proceeds could be negotiated between the communities, states and the Federal Government.[54]

The Minister for Petroleum Resources is to manage and allocate petroleum resources and their derivatives on behalf of the Federal Government and in accordance with the principles of good governance, transparency and sustainable development. He or she is to grant, amend, renew, extend or revoke upstream petroleum licences and leases upon the advice of the Inspectorate pursuant to the provisions of this Act.[55]

5. Prospects in the Petroleum Industry Bill (PIB)

Where oil is found in a community or individual's land, the compensation payable by the concerned oil company has been generating controversies over the years. Hence, the issue of compensation has been recurring in every segment of the law on oil and gas extraction in Nigeria, but none has been realistic as the one in the PIB because it provided that the rates shall be arrived at through a consultative process and that the Agency involved shall update the guidelines annually to reflect rates of inflation and any other relevant factors. Though so much still needed to be done, it is more than paying compensation to the community or individual because the effect of oil extraction on the people and the environment is devastating. The Federal government needs to take proactive steps to ensure that the infrastructural facilities are developed, and the outdated ones are upgraded. The PIB provides for compensation in section 296(1) as follows:

> The holder of a petroleum exploration licence, petroleum prospecting licence or petroleum mining lease shall, in addition to any liability for compensation to which the holder may be subject under any other provision of this Act, be liable to pay fair and adequate compensation for the disturbance of the surface of the land or any other rights to any person who owns or is in lawful occupation of the licensed or leased lands, in accordance with written guidelines issued by the Agency. (2) The rates of compensation contained

54 Ayodele, OA 'A comparative study of the legal framework governing oil and gas exploration and exploitation in Nigeria' (LLD dissertation, North-West University, South Africa, 2018) 265-271.

55 Section 6(1)(g) of PIB. Note that is contained in section 2(1)(g) of the Petroleum Industry Governance Bill. The Upstream Petroleum Inspectorate is to be known under the PIGB as Nigerian Petroleum Regulatory Commission.

> in the guidelines referred to in subsection (1) of this section shall be arrived at through a consultative process and the Agency shall update the guidelines issued annually to reflect rates of inflation and any other relevant factors.[56]

5.1 Regulatory and institutional framework under the Petroleum Industry Bill (PIB)

Before the new National Oil and Gas Policy, there has not been clear cut regulatory framework governing the industry. At some time, a department in the NNPC was the Regulator, at some other time it was the DPR – an arm of the Ministry of Petroleum Resources that was the regulator. Thus, there were no clear-cut roles for these institutions.[57] The Committee (OGIC) recommended that the NNPC should be made to face the business of oil exploration and production. To bring to fruition the recommendation of the Committee to commercialise the NNPC, section 148 of the PIB provides as follows:

> The Minister shall, not later than three months after the effective date, take such steps as are necessary under the Companies and Allied Matters Act to incorporate the National Oil Company as a public company limited by shares, which shall be vested with certain assets and liabilities of the NNPC.

Other regulatory and institutional frameworks are: The National Oil Company (NOC),[58] *Petroleum Technical Bureau*,[59] *Upstream Petroleum Inspectorate* (NPI)[60] and *Petroleum Technology Development Fund*.[61] Some of these institutions are retained by the PIGB while some were jettisoned. The institutions retained under the PIGB will be considered in subsequent paragraphs, but before then an important provision of the PIB – the PHCF is discussed below.

5.2 The Petroleum Host Community Fund (PHCF)

The PIB also provides for a fund known as the PHCF.[62] It is noteworthy that this is one of the giant strides taken to solving the problem in the Niger Delta of Nigeria. The crisis in this part of the country has assumed an alarming proportion in recent times. The people are agitating for improved conditions of living. They decried the lack and sometimes decade infrastructural facilities despite billions of Naira realised from the region. One of

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56 Section 296 (1) of the PIB.

57 *Ibid*.

58 The National Oil Company (NOC) will replace NNPC and it is to be incorporated as a limited liability company limited with shares under the Companies and Allied Matters Acts (CAMA 1990), section 148 of the Petroleum Industry Bill, 2012.

59 Section 9 provides for the establishment of the Petroleum Technical Bureau, which shall consist of professionals with expertise in the upstream and downstream sectors of the petroleum industry.

60 NPI is meant for the upstream sector regulations, section 14(1) of the PIB 2012. The NPI will assume the functions of the former DPR like setting standards and regulations for the industry and for ensuring adherence to environmental guidelines from time to time, section 14(1)(e) and (g) of the PIB 2012.

61 It is provided that there shall be established Petroleum Technology Development Fund. This is provided for in section 73(1) of the PIB.

62 Section 116 of the PIB.

the indigenes of the communities in Bayelsa state, while responding to a question from the researcher on the reason for the unrest in the Niger Delta, responded as follows:

> The Niger Delta crisis is quite unfortunate, but it is expected. In a situation where people by divine providence their ancestors reside in a particular location, unknown to any person that God has endowed the soil where they locate the wealth that is enough to manage the environment. But in a situation where the government has come with laws that did not favour the development of those areas of course you should expect reactions. These are spontaneous reactions because of negligence of the Federal Government, as a result of not doing what government supposed to do.[63]

Unfortunately, the current provision in the Land Use Act on compensation that is made applicable to oil industry is inadequate. This explains why communities in the Niger Delta have been resorting to court actions against the oil companies.

