

# PRETORIA STUDENT LAW REVIEW

2024 • 18



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Pretoria University Law Press

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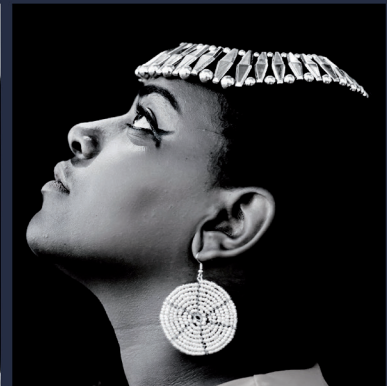
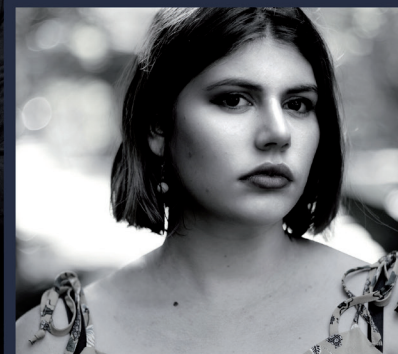
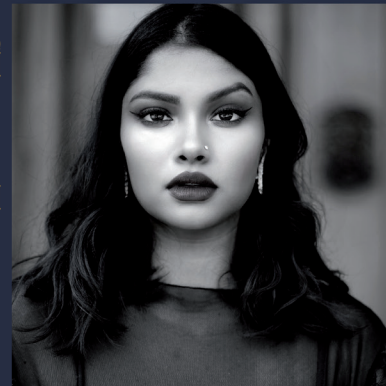
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# **PRETORIA STUDENT LAW REVIEW (2024) 18**

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## NOTE ON CONTRIBUTIONS

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

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0002

## EDITORS' NOTE

<https://doi.org/10.29053/pslr.v18i1.6466>

*by Joshua Nduku*



It is a pleasure you present to you the 2024 edition of the Pretoria Student Law Review. This journal comes at a time when young academic voices are essential and when African literature is becoming increasingly important. As one of the few student-led journals in South Africa, the PSLR plays an important role in both the University of Pretoria and the South African legal fraternity by providing a platform where budding authors can contribute meaningfully to legal discourse, bridging the gap between studentship and scholarly research. This is exactly what the articles in this edition exemplify. It comprises five articles whose topics range from artificial intelligence and climate change to international law and case analysis.

To the authors, thank you for your patience and your fortitude throughout this process. It is not easy to write and publish; your courage to submit, correct and re-correct has led to the amazing submissions that make up this edition. Your understanding as the journal went through changes did not go unnoticed, and for that, thank you once again.

Much like every young journal, the journey to publication was not linear. It came with many challenges and but even more successes. These successes would to have been possible without a strong team with a unified vision around me. For this, I would like to extend my heartfelt gratitude to the Faculty of Law and the Pretoria University Law Press, who continue to support this journal as it continues to grow year on year. To the guardians, Dr Jooste and Dr Magau. Your strong commitment to the journal and the endless hours you sacrificed to make sure that this edition came to fruition are greatly appreciated. To my predecessors, Lisa Ndyulo and Eric Geldenhuys, for your

continued belief in and your forward-looking vision to evolve the PSLR. Your involvement in the journal and advice even past your tenure is a testament to the passion you have for this journal. Thank you. To the senior editors Jolanda Pretorius and Robin Zeelie, for stepping in to fill essential roles on the board and for being a structure that was not only a sound board for the multiple ideas I had for the journal but also helped bring them to life. To the 2024 editorial board, for staying the course. Your steadfastness and willingness to be an integral part of the journal are the reason why this edition is being published.

Stepping into the role of Editor-in-Chief was not an easy transition. It came with many unknowns. It would be amiss for me to say that I am where I am today without my family. When I first took up this position, you were the first people to be in my corner, and you have never left that corner. It is your sustained support and love that helped me through the difficult times, and your joy that helped me relish the good times. More specifically, I would like to thank my grandmother, who continuously cheers for me even when she is unsure what she is cheering for. I hope I continue to make you proud. To my mother, for the endless hours you spent on the phone giving me advice and encouragement. You are an inspiration to me, and I hope my actions are a reflection of all the good that you have poured into me. Thank you.

As the journal grows, it is my belief that so too will the variety of articles and authors. For now, it is my sincere hope that every reader enjoys the articles in this journal and gains valuable insights into the topics presented by the authors, who bring with them a strong African perspective from three different countries.

A handwritten signature in black ink, appearing to read 'Joshua Nduku'.