For instance, in *Jonah Gbemre v Shell Petroleum Development Company and Others*[64] (Jonah Gbemre was supported by Environmental Rights Action, Friends of the Earth Nigeria and the Climate Justice Programme), Gbemre filed a case in the Federal High Court of Nigeria to stop gas flaring in the Iwerekan community in Delta state. On 14 November 2005, the Federal High Court of Nigeria ruled that gas flaring was a violation of the constitutionally guaranteed rights to life and dignity and ordered that flaring should be brought to an end in Iwerekan.

On 10 April 2006, the Federal High Court granted a conditional stay of Execution of the court order. Three conditions were attached, including that Shell and NNPC stop gas flaring activities in Nigeria by 30 April 2007. The court also told SPDC to produce a detailed plan of action, showing how they would stop gas flaring in Iwerekan. Jonah Gbemre's legal representative attended the court on 30 April 2007. He discovered that, not only had no detailed scheme for stopping the flaring been submitted, but that the judge had been transferred to another court division and the case file was not available. No representatives of the company or government turned up. SPDC subsequently obtained a further stay of the court order, with no known conditions attached. As of May 2009, two years after the expiry of the original deadline, gas flaring continued in Iwerekan.[65] Based on the above case and the inadequate provision for compensation it has been argued that the Federal Government should ensure that the host communities are adequately taken care of through legislation.[66]

The payment of compensation is inadequate considering the level of environmental degradation and impoverishment of the people of oil producing communities. If the communities are allowed to handle the extraction of the crude oil, they will adequately take of themselves.

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63 Personal communication by way of an interview on 7 February 2019 at Ologama in Bayelsa State.

64 (2005) Suit No. FHC/8 /CS/53/05.

65 Amnesty International "Nigeria: Petroleum, Pollution and Poverty in the Niger Delta" *Amnesty International* 21 77 <https://bit.ly/3hFbO9w> accessed 2 June 2019

66 Ayodele, OA 'A comparative study of the legal framework governing oil and gas exploration and exploitation in Nigeria' (LLD dissertation, North-West University, South Africa, 2018) 212.

The Federal Government, in a deliberate effort to develop the oil producing communities, proposed the establishment of the PHCF. According to section 117 of the PIB, the Fund shall be utilised for the development of the economic and social infrastructure of the communities within the petroleum producing area. Section 118(1) mandates upstream petroleum producing companies to remit monthly ten percent of its net profit as follows:

> (a) for profit derived from upstream petroleum operations in onshore areas and in the offshore and shallow water areas, all such remittance shall be made directly into the PHC Fund; and
>
> (b) for profit derived from upstream petroleum operations in deepwater areas, all of the remittance directly into the Fund for the benefit of the petroleum producing littoral States.'

The Section 18(2) defines 'net profit' as the adjusted profit less royalty, allowable deductions and allowances, less Nigerian Hydrocarbon Tax and less Companies Income Tax. At the end of each fiscal year, each upstream petroleum company is mandated to reconcile its remittance pursuant to section 18(1) with its actual filed tax return to the Service and settle any such difference.[67] Section 18(4) states that the contributions made by each upstream petroleum company will constitute an immediate credit to its total fiscal rent obligations as defined in this Act.

Section 18(5) provides that in case of act of vandalism, sabotage or civil disturbance that causes damage to any petroleum facilities within a host community, then the cost of the repairs shall be paid from the fund earmarked for that community unless it is established that no member of the community is found culpable. This provision of paying for the repairs caused by vandalism from the fund of the community who is responsible for it is like giving something with the right hand and collecting it back with the left hand. This is because without a proper investigative process by which to examine oil damage, this clause of the Bill may easily render the PHCF vulnerable to corruption and misuse.[68]

The Minister is empowered to make regulations on entitlement, governance and management structure with respect to the PHCF, subject to the provision of section 8 of the proposed Act.[69] Going by this provision of the PIB, the communities that are entitled to the Fund, governance and management structure are left entirely in the hands of the Minister of Petroleum Resources. In contrast to the PHCF and the other institutions set up under the Bill, there is no provision for a board of directors or staff. This is a serious shortcoming of the Bill because the administration of the Fund is subject to the arbitrary power of the Minister of Petroleum Resources.[70]

6. Prospects and challenges in the Petroleum Industry Governance Bill (PIGB)

The PIGB is a segment of the PIB which was set to transform the operations in the Nigerian petroleum industry. The PIB is being held up in the National Assembly due to

67 Section 18(3) of the PIB.

68 Stakeholder Democracy Network (SDN) 'A Closer Look at the Petroleum Industry Bill (PIB)' (2015) 7 <https://bit.ly/3k1pvQz> accessed 9 May 2019.

69 Section 118(6) of the PIB.

70 Stakeholder Democracy Network (SDN) (n 68) 11.

the inability of stakeholders to agree on some of its provisions such as the PHC Fund, ownership structure and the tax regime. Following this unresolved disagreement, some of the concerned stakeholders requested for a piecemeal approach to enacting the Bill.[71] The Chairman, House of Representative Committee on Petroleum Resources Downstream Sector, while responding to the question put to him concerning the delay in the passage of the PIB, responded as follows:

> No doubt, there are contending interests and issues like of ownership and control, tax regime, institutions, power structures, etc. Even the oil companies are coming to express their reservations about some aspects of the proposed PIB. To ensure that all interests are balanced, for instance the interest of the International Oil Companies, the interest of the National Oil Company, interest of the Host Communities, the interest of the Government, the regulator and that of the inspectorate we must hear all the stakeholders out before the PIB can be passed.[72]

The Chairman Senate Committee on Petroleum Upstream Sector, in his own response to the same question on what is responsible for the delay in the passage of PIB. has this to say:

> PIB as it was would have been very difficult to pass for some reasons, for example, the Host Community interest, when you talk about South-South, I could remember the Mid-Belt people were saying if you are going to do this for the South-South what about the Kanji and Siroro Dams that are used to supply electricity for Nigeria. So, because of all these interests we said let us slow down on the passage of the Bill. Instead let us treat the issue of regulatory authorities first because they are not performing satisfactorily. So, we say let us start by breaking down the old PIB to segments, for instance, we are dealing with Petroleum Industry Governance Bill and we hope to deal with that in the next few months. When we finish with that we want to go to the fiscals – what should be the responsibilities of the International Oil Companies (the IOCs) and so on and so forth.[73]

The PIGB sets out to achieve the following, amongst others: to create efficient and effective governing institutions with clear and separate roles for the petroleum industry; establish a framework for the creation of commercially-oriented and profit-driven petroleum bodies that ensure value addition and based on international best practice; promote transparency and accountability in the petroleum industry and to foster a conducive business environment for petroleum industry operations.[74] The PIGB can be classified into the

71 Perchstone and Graeys & Company 'Nigeria: The Introduction of The Petroleum Industry Governance and Institutional Framework Bill 2015' <https://bit.ly/3hGGqYo> accessed 5 May 2019; Templars, 'The Petroleum Industry Governance Bill, June 2017' <https://bit.ly/39cq7h5> accessed 12 July 2019; Ayodele, O 'The Petroleum Industry Governance Bill Changing the Regulatory Landscape June 2017' <https://bit.ly/3CloElo> accessed 12 July 2019.

72 Personal communication by way of an interview with the Chairman House Committee (Hon. Akinlaja Joseph) on Downstream Sector resources on 2 March 2017.

73 Personal communication by way of an interview with the Chairman Senate Committee on petroleum resources (Senator Tayo Alasoadura) on 2 March 2017. It is interesting to note that the Senate passed the Petroleum Industry Governance Bill on 25 May 2017, a few weeks after conducting the interview relieved above.

74 Perchstone and Graeys (n 71); see Part I Objectives (a-d) of the Governance and Institutional Framework for the Petroleum Industry and for Other Related Matters, 2018.

following categories: Policy and General Strategy, Formulator, Regulator, Commercial Institutions and Ancillary Institutions.

6.1 The role of minister under the PIGB

The policy and general strategies are left in the hands of the Minister of Petroleum Resources. He or she will be responsible for the determination, formulation and monitoring of Government policy for the petroleum industry.[75] He or she is to supervise the affairs and operations of the petroleum industry subject to the provisions of this Act.[76] The Minister will be empowered to promote, amongst other things, local content in the Nigerian petroleum industry to represent and execute treaties and agreements on petroleum Nigeria entered into with other countries.[77] The Minister will not be able to grant, amend, renew, extend or revoke any licence or lease required for petroleum exploration or production, except on the recommendation of the NPRC.[78] This is to ensure separation of duties and provide for checks and balances. However, the Minister still retains pre-emptive rights to all petroleum products in the country in the event of a national emergency.[79] The PIGB prescribes 10 years without option of fine for contravention of the Bill; it tags such an act economic sabotage.[80]

6.2 National Petroleum Regulatory Commission (NPRC)

The PIGB provides for the establishment of the NPRC which will be a body corporate with perpetual succession and a common seal and which may sue or be sued in its corporate name.[81] It replaces the current DPR, the Petroleum Inspectorate and the Petroleum Products Pricing Regulatory Agency (PPPRA) and, as such, will take over all assets, funds, resources and other movable and immovable properties currently held by the Petroleum Inspectorate, DPR and the PPPRA.[82] It shall be responsible for regulating the entire industry.[83]

The Commission, which shall be independent from the Minister of Petroleum, shall be run by a Governing Board[84] whose members, other than those representing the Ministries of Petroleum, Finance and Environment, shall be appointed by the President subject to the approval of the Senate. The Governing Board shall comprise 11 directors, five (5) of whom shall be executive directors.[85] Some of the terms of reference of the Committee were that the Committee should assume the full mandate for the implementation of the OGIC

75 Section 2(1)(a) of Part II of the Governance and Institutional Framework for the Petroleum Industry and for Other Related Matters, 2018, otherwise referred to as PIGB, 2018.
76 Section 2(1)(b) of Part II of the PIGB 2018.
77 Section 2(d)-(g) of Part II of the PIGB 2018.
78 Section 2(1)(g). This is contrary to the position under the Petroleum Act which gave the Minister discretion to grant, amend, renew, extend or revoke upstream petroleum licences and leases pursuant to the provisions of the Act; this power was also retained under the Old PIB, however, upon the advice of the Inspectorate.
79 Section 3 of Part II of the PIGB, 2018.
80 Section 3(3) of Part II of the PIGB, 2018.
81 Section 4(1) of Part III of PIGB, 2018.
82 Section 4(3) of Part III of PIGB, 2018.
83 It means that its regulatory cut across the upstream, midstream and downstream sectors.
84 Section 13 of PIGB, 2018.
85 Section 20 of PIGB, 2018.

report, especially as enshrined in the Road Map approved by government; advise on the take-off, of the new bodies, institutions, organisations and agencies that would constitute the institutional framework for the restructured Oil industry; and to engage, as much as possible, all industry stakeholders in the course of the implementation programme, as well as resource persons, facilitators and consultants where necessary.