**Joshua Nduku**  
Interim Editor-in-Chief 2024

# STATE OF STATELESSNESS FOR DISPLACED PERSONS THROUGH THE DOCTRINE OF UBUNTU: SOUTH AFRICAN DOMESTIC PERSPECTIVE AND INTERNATIONAL LAW OBLIGATION THROUGH THE LENS OF *KHOZA V MINISTER OF HOME AFFAIRS* [2023] 2 All SA 489 (GP)

<https://doi.org/10.29053/pslr.v18i1.6463>

by Ramekgwe Daniel Tjikila



## Abstract

*The notion of statelessness and the positioning of the South African government in protecting its territorial integrity have been attributed to preserving its financial capability to cater for its nationals while imposing administrative and financial constraints on those who come to its shores seeking asylum due to instability in their respective regions, often leaving them displaced and undocumented. Subsequently, the criteria for defining statelessness remain contested, making the state privy to act unreasonably unjust in certain circumstances. Consequently, the government implicitly foreshadows its privy policy by scrutinising such applications as a programme that aims to ensure that it does not have an excess of foreigners who may negatively affect service delivery and cause unwanted issues like crime. As a result, stateless people are perceived as interfering with the allocation of the national fiscus. The notion of statelessness will, however, be explored as this paper progresses through the case of *Khoza v Minister of Home Affairs and Others* by showing how a decolonised and transformative endeavour of ubuntu should be practised. As such, the idea of ubuntu will be affirmed through the international obligation of international human rights while simultaneously arguing that Africans have not*



## 2 State of statelessness for displaced persons through the doctrine of ubuntu

*become so assimilated as to regard other Africans as strangers, to such an extent that the systems in place today are based on national self-centred interests that hold Western influence. This influence, as the paper unfolds, will prove that stateless persons in South Africa tend to be subversively (implicitly) discriminated against when they apply for nationality. Therefore, a xenophobic stance from an institution such as the Department of Home Affairs gains enormous adherence when it processes applications, especially for Africans.*

**Keywords:** statelessness, stateless persons, ubuntu, foreigners, national interests, identity crisis.

## 1 Introduction

It is painful to see my daughter growing full of dreams and developing every day into a more clever person, knowing deep inside she has an uncertain future.<sup>1</sup>

Once they had left their homeland, they remained homeless; once they had left their state, they became stateless; once they had been deprived of their human rights, they were rightless, the scum of the earth. Nothing which was being done, no matter how stupid, no matter how many people knew and foretold the consequences, could be undone or prevented. Every event had the finality of a last judgment, a judgment that was passed neither by God nor by the devil, but looked rather like the expression of some unreedemably stupid fatality.<sup>2</sup>

Amid inequalities that persist in this world, there is a phenomenon of George Orwell's *Animal Farm* novel, and in his proclivity, he submits that 'all animals are equal, but some are more important than others'.<sup>3</sup> As such, following the George Floyd scandal, in Africa, and especially in South Africa, it was noted that black people are loathed ubiquitously, and there was a need for Africa to socially create a space for the provision of dignity for socio-economically disadvantaged people, particularly those from black African ancestry.<sup>4</sup> This was due to growing tensions permeating a perspective that Western and liberal nations tend to be unwelcoming to Africans

1 P Jessica et al *Promoting citizenship and preventing statelessness in South Africa: A practitioner's guide* (2014) at 5.

2 JS Wessel 'On the border subjects: Rethinking the figure of the refugees and the undocumented migrant' (2016) 23 *Constellations* at 47.

3 S Harkins & J Lugo-Ocando 'All people are equal, but some people are more equal than others' in J Servaes & T Oyedemi (eds) *The praxis of social inequality in media: A global perspective* (2016) at 3.

4 Eyewitness News, 'A black man is hated everywhere' – EFF protest in solidarity with 'Black Lives Matter' (2020), <https://www.youtube.com/watch?v=KqrAaAe4skU> accessed 25 November 2023. See also, the case of *R (on the application of AAA (Syria) and others) v Secretary of State for Home Department (United Nations High Commissioner for Refugees intervening) and other appeals* [2023] 4 All ER 253, is significant because it shows how Britain violated the law of refoulement, which prohibits a government from transferring or denying asylum seekers from its territory to another state of Rwanda. The Court thus dismissed the application.

due to exclusion, which is manifested through white supremacy, racism, xenophobia, and economic marginalisation worldwide.<sup>5</sup> Poignantly, it is more difficult for black Africans to travel in Africa than for persons of European ancestry.<sup>6</sup>

Despite these fictitious endeavours to dignify black Africans, South Africa harbours xenophobia against black immigrants from neighbouring African nations.<sup>7</sup> Individuals who apply for special permits, asylum, or are stateless continue to be harmed by unnecessarily lengthy waiting periods when processing their applications,<sup>8</sup> while individuals of European origin may readily settle in South Africa without hassles.<sup>9</sup> Moreover, the influence of the European Union ('EU') has further predisposed the South African government to impose sterner border control, to secure financial advantage over EU routes, after concerns were raised that African immigrants forge their documents and use South Africa as a passage to Europe.<sup>10</sup>

According to the Universal Declaration of Human Rights of 1948, specifically Article 15, everyone has the right to a nationality.<sup>11</sup> The right to nationality, however, is not always realised, just like any other right.<sup>12</sup> The juridical concept of nationality has two distinct aspects.<sup>13</sup> As it relates to the rights and obligations of both people and the State, it is governed by both domestic and international law standards.<sup>14</sup> The idea of nationality has been described as the most common and occasionally the sole connection between a person and a State, guaranteeing that the person's rights and duties under international law are honoured.<sup>15</sup> International law norms accept that it is very feasible for a person to find oneself without any nationality at all due to the vast differences in the domestic laws of many States, especially regarding the acquisition of nationality.<sup>16</sup> This may take

5 As above.

6 L Madowo, 'Why is it so harder for Africans to visit other African countries?', 8 October 2018 <https://www.bbc.com/news/world-africa-45677447> (accessed 25 November 2023).