The Minister will oversee the work of the Commission's Board and issue general policy directions to the Commission if the directives are not in conflict with the Act.[86] This provision runs contrary section 13 which states that the Commission shall be independent of the Minister of Petroleum. Section 2 should be amended to read that the Minister shall not interfere with the works of the Commission. For example, a similar body was established in Canada by the Federal Government, the National Energy Board (NEB) to regulate inter-provincial and international trade and commerce, including the import, export and transport of natural resources. The NEB also makes decisions and recommendations, which include environmental assessments, on applications to construct, operate, decommission and abandon pipelines and international and designated inter-provincial power lines.[87] It also decides on applications for the export of oil, natural gas liquids, electricity and the export and import of natural gas.[88] The body performs these functions without interference from any quarters. The PIGB also allows a person who has interests in oil and gas industry to become a member of the Board in so far as he or she declares his or her interest and in the opinion of the President there shall not be a conflict of interest.[89] In this circumstance, the President is to determine whether there will be a conflict of interest or not, and the criteria for this decision is not stated which means the decision is discretionary. This kind of provision can easily be abused; it is advised that someone with an interest should not be appointed as a member of the Commission.

The objectives of the Commission are, amongst others, promoting the healthy, safe and efficient conduct of all petroleum operations in an environmentally friendly and sustainable manner,[90] and ensuring compliance with all applicable laws and regulations governing the petroleum industry.[91] This provision seems promising in terms of reducing the effects of oil extraction on the environment.

Under the provision of the PIB, the Ministry of Environment has overriding power over environmental matters.[92] However, the PIGB jettisoned this provision and gave the power to the Commission and the Commission does not need to consult with the Ministry of Environment on the issue of environmental protection.[93] The reason for this is not given and one wonders why. It is therefore advised that the provision that saddled the

86 See generally section 2 of PIGB, 2018.
87 Canada National Energy Board '2017-2018 Departmental Plan' <https://bit.ly/2XquKBw> accessed 27 June 2017.
88 Canada National Energy Board (n 87).
89 See section 13(11) and the third schedule to this Act.
90 Section 5(a) of Part III of PIGB, 2018.
91 Section 5(c) of Part III of PIGB, 2018.
92 See section 5(a) of PIGB, 2018.
93 See section 5(c) of PIGB, 2018.

Commission with the authority to see the promotion of a healthy environment is revised to ensure checks and balances and the Commission should consult regularly with the Ministry of Environment on the issue of environmental protection.

Although the PIGB mentioned the need to stop gas flaring, it failed to prescribe a definite date for the stoppage of routine gas flaring. This omission is not only a major setback for the environment, but also a big blow to the people of the Niger Delta who have been unjustly subjected to pollution through mindless flaring of associated gas since the commencement of petroleum exploitation in Nigeria in the 1950s. There is the need for a clear cut the petroleum legal regimes to put an end to decades of the deplorable practice of gas flaring by criminalising it.[94]

The PIGB provides a maximum of 12-month period for the exercise of the enforcement of civil rights against polluters especially for suits against the institutions and agencies created under the PIGB, a member of the governing boards or an employee in respect of their functions and powers under the Act.[95] The limitation of action is shorter than the time provided for civil action under the Statute of Limitations. It is a known fact that plaintiffs in oil and gas pollution do have difficulties with collating evidence, raising money to fund their case and other legal issues.[96] Therefore, the 12-month limitation of cause of action in this respect is not in the interest of the poor people who are often the victims of the oil pollution in Nigeria.[97] In the meantime the limitation for civil action should apply while considering giving special concession of an expanded time to litigants in oil and gas actions because of the peculiar circumstances of the industry.

The Limitation Law requires that a lawsuit must be commenced within a specific period of time from when the injury or omission, causing the damage or loss, arose or occurred. The primary essence of having a Limitation Law is to ensure that all claims are diligently and promptly presented, while the evidence in support of the claim, or the defence to a claim, are still available and the memory of a witness memory is still fresh. A further essence for the Limitation Law is to guarantee conclusiveness in litigation.[98] For example, actions based on any legal instrument under seal – especially where such legal instrument relates to an interest or charge on land, or the arrears of an annuity charged on an immovable property, or the enforcement of an arbitration award where the Arbitration Agreement is under seal, or the judgment of a competent Court of Law, etc. – must be commenced (or where a judgment or award is to be enforced) within a period of 12 years and six years for simple contracts from the period when the cause of action arose or the judgment or award was entered.[99]

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94 See Social Action 'PIGB Shortchanges the Environment and Local Communities: Withhold Accent – CSOs, Host Communities Charge President Buhari' <https://bit.ly/3xOcvTp> accessed 8 July 2021.

95 Section 61(2)(a) of the PIGB, 2018.

96 The other problems faced by the litigants are the jurisdiction of court (which of the courts to approach), *locus standi* etc.

97 Onumahon C 'Shortchanged: How the Senate's Petroleum Industry Governance Bill fails the environment and local communities' Text of a Press Conference by the Social Development Integrated Centre (Social Action), 21 June 2017, Abuja, Nigeria.

98 Section 3, The Limitation of Actions Act.

99 Sections 8 (1)(a) and 12 (1) (a) of the Limitation Law of Lagos State.

Another important omission is the lack of due regard to the interest of the host communities in the issuance of petroleum licences.[100] This is one of the reasons for incessant crisis in the oil rich Niger Delta of Nigeria and any law that fails to address this problem cannot solve the crisis in the region. One wonders why the same provisions applicable to a sister sector[101] are not made applicable to oil and gas sector. For example, section 102 of the Mining Act provides for proper consultation with and consent of land owners even before the grant of mining title to a mining company. This can be seen in section 102 which provides that:

> The Minister shall, before granting a mining lease on any private or any state land –
>
> (a) cause the owner or occupier of the land to be informed of the intention of the Minister to grant the lease; and
>
> (b) require the owner or occupier of the land to state in writing within the period specified by the Regulations made under this Act, the rate of annual surface rent which the owner desires should be paid to him by the lessee for the land occupied or used by it for or in connection with its mining operations.

A provision, similar to the provision under the Mineral and Mining Act mentioned above, should be inserted in the law to involve the oil producing communities from exploration to production of the resources. For instance, the host community must be made to understand the impact the industry will have on the environment and the plan put in place to ameliorate the negative impact.

6.3 The commercial entities

It is expected of the Minister of Petroleum Resources, within six months of the signing into law of the PIGB, to incorporate two companies to be known as Nigeria Petroleum Assets Management Company (NPAMC),[102] National Petroleum Company (NPC)[103] and Ministry of Petroleum Resources Incorporated (MOPI).[104] These institutions are discussed there under.

6.3.1 Ministry of Petroleum Resources Incorporated (MOPI)

MOPI is an institution created to hold on behalf of the Government shares in the successor commercial entities to be incorporated. It has argued that the power granted to the Minister to transfer assets of the MOPI is too wide and can lead to misuse and abuse of such powers.[105]

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100 Section 6 (1) of PIGB, 2018.
101 Nigeria Minerals and Mining Act 2007.
102 See section 37 of PIGB, 2018.
103 See section 61 of PIGB, 2018.
104 See section 36 of PIGB, 2018.
105 Ayodele, O 'The Petroleum Industry Governance Bill Changing the Regulatory Landscape' *Bloomfield Law Practice, Nigeria* June 2017 <https://bit.ly/3hJ2yRP> accessed 12 July 2019.

6.3.2 Nigeria Petroleum Assets Management Company (NPAMC)

The NPAMC will manage the Production Sharing Contracts while NPC shall be responsible for all other assets such as Joint Ventures.[106] NPAMC has an obligation to comply with the Codes of Corporate Governance issued by the Securities and Exchange Commission and publish its annual reports and accounts on its website and public media.[107] This is a good development because it will enhance accountability and transparency in the activities of the body.

6.3.3 National Petroleum Company (NPC)

To ensure accountability and transparency, the NPC is to comply with the general rules of accountability applicable to companies under the Companies and Allied Matters Act and the Investment and Securities Act. It is however exempted from complying with the provisions of the Fiscal Responsibility Act, 2007 and the Public Procurement Act, 2007.[108] This means in effect that the NPC will not be required to file reports on its operations and budgets to the Ministry of Finance or any other authorities concerned; hence, making it run more like a private company than a statutory corporation.[109] This is a welcome development because the former NNPC was bedevilled with bureaucratic bottle necks and it was heavily politicised; the new NPC will function better as a private company rather than a statutory corporation.

To ensure that NPAMC and NPC are not financially encumbered with the liabilities of NNPC, the Governance Bill proposes the incorporation of a liability management company to which certain liabilities of the NNPC will be transferred for resolution purposes. Upon the conclusion of the settlement of such liabilities, the liability management company shall be wound up.[110]

The PIGB will curtail the power of the Minister in that he or she will not be allowed to create new institutions as against the initial provision of the old PIB that granted the Minister the discretion to create new institutions.[111] This is an improvement over the old PIB thereby reducing the overbearing influence of the Minister.

6.3.4 Petroleum Equalisation Fund

The fund is meant to be given to the petroleum marketers for any loss they might have suffered as result of maintaining uniform price for petroleum products across Nigeria.[112] As such, 5% levy on all petroleum products shall be paid into the Petroleum Equalisation Fund.[113] One of the shortcomings of the law is that the Minister can use the Petroleum Equalisation Fund for infrastructural purposes or approve the use of the fund for other

106 See section 39 of PIGB, 2018.
107 See section 59 of PIGB, 2018.
108 See section 62 of PIGB, 2018.
109 Perchstone and Graeys (n 64)
110 Templar, 'The Petroleum Industry Governance Bill, 2017' <https://bit.ly/3Cl2Mq5> accessed 12 July 2019.
111 See section 2 of PIGB, 2018.
112 See section 37 (a) of PIGB, 2018.
113 See section 36 (1)(a) of PIGB, 2018.

financial purposes.[114] This provision needs to be reviewed otherwise the fund will be missapplied. Perhaps the influence of the Minister explains why the President combines the office of the Minister of Petroleum with his duty as head of state and government because of lack of trust.[115] This practice is even more dangerous because it can lead to abuse of power on the part of the President. The PIGB ought to address this point to prevent over concentration of power in the president.