7 C Steenkamp 'Xenophobia in South Africa: What does it say about trust?' (2009) 1 *The Round Table* at 439.

8 A Umezurike & C Isike 'An analysis of the opinions of African immigrants on service delivery by the Department of Home Affairs, South Africa' (2013) 1 *Inkanyiso: Journal of Humanities and Social Sciences* at 59.

9 J Campbell *Travels in South Africa: Undertaken at the request of the Missionary Society* (1815) at 4, 31, 324.

10 L Landau & A Segatti, 'Human development impacts of migration: South Africa case study' (2009) Human Development Research Paper (HDRP) Series 5(1), 2 <https://mpira.ub.uni-muenchen.de/19182/> (accessed 26 November 2023).

11 Dugard J et al *Dugard's international law: South African law perspective 5th edition* (2017) at 535.

12 As above.

13 P van Krieken 'Disintegration and statelessness' (1994) 12 *Netherlands Quarterly of Human Rights* at 23.

14 As above.

15 As above.

16 W Wilkinson 'Statelessness' (1916) 1 *International Law Notes* at 26.

place due to the person's own actions or through no fault of his own.<sup>17</sup> As a result, they can be stateless by birth.<sup>18</sup> According to the United Nations Human Rights Commission for Refugees, an international legal definition of a stateless person is:

'[A] person who is not considered as a national by any State under the operation of its law'. In simple terms, this means that a stateless person does not have a nationality of any country. Some people are born stateless, but others become stateless.<sup>19</sup>

As part of their sovereign power, according to the UN Refugee Agency, States can define the rules for the attainment, amendment, and loss of nationality.<sup>20</sup> Nevertheless, duties arising from agreements to which they are parties, general legal principles, and customary international law all place restrictions on the discretion of States concerning nationality.<sup>21</sup> As such, according to international law norms, each State must decide who constitutes its citizens by using national law.<sup>22</sup> Insofar as it adheres to general international law principles, this decision will be accepted on a global scale.<sup>23</sup> Therefore, the State should not implement policies that go against universally accepted standards for how nationality is acquired, lost, or denied.<sup>24</sup> The Convention relating to the Status of Stateless Persons, for instance, was adopted in 1954, and it defines a stateless person as 'a person who is not considered as a national by any State by operation of its law'.<sup>25</sup> A system for the identification, protection, and naturalisation of state individuals is also established by this treaty.<sup>26</sup> These safeguards largely resemble those offered to refugees under the 1951 UN Convention.<sup>27</sup> To prevent situations of statelessness from occurring, a second convention, the Convention on the Reduction of Statelessness, was enacted in 1961.<sup>28</sup> This

17 As above.

18 As above.

19 UNHCR, 'Are you a stateless person', <https://help.unhcr.org/southafrica/get-help/stateless/> (accessed September 2023).

20 The UN Refugee Agency, 'What is statelessness?', <https://www.unhcr.org/ibelong/wp-content/uploads/UNHCR-Statelessness-2pager-ENG.pdf> (accessed 14 October 2023).

21 The UN Refugee Agency (n 20).

22 C Batchelor 'Statelessness and the problem of resolving nationality status' (1998) 1 *International Journal of Refugee Law* at 156.

23 As above.

24 As above.

25 Dugard (n 11) at 535.

26 As above.

27 As above.

28 989 UNTS 175. Adopted on 30 August 1961 and entered into force on 13 December 1975. United Nations, *The Convention on the Reduction of Statelessness*, 30 August 1961 UNTC accessed on <https://treaties.un.org/doc/Publication/UNTS/Volume%20989/v989.pdf> (accessed 13 September 2024). See also, Yadav, 'Kiran Gupta v The State Election Commission & Ors letters patent appeal no. 139 of 2020 in civil writ jurisdiction case no. 19109 of 2019, Patna H? C' (2021) *Jindal Global Law Review* 207.

agreement established guidelines for the conferment and non-withdrawal of citizenship.<sup>29</sup>

When it comes to citizenship or nationality,<sup>30</sup> there is an ontological tie between the State and the person.<sup>31</sup> Those who find themselves in a situation of statelessness are vulnerable to severe exclusion that frequently prevents them from taking advantage of the social, political, and economic leverage that the State has to offer.<sup>32</sup> After all, they are the least identified, understood, and noticeable.<sup>33</sup> Statelessness may put constraints on the fiscal plans that have been budgeted, according to Krause, because if the State must provide for more people than the actual population that has been identified, it may incur additional costs that were not originally budgeted for and may result in problems with service delivery.<sup>34</sup> A potential solution that might ameliorate the problem of financial constraints caused by stateless persons, asylum seekers or undocumented foreign nationals could involve emphasising domestic governance systems and prioritising African philosophy, such as ubuntu, which values communal responsibility and the well-being of all individuals by implementing social integration programmes,<sup>35</sup> regional cooperation,<sup>36</sup> continental policy frameworks,<sup>37</sup> intelligence gathering<sup>38</sup> and decentralised support systems.<sup>39</sup> By grounding the policy in African philosophical traditions like ubuntu, which focuses on shared humanity and responsibility, and using continental or local strategies, African States can address these issues in a way that does not rely solely on Western fiscal models.

29 989 UNTS 175. Adopted on 30 August 1961 and entered into force on 13 December 1975. See also, A Yadav 'Kiran Gupta v The State Election Commission & Ors letters patent appeal no. 139 of 2020 in civil writ jurisdiction case no 19109 of 2019, Patna (n 28) 205.

30 Nationality is essentially a term of international law and denotes that there is a legal connection between the individual and the State for external purposes. See, for example, I Brownlie 'The relations of nationality in public international law' (1963) 39 *British Yearbook of International Law* at 299. On the other side, citizenship is a constitutional law term that describes individuals' internal status within a State. See, for example, J Shaw *Citizenship and Constitutional Law: An introduction* in J Shaw (2018) at 7.

31 A Warri & V Chikadzi, 'Statelessness, trauma and mental well-being: Implication for practice, research and advocacy' (2022) 8 *African Human Mobility Review* 47.

32 As above.

33 As above.

34 M Krause 'Stateless people and undocumented migrants: An Arendtian perspective' (2011) *Statelessness in the European Union: Displaced, Undocumented, Unwanted* at 82. See also, M Krause 'Undocumented migrants: An Arendtian perspective' (2008) 1 *European Journal of Political Theory* at 331-332.

35 Developing long-term initiatives to reintegrate stateless people into the economy, such as small business incentives or vocational training, to help them transition from being financial liabilities to contributors. See, for example, *Koyabe and Others v Minister of Home Affairs* 2010 (4) SA 327 (CC); *Tafira and Others v Ngozwane and Others*, 12960/06, South Africa: High Court, 12 December 2006, <https://www.refworld.org/jurisprudence/caselaw/zafhc/2006/en/75332> (accessed 25 September 2024); *Minister of Home Affairs and Others v Somali Association of South Africa & Another* [2015] 2 All SA 294 (SCA).

The case of *Khoza and Minister of Home Affairs and Another (Khoza)*,<sup>40</sup> which was heard at the Pretoria High Court, set forth an essential component of international law, specifically statelessness. It is submitted that Maritz AJ's commentary further strengthened the existential possibility of how a nexus is formed between domestic law and international law. In this matter, the Court took into consideration the circumstances of a person who was born in South Africa but who, since no nation recognised him as its citizen, was functionally stateless. The Court considered whether the South African government's arbitrary denial of nationality to Mr Khoza was in line with its duties under international law, which includes statelessness-related treaties and conventions.

This paper presents novelty in international law by covering the significance of what ubuntu means for stateless persons in the domestic context of South Africa. In other words, the novelty of this paper is its attempt to prove how other governments and countries may align with and appreciate the relevance of ubuntu's contribution to humanity globally. This is carried out by personifying ubuntu in international law through steps aimed at making jurisprudence more humanly inclusive for persons who become stateless because of

- 36 In order to solve the concerns of statelessness and migration, African governments should collaborate more closely. To lessen the financial strain on individual nations, this may entail pooling funds for the continent's response to displaced people or those who are stateless. After the fall of the Soviet Union, individuals within the former Soviet republics were not considered stateless, based on the principle that anyone residing in these countries was not classified as a foreigner. Consequently, the Soviet States worked collectively to manage migration and prevent statelessness. See, for example, S Lezgiyeva 2018 'Without a Country: Stateless Armenian Refugees in the U.S.S.R and Russia, 1987-2003' (Master of Arts, University of Maryland, Baltimore County) at 6.
- 37 Promoting African Union ('AU') policies that assist member States in better managing their stateless people. Pre-emptive budgeting or group insurance plans that provide for unforeseen circumstances related to migration trends may be used in this situation. See, for example, African Union. *Protocol to the African Charter on Human and People's Rights Relating to the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa*. [https://au.int/sites/default/files/newsevents/workingdocuments/35139-wd-pa22527\\_e\\_original\\_explanatory\\_memoandum.pdf](https://au.int/sites/default/files/newsevents/workingdocuments/35139-wd-pa22527_e_original_explanatory_memoandum.pdf) Adopted by the African Union, February 2018.
- 38 Implementing artificial intelligence technology at the borders, utilising biometric identification systems capable of detecting undocumented individuals in a timely manner, even before officials arrive on site. See, for example, GSA Plumtre 'Time out of joint: Temporal rupture and migration management' (Unpublished Master of Arts thesis, McGill University (Canada) 2019) at 4-5.
- 39 Integrate migration management into decentralised government systems so that local communities contribute to supporting stateless or asylum persons. This would ease the fiscal burden on the national government while encouraging community involvement. A practical example of ubuntu can be seen when the European Union assisted Ukrainians who were fleeing their State as a result of Russian bombardment. See, for example, V Astrov et al 'Russia's invasion of Ukraine: Assessment of the humanitarian, economic, and financial impact in the short and medium term' (2022) 19 *International Economics and Economic Policy* at 361.
- 40 [2023] 2 All SA 489 (GP).