The main problem in Nigeria is corruption. This pervades every sector of the economy. The petroleum subsidy scandal was widely reported in the news and up till now none of the key personalities involved has been brought to book.[116] Thus, a provision of Petroleum Equalisation Fund, without providing a mechanism for dealing with the massive corruption that has attended the management of such funds in the past, is just a way of providing a fertile ground for corruption.[117]

By necessary implication, all provisions under the PIB not provided for under the PIGB will not stand because section 84 of Part 6 of the PIGB provides that

> … the provisions of all existing enactments or laws, including but not limited to the Petroleum Act, Pipeline Act, Petroleum Profit Tax Act and the Companies and Allied Matters Act, shall be read with such modifications as to bring them into conformity with the provisions of this Act.

Also by the provision of section 84(2), the PIGB shall prevail in the case of any inconsistency between the provisions of PIB and the PIGB.[118] It should be noted, however, that the PIGB is a fragment of the PIB which caters for the governance and institutional framework of the operation in the Petroleum Industry only. Hence, the PIGB cannot be said to cater for all other important subject matters in the PIB.[119] It is therefore hoped that the legislature will consider the passage of the other aspects of the PIB in the nearest future.

Despite the fact that the Bill needed to be improved upon, the present government in Nigeria did not even deem it expedient to sign into law the Bill as passed by the National Assembly. The much-talked PIGB has suffered a setback in the Presidency, the Presidency sent the Bill back to the National Assembly because it has issues with its current form.[120] Part of the grouse the Presidency has with the Bill is the fact that

> (i) the Bill would reduce the power of the president and oil minister to oversee and award oil licences and contracts,[121]

114 Section 37 (b) of PIGB, 2018.

115 Ayodele (n 105 above).

116 Tukur 2017 "55 Nigerians stole over N1.34 trillion in 8 years – Lai Mohammed" (2016) Premium Times <https://bit.ly/3iMJoLZ> accessed 24 November 2019.

117 Onumahon (n 96 above).

118 Perchstone and Graeys (n 109 above).

119 *Ibid.*

120 The Bill was sent back to the National Assembly on Wednesday, 29 August 2018, for what the presidency referred to 'issues with its current form'.

121 It is important to note that President Muhammadu Buhari is also the Nigerian Oil Minister.

(ii) the provision will allow the regulatory body to take 10 percent of oil revenues, to the detriment of federal, state and local governments,[122] and

(iii) expanding the scope of equilisation Fund is in divergence with the administration's policy.

7. The Petroleum Act 2021

The Act vests the property and ownership of petroleum within Nigeria and its territorial waters, continental shelf and Exclusive Economic Zone in the Government of the Federation of Nigeria.[123] The Act is meant to repeal all existing laws when it becomes operational.[124] It is divided into five chapters namely:

1. Chapter one: Governance and Institutions
2. Chapter two: Administration
3. Chapter three: Host Communities Development
4. Chapter four: Petroleum Industry Fiscal Framework
5. Chapter five: Miscellaneous Provisions.[125]

The Petroleum Act has a chequered history. It was first presented as the PIB in 2008, and subsequently in 2012 and 2017 with minor amendments. It was re-presented to the National Assembly in 2020. The Bill was essentially the same as the previous Bills with similar aims that is: establishing good governance, best practices, and ease of doing business in the industry by clarifying roles and responsibilities of officials and institutions; enable frontier exploration, mandate improved environmental compliance and transform NNPC into a commercially viable enterprise.[126] The important provisions of the Act are discussed hereunder.

7.1 Establishment of the Nigerian Upstream Petroleum Regulatory Commission

Section 4 of the Act created a Commission called the Nigerian Upstream Petroleum Regulatory Commission. The Commission is to regulate upstream petroleum operations including technical, operational and commercial activities and also to ensure compliance with all applicable laws and regulations governing upstream petroleum operations. It shall be a body corporate with perpetual succession and a common seal.

122 The statement is credited to Ita Enang, a Presidency official who liaises with the legislature.
123 Section 1.
124 Musa A, Bappah, H 'Issues and Challenges on Environmental Rights: The Nigerian Experience. American International' *Journal of Social Science* 2014 3(5) 151.
125 It is important to say that the Bill though passed into law by the National Assembly is not a binding law until assented to by the President.
126 See Vanguard '10 things to know about Nigeria's PIB' <https://bit.ly/3soE8B4> accessed 5 July 2021.

7.2 Establishment of the Nigerian Midstream and Downstream Petroleum Regulatory Authority

Section 29 established the Nigerian Midstream and Downstream Petroleum Regulatory Authority. The objectives of the Authority are to regulate midstream and downstream petroleum operations, including technical, operational and commercial activities, and also ensure efficient, safe, effective and sustainable infrastructural development of midstream and downstream petroleum operations.[127] The objects and functions of the Authority are limited to midstream and downstream petroleum operations in the petroleum industry.

7.3 Incorporation of the Nigerian National Petroleum Company Limited

Under section 53, the former NNPC shall become a limited liability company. The Minister shall, within 6 months from the commencement of the Act, cause to be incorporated under the Companies and Allied Matters Act, a limited liability company, which shall be called Nigerian National Petroleum Company Limited (NNPC Limited). Ownership of all shares in NNPC Limited shall be vested in the Government at incorporation and held by the Ministry of Finance Incorporated on behalf of the Government.

The Minister of Petroleum and the Minister of Finance shall determine the assets, interests and liabilities of NNPC to be transferred to NNPC Limited or its subsidiaries. NNPC shall cease to exist after its remaining assets, interests and liabilities other than its assets, interests and liabilities transferred to NNPC Limited or its subsidiaries under section 54(1) shall have been extinguished or transferred to the Government.