migration caused by geopolitical conflicts and socioeconomic inequities.

In addressing that novelty, this paper covers international law jurisprudence of statelessness, and it brings forth some foreign case laws. This endeavour attempts to universalise the concept of ubuntu globally by infusing existing literature on how international law may be interpreted in the domestic context of South Africa. Poignantly, this paper does not criticise Maritz AJ's judgment but looks to mediate its significance to the South African context and, as such, simplifies how the philosophy of ubuntu may be perceived in that judgment. This paper looks to pinpoint stereotypes, biases, racism, and xenophobia that overshadow national interests. These national interests, as the paper unfolds, will show that national government policies are dictated by unfounded concerns that pinpoint a person as foreign or inclined to external relations, which, to a certain extent, influences the State to protect its territorial integrity in defence of its citizens to the disadvantage of undocumented persons unjustly. It is submitted that the national government's policy, regrettably, imposes limitations on the publication, further undermining the legitimacy of international human rights norms concerning citizenship, immigration, and refugee protection (including stateless persons).<sup>41</sup> In denying blameless stateless persons, such as Mr Khoza, recognition of their status, the concept of statelessness is integrated with ubuntu to demonstrate that when one among a community faces an identity crisis, a collective obligation arises to support and care for that individual.

In outlining the *Khoza* case, this paper will first lay out the framework of the facts and background information of the case. Secondly, a jurisprudential analysis will be made, considering procedural technicalities and whether the applicant was a South African and entitled to nationality. Thirdly, this paper will explore the doctrine of ubuntu and its impact on how Africans tend to be receptive to a stateless person. In other words, the international law concept of statelessness will be decolonised to Africanism. This decolonisation, as the paper unfolds, will show how Mr Khoza, like any rightless person, ought to be sheltered, rather than choosing the trajectory of isolation and deprivation of nationality based on unsound, unreasonable, and arbitrary procedures.

The last segment will focus on statelessness at an international and regional level. This international regionalism, it is submitted, will be paved using the case of *Khoza* and personifying it with foreign

41 South African Department of Home Affairs. 2024. *White Paper on Citizenship, Immigration and Refugee Protection: Towards a Complete Overhaul of the Migration System in South Africa*. Government Gazette No. 50530, Notice No 432, 17 April 2024.

judgments that were dealt with in the African Court on Human and Peoples Rights, the Permanent Court of International Justice and the European Court of Human Rights. In simple terms, statelessness will be comparatively analysed to demonstrate that ubuntu, though traditionally an African customary practice, is in fact a global phenomenon that has long existed but has not been widely recognised as such. It can be assessed at both regional and global levels.

## 2 Khoza: Facts and litigation background

The *Khoza* case centred on a comprehensive report, which, incidentally, is disputed. This report was prepared by the Department of Home Affairs<sup>42</sup> and other involved parties. Their role was to determine whether Mr Khoza, the applicant, was eligible for South African citizenship,<sup>43</sup> even though he did not meet the criteria to be classified as a ‘stateless person’.<sup>44</sup> Maritz AJ noted that according to Mr Khoza’s testimony, he was born in South Africa on 17 April 1997 and has spent his whole life there. This serves as more proof that he has never left South Africa, nor was he identified by his parents’ native state. Mr Khoza currently resides in Thaba Nchu in Limpopo.<sup>45</sup>

Before his birth was formally recorded by his biological parents to the Department of Home Affairs, Mr Khoza’s mother, Ms Martha Nthane (‘the applicant’s mother’), passed away when Mr Khoza was six years old.<sup>46</sup> The applicant was nine years old on 12 December 2006, when his grandmother, Ms Lucy Ndlovu (‘the applicant’s grandmother’), brought him to the Thabang Youth Centre (‘the Centre’) in Limpopo. The applicant’s mother and grandmother both lived at the ‘Small Block’ informal settlement.<sup>47</sup>

The Centre provided support for them.<sup>48</sup> The municipality provided the mother of the applicant with a pauper’s burial after her death.<sup>49</sup> The applicant had no South African identification, nor did his mother or grandparents.<sup>50</sup> According to the applicant, two workers from the Centre’s home-based care programme took care of his mother throughout her sickness and until her passing.<sup>51</sup> These workers arranged for his mother’s burial with the municipality, but because

42 See, for example, the type of service the Department of Home Affairs provides on its website. Department of Home Affairs, Republic of South Africa, <https://www.dha.gov.za/> accessed 23 September 2023.