7.4 Environmental protection

7.4.1 Gas flaring[128]

This is one of the major problems caused by exploitation of crude oil with attendant health-related problems. For instance, the process of gas flaring results in the dissemination of greenhouse gases (GHG) and other air pollutants such as carbon dioxide (CO_2), methane (CH_4), ethane, propane, butane, hydrogen sulphide (H_2S) and nitrous oxide (NO_2). Greenhouse gases have long been implicated in global warming and climate change.[129] Several health hazards have been associated with gas flaring.[130] Gas flaring emits black carbon which is second to carbon dioxide in terms of its impact on global warming.[131]

127 Section 31.

128 Gas flaring is when chemical factories, oil refineries, oil wells, rigs and landfills, gaseous waste products, and sometimes even non-waste gases, produced are routed to an elevated vertical chimney called a gas flare and burnt off at its tip.

129 Ajugwo AO 'Negative effects of gas flaring: the Nigerian experience'. *J Environ Pollut Hum Heal* (2013) 1 6-8.

130 The adverse health impacts, including cancer, neurological, reproductive and developmental effects. Deformities in children, lung damage and skin problems. This was reported by Ovuakporaye, SI, Aloamaka, CP, Ojieh, AE, Ejebe, DE and Mordi, JC 'Effects of gas flaring on lung function among residents of Gas flaring community in Delta State, Nigeria' *Res. J. Env. Earth Sci* (2012) 4(5) 525-528.

131 See Huang, K and Fu, JS 'A global gas flaring black carbon emission rate dataset from 1994 to 2012' *Scientific Data* (2016) <https://go.nature.com/3tLNHuO> accessed 4 July 2021.

7.5 Prohibition of gas flaring

The Act in section 104 seeks to prohibit gas flaring. Also, in a bid to fulfil its obligations under the United Nations Framework Convention on Climate Change (UNFCCC) and similar Conventions, the Act demands strict adherence to a gas flaring plan. A licensee or lessee producing natural gas is expected to, within 12 months of the effective date of the Act, submit a natural gas flare elimination and monetisation plan to the Commission, which shall be prepared in accordance with regulations made by the Commission under this Act. A Licensee or Lessee who fails to adhere to the provision shall pay a penalty prescribed pursuant to the Flare Gas (Prevention of Waste and Pollution) Regulations.

However, the Bill, instead of making clear provision on ending gas flaring, failed to mention any penalty for gas flaring apart from what is contained in section 201 that 'the lessee shall pay such gas flaring penalties as the minister may determine from time to time'. Worse still, the Bill provided that the Minister can permit flaring in circumstances whereby he feels utilisation is not feasible.[132]

7.6 Host communities development

The objectives of this provision include to foster sustainable prosperity within host communities and to provide direct social and economic benefits from petroleum operations to host communities.[133] It also seeks to enhance peaceful and harmonious co-existence between licensees or lessees and host communities.

In a bid to achieve these objectives, the Bill mandated that Settlors – a holder of an interest in a petroleum prospecting licence or petroleum mining lease or a holder of an interest in a licence for midstream petroleum operations, whose area of operations is located in or appurtenant to any community or communities – shall incorporate a trust for the benefit of the host communities for which the settlor is responsible (host community development trust).[134] The constitution of each host community development trust shall provide that the applicable host community development trust fund be used exclusively for the implementation of the applicable host community development plan (section 241).

The funds of the host communities development trust created pursuant to this Act shall be exempted from taxation.[135]

7.7 Petroleum industry fiscal framework

One of the objectives of this provision is to establish a progressive fiscal framework that encourages investment in the Nigerian petroleum industry, balancing rewards with risk and enhancing revenues to the Federal Government of Nigeria. The Federal Inland Revenue Service has been saddled with the responsibility of administering and collecting Government revenue in the petroleum industry.

The Act replaces the existing petroleum profits tax with Hydrocarbon Tax, at the rate of 50% for petroleum operations onshore, and in shallow water fields; and 25% for

132 Section 277.
133 Section 234.
134 Section 237.
135 Section 256.

petroleum operations in deep-water, bituminous and frontier acreages. Hydrocarbon tax shall apply to crude oil, condensates and natural gas liquids produced from associated gas.

In addition to the Hydrocarbon Tax, the Act also makes provision for Companies Income Tax at the rate of 30% on upstream petroleum operations.

Any Company or taxpayer who does not agree with an assessment made pursuant to section 285(6) of the Act, may appeal against the assessment to the Tax Appeal Tribunal established under the provisions of section 59 of the Federal Inland Revenue Service (Establishment) Act.

According to section 260(1), hydrocarbon tax will apply to companies engaged in upstream petroleum operations in the onshore, shallow water and deep offshore. It does not however apply to:

> 1. associated and non-associated natural gas; and
> 2. condensates and natural gas liquids produced from non-associated gas in fields or gas processing plants, provided the related volumes are determined at the measurement points or at the exit of the gas processing plant, regardless of whether the condensates or natural gas liquids are subsequently comingled with crude oil.'

Thus, the tax applies to crude oil, condensates and natural gas liquids produced from associated gas. If these provisions are adequately implemented, it will no doubt increase the revenue accruable to the Federal Government of Nigeria.

7.8 Petroleum Host Community Fund (PHCF)

The PHCF was discussed under the PIB, and its provision is essentially the same as contained under the Act. However, one of the grey areas of the Act is the disagreement between the two houses of National Assembly. The House of Representative passed 5% as against 10% proposed under the PIB for the host communities, while the Senate passed 3%. It is worthy to note that the Southern Nigerian Governors' forum at their meeting that was held on 5 July 2021 has rejected the 3% passed into law by the Senate, but supported 5%. This article opines that the law should be amended to implement the inclusion of 10% fund to take care of the host communities that directly bear the brunt petroleum extraction.

7.9 Ownership structure

The Governors' forum likewise rejects the ownership structure which gave exclusive ownership to the Federal Government of Nigeria.[136] The Act does not depart from the former laws and the provisions of the PIB and PIGB. It expressly ceded the ownership and control of petroleum resources to the Federal Government. It was noted in this article that this has been one sources of crisis in the Niger Delta. Since Nigeria is a Federal state, the law should be couched in a way that will take care of the oil producing states better what it is at the moment. The article suggests that 50% of the proceeds of any mineral resources produced in a state be paid to that state.

136 Section 1 of the Act.

8. Recommendations

1. The minister still retains pre-emptive powers; it is recommended that this power be subject to the approval of the National Assembly.
2. The Minister still issues general directive to the Commission, this is not right, a neutral body should be saddled with that responsibility.
3. The President is to deter membership in case an appointee is seen to have a conflict of interest, this discretion may be affected by politics, hence an independent body should determine eligibility.
4. The Commission is saddled with conflicting assignment; it is to 'ensure that regulations are fair and balanced for all classes of lessees, licensees, permit holders, consumers and other stakeholders' and at the same time enforce environmental regulations against the same commercial entities. There should be separation of functions for effectiveness.
5. The Commission need not consult with the Ministry of Environment on Environmental matters; this provision should be revised to ensure checks and balances.
6. Limitation time is shorter than what is contained in civil action against members of the board and its employees, this is not in the interest of poor litigants considering the technical nature of cases concerning the dispute in oil and gas.
7. The PIGB did not make mention of the PHCF; host community is not adequately taken care of, it is recommended that as a matter of urgency PHCF be included in the PIGB for peace to reign in the region.
8. Institutional framework should be put in place for the prudent management of the Petroleum Host Community Fund.
9. PIGB should borrow a leaf from Mineral and Mining Act, 2007 on providing proper consultation with host communities in order to enhance the development of these communities. Section 102 of the Mineral and Mining Act is instructive in this regard.
10. This article recommends separation of the office of Minister of Petroleum from that of the Presidency for clarity of roles and for checks and balances.

9. Conclusion

The Nigerian Petroleum Act (which was enacted in 1969), and other laws that were enacted thereafter, were outdated and could not ensure sustainable development of the oil and gas industry. The governance structure was clumsy; it was unable to engender development and internationalisation of the oil and gas industry. The Nigerian government rose to the occasion by developing oil and gas policy in 2004 to promote sustainable development by ensuring an efficient and effective administration in the sector. The government took a holistic view of the industry and came up with PIB aimed at reforming the entire petroleum industry.

Unfortunately, the National Assembly was unable to pass the Bill in the current state then but got it disarticulated into different segments. The Petroleum Industry Governance Bill, which is one of the segments was passed by the National Assembly, though yet to be assented to by the President. However, the Bill is fraught with defects that could make the new law ineffective. For example, the Bill retains the controversial ownership structure and also left out the much-desired development of the host communities. It also compounded the usual legal challenges faced by the victims of oil pollution who might want to seek redress in court against injustice suffered by them.

The Bill shies away from resolving these teething issues of developmental challenges of the Niger Delta region and this is a minus for the Bill. Niger Delta development has been one of the major challenges faced by oil companies and the Nigerian government in their quest to increase production of oil and gas. This article has therefore advocated for the revision of the PIGB to include the host community fund as contained in the original PIB. The article also advocates as a matter of urgency for another Bill on the development of the host communities to ameliorate the effects of oil and gas exploration and exploitation in the region.

There is also the need to resolve the internal contradictions for effective regulation of the sector. The Minister still wields much power, and this can compromise the independence of the entities he oversees. It is equally important that the other segments of the old PIB be passed into law without further delays because all the segments are one body designed to reform the entire petroleum sector; all the segments can only work together to achieve the desired result. In all, the institutions needed to be strengthened to block corrupt officials from perpetrating corrupt practices. Government must strive to eradicate corruption in the oil and gas sector otherwise the reform will end up like those reforms in other sectors of the economy.

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(a) For an article to be accepted for publication in the journal, it must meet high-level quality standards and it must be an original piece that has never been published or is not under consideration by another publication.

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The journal publishes articles, book reviews, case notes and comments. The journal welcomes articles of between 8 000 to 12 000 words, inclusive of references. Book reviews, case notes, and comments must be between 3 000 to 5 500 words, inclusive of references. All contributions to the *Turf Law Journal* will be subjected to a compulsory double-blind peer review.

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Manuscripts may only be submitted in electronic format (utilising MS Word) through an email to the editor. In addition, authors –

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The journal will ordinarily adopt a double-blind review except where there is a stark difference between the two reviewers about the acceptability of the proposed manuscript, in which case the Editor-in-Chief may appoint the third reviewer. In order to expedite the process of review, reviewers will be given maximum of four weeks to review a manuscript.

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(a) **Editor-in-Chief:** This will be the person of reputable scholarly stature who will enable the journal to assert itself in the community of premier journals nationally and internationally. The Editor-in-chief is the executive manager of the journal.

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