43 Citizenship and nationality will be interchangeably used.

44 *Khoza* (n 40) para 4.

45 As above.

46 As above.

47 *Khoza* (n 40) para 5.

48 As above.

49 As above.

50 As above.

51 As above.

she was undocumented, he has struggled to find her grave, and neither he nor the Centre was able to secure a copy of her death certificate.<sup>52</sup> He says he has no idea where she was interred.<sup>53</sup>

His placement in the Centre's custody during 2007 was affirmed by several Children's Court orders.<sup>54</sup> The Children's Court determined that the applicant, who was an orphan, required care and protection.<sup>55</sup> Unfortunately, the Children's Court was unable to make copies of any court orders from 2006 to 2012.<sup>56</sup> Only copies of the 2012 court orders were available.<sup>57</sup> The applicant included a copy of the Centre's registration proving his arrival on 12 December 2006 in it.<sup>58</sup> The applicant, who reached 21 years of age, has not been officially placed by a court order at the Centre, but he is a participant in Thabang's Independent Living Programme, which helps young adults obtain skill training and find jobs.<sup>59</sup>

Mr Khoza sought a birth certificate and an identification document at his local Home Affairs office in 2013, when he was sixteen.<sup>60</sup> His dealings with Home Affairs during this time are summarised in a copy of a report from the Centre dated 7 September 2015.<sup>61</sup> According to Maritz AJ, as she studied the investigation conducted by Home Affairs, it was clear from this report that Mr Khoza completed ninth grade in 2013 and entered the Itereleng Skills Training Centre in 2014.<sup>62</sup> There, he took welding and sewing courses before the year was through.<sup>63</sup> He was enrolled in a learnership programme for general labourers and game rangers in 2015 at a nearby game farm.<sup>64</sup> Maritz AJ noted that, according to the investigation, he is still there and making good progress.<sup>65</sup>

The following segment of this paper will attempt to draw an inference of ubuntu and statelessness. In doing so, the segment's paper will draw on the reasoning presented in the judgment to show how the African philosophy of ubuntu becomes significant in showing that Africans have never been isolated by geographic boundaries and by epistemological reflections of *uti possidetis*.<sup>66</sup> Nevertheless,

52 As above.

53 As above.

54 *Khoza* (n 40) para 6.

55 As above.

56 As above.

57 As above.

58 As above.

59 As above.

60 *Khoza* (n 40) para 7.

61 As above.

62 As above.

63 As above.

64 As above.

65 As above.

66 Dugard defines *uti possidetis* as an international law principle of respecting colonial boundaries, even though they were arbitrarily drawn by colonial powers. See, for example, Dugard (n 12) at 186.



Maritz AJ's interpretation of statelessness will be highly commended for furthering the ideology of compassion and showing gratitude for those who, like the applicant, find themselves facing identity crises.

### 3 Ubuntu and statelessness

There is a well-known African adage called 'ubuntu' that is widely used in South Africa and other parts of the continent of Africa.<sup>67</sup> It destroys the idea of individualism and encourages individuals to interact with others efficiently rather than living in solitude.<sup>68</sup> As such, people's behaviours and inactions are partially influenced by their interpersonal connections.<sup>69</sup> According to this African doctrine, a person in an African community reaches their potential through relationships with other individuals.<sup>70</sup> Ubuntu implies 'I am because we are, and because we are, therefore I am'.<sup>71</sup> In connecting this proverb with statelessness in an African context, this is centrally fundamental around an obligation owed by claiming that when one person is in a state of nothingness and is destitute, ubuntu will naturally compel humility to compassionately endow those resourced as a society to offer refuge and open doors.<sup>72</sup> As such, humanism's 'ubuntu' fosters sanctuary as this door opens and is given a figurative expression, which comes as a measure of protecting an individual who is declared stateless from experiencing the punitive actions associated with an identity crisis.<sup>73</sup> In this segment, the significance of the *Khoza* judgment will be analysed within the ambit of ubuntu and statelessness. In addressing two previously mentioned factors, 'ubuntu and statelessness', it is submitted that the importance of Critical Race Theory will be advanced provocatively and, as such, international law's formality will be dismantled/decolonised in a manner that may be alien-like to a conventional international law bibliography.

There was an unwritten but well-known 'customary' practice in Africa that when strangers approached a foreign territory that they were not familiar with, they were customarily compelled to introduce

67 T Coleman 'Reflecting on the role and impact of the constitutional value of ubuntu on the concept of contractual freedom and autonomy in South Africa' (2021) 24 *Potchefstroom Electronic Law Journal* at 8.

68 As above.

69 As above.

70 As above.

71 D Bilchitz et al *Jurisprudence in an African context* (2020) at 23.

72 J Kanamugire 'Historical development of refugee framework in Africa' (2020) 10 *Tribuna Juridică* at 322 & 324.

73 M Mogoboya 'Repurposing African humanism as a catalyst for peace through Mphahlele's *The Wanderers: An (auto) biographical approach*' (2019) 8 *Ubuntu: Journal of Conflict and Social Transformation* at 125.

themselves to the monarch or chief,<sup>74</sup> especially if they were seeking refuge or passing.<sup>75</sup> For example, when King Shaka Zulu ruled over the eastern part of South Africa, the idea of ubuntu caused some controversy.<sup>76</sup> He had built up an impenetrable military force, and as a result, he was able to grant people the status of becoming Zulu citizens, provided they could prove they shared the same language, allegiance, culture, and ancestry as the Zulus.<sup>77</sup> Furthermore, given that Europeans drew borders without any Africans present at the Berlin Conference,<sup>78</sup> Pan-Africanism and left-wing African philosophers hold a strong belief that Africans cannot be strangers in Africa and that to suggest that someone is stateless is to curse a proclivity that makes Africans more interconnected than any other continent globally.<sup>79</sup> It is submitted that the relevance of the *Khoza* case and its premise stems from the fact that a child's birthright reflects an obligation to be granted nationality, and that identity awareness and belonging, rather than politicised ideas centred on hate against outsiders, influence this obligation.<sup>80</sup>

Thus, statelessness has never been exclusively associated with Western interpretations of international law norms; rather, it rose to prominence as it was codified into domestic law, where it had previously only been practised through customary norms that were oral rather than written,<sup>81</sup> and as customary practice and cooperation among those States was widely acknowledged as opposed to those in

74 Currently, the practice has lost relevance but permits from the government and local tribal leaders are still endorsed for introducing themselves and stating the purpose that brought them to their land, especially when a person is doing academic work or wants to purchase land that is owned by a tribal authority. See, for example, G Schutte 'Tourists and tribes in the "new" South Africa' (2003) 50 *Ethnohistory* at 474.

75 D Hughes *From Enslavement to environmentalism: Politics on a Southern African frontier* (2011) at 29.

76 M Mahoney *The other Zulus: the spread of Zulu ethnicity in colonial South Africa* (2012) at 23-24.

77 As above. See also, for example, M Olivier et al *Liber Amicorum: Essays in honour of Professor Edwell Kaseke and Dr Mathias Nyenti* (2020) at 203.

78 M Ramutsindela 'African boundaries and their interpreters' (1999) 4 *Geopolitics* at 180. For example, persons from Europe or America, hold a belief that Africa is a single country and, as such, cannot consist of many countries.

79 L Mabundza & B Seepamore 'Gender and healthy relationships' in *Promoting Healthy Human Relationships in Post-apartheid South Africa: Social work and social development perspectives* (2021) at 42. See also, for example, A Ajala 'The nature of African boundaries' (1983) 18 *Africa Spectrum* at 178; S Michalopoulos & E Papaioannou 'The long-run effects of the scramble for Africa' (2016) 106 *American Economic Review* at 5.

80 K Joon et al 'Gendering immigrant subjects: 'Anchor babies' and the politics of birthright citizenship' (2018) 24 *Social Identities* at 312.

81 Byrness submits that because of Shaka Zulu's massive territorial conquest he made to mobilise tribal states to a central Zulu government, African chiefs and Kings in Southern Africa used to accommodate and grant citizenship and refuge to unknown Africans who came from neighbouring war-torn tribal zones (foreigners) due to difaqane wars. See, for example, R Byrness *South Africa: A country study* (1996) at 23.

the developing South.<sup>82</sup> When ubuntu and hospitality for strangers are construed within the concept of statelessness, then it would mean that the word ‘community/village’ is not in solitude and, as such, borders cannot be justified to isolate Africans in the preservation of securing resources, self-determination, and identity.<sup>83</sup> Henceforth, in the case of *Port Elizabeth Municipality v Various Occupiers* (*Various Occupiers*), Sachs J held that homeless and destitute people should not be seen as a burden, and those with resources and who are able should not institutionally isolate such persons.<sup>84</sup> For the purposes of the *Khoza* ruling, a nexus between ubuntu and the case of *Various Occupiers*, it is submitted that these cases permeate an ideology of owing an obligation towards one another.<sup>85</sup> This obligation is driven by caring and showing active concern for each other’s welfare through communitarianism.<sup>86</sup>

When compared to the *Khoza* case and the two examples of obtaining nationality, and ‘customary acknowledgement from the monarch or Pan-Africanism’<sup>87</sup> in ancient Africa, as mentioned above, it is implied that ubuntu made it simpler for displaced people to naturalise and become citizens than it would have been for them to live in a contemporary setting with colonially imposed legal and administrative systems.<sup>88</sup> For instance, in a colonially imposed administrative system, ubuntu does not find relevance. This is because disproportionately prioritising refugees and stateless persons in its systems threatens the territorial integrity of a government, as proper methods for naturalisation are acquired unjustly, and such persons lack financial resources and are likely to overwhelm the

82 T Molnar ‘Remembering the forgotten: International legal regime protecting the stateless persons stocktaking and new tendencies’ (2014) 11 *US-China Law Review* at 825.

83 T Bennett ‘Ubuntu: An African equity’ (2011) 14 *Potchefstroom Electronic Law Journal* at 36. Zondi and Makhoba submit that Christian ethics and *ubuntu*, to a large extent are intertwined. These authors pinpoint the significance of Hebrews 13:2, and they argue black people are welcoming to others, to the extent that *ubuntu* philosophy does not subscribe to the isolation and rejection of (stateless) people who seek refuge. See, for example, N Zondi & K Makhoba ‘What has happened to the principles of ubuntu? Exploring the concept of xenophobia in the post-apartheid literary work, Kudela Owaziyo by Maphumulo’ (2018) 38 *South African Journal of African Languages* at 270.

84 2005 1 SA 217 (CC) para 37.

85 G Kateb ‘Individualism, communitarianism, and docility’ (1989) 56 *Social Research* 925.

86 Kateb (n 85) at 926.

87 Kamba concedes that although ancient Africa identified itself through ethnic solidarity, the influence of colonialism on Africans changed that trajectory and, as such, Pan-Africanism became an alternative as a tool of unity in the continent. See, for example, S Kamba ‘A call for a ‘right to development’-informed Pan-Africanism in the twenty-first century’ (2019) 19 *African Human Rights Law Journal* at 439-440.

88 M Peters & T Besley ‘The refugee crisis and the right to political asylum’ (2015) 47 *Educational Philosophy and Theory* at 1369.

financial state apparatus to cover the existing population on basic service delivery.<sup>89</sup>

The overwhelming systems sternly regulate institutions, such as the Department of Home Affairs, to restrict the number of persons who can acquire nationality. The Court in the *Khoza* case regrettably failed to recognise the significant unpleasantness caused by statelessness and the adverse consequences that come with being considered an alien in a country that one grows up in.

However, the generational curse of the applicant's parents, who came to South Africa under duress and terror, although not explicit, also shows how the judiciary has developed into a pillar of transformative constitutionalism through ubuntu<sup>90</sup> on stateless persons and how courts will step in when an administrative agency like Home Affairs behaves unreasonably.<sup>91</sup>

Significantly, the applicant in the *Khoza* case was born in South Africa in 1997. According to Maritz AJ's portrayal of the evidence gathered, the learned Judge concedes that the applicant does indeed deserve to be given nationality because the government cannot deport a stateless person.<sup>92</sup> However, implicitly, this demonstrates how neo-liberal governments in Africa have imitated Western models of supervising migration without realising the role that wars, conflicts, and other socioeconomic factors – as was the case with the applicant's parents – play in the ongoing global movement of human migration.<sup>93</sup> The Court determined that Mr Khoza had no links to any other country and had no claim to such citizenship or nationality based on the facts and, as such, found that the applicant had met the burden of proof required by section 2(2) of the Citizenship Act.<sup>94</sup> The Phadagi investigation further supported the uncontested fact that Mr Khoza was born in South Africa and has no knowledge of any other

89 A Paxton 'Finding country to call home: Framework for evaluating legislation to reduce statelessness in Southeast Asia' (2012) 21 *Pacific Rim Law & Policy Journal* at 623.

90 For example, in *S v Makwanyane and Another* [1995] ZACC 3 (6 June 1995) para 130, where the Constitutional Court held that the purpose of a new constitutional order is to recognise that 'there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation'.

91 *DGLR and KMRG v Minister of Affairs* (3 July 2014) ZAGPPHC (unreported), available <https://www.citizenshiprightsafrika.org> at Appellants-Heads-of-Argument-Min-of-DHA-v-DGLR-SCA.pdf (accessed 7 September 2023).

92 *Khoza* (n 40) para 24.4.

93 O Aihwa *Neoliberalism as exception: Mutations in citizenship and sovereignty* (2006) at 6, 8.

94 *Khoza* (n 40) para 55. Section 2(2) of the Citizenship Act 88 of 1995 states that: 'A person born in the Republic of South Africa of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence, acquires South African citizenship by birth if, at the time of his or her birth, one of his or her parents (i) was admitted into the Republic for permanent residence; or (ii) has been ordinarily resident in the Republic for a period of not less than five years immediately prior to the birth'.

nation.<sup>95</sup> Additionally, the Court had already emphasised that it was clear that Mr Khoza was a South African citizen by birth.<sup>96</sup>

According to the African concept of ubuntu, a person's burden is shared by the whole community.<sup>97</sup> When a child is born, for example, every village elder considers themselves to be such a toddler's parent, and their duty to care for the child takes precedence collectively.<sup>98</sup> Additionally, according to the ubuntu doctrine, a government must act like a parent, by taking care of the orphaned and, in this context, making plans for the non-citizen or person without documentation to be accepted and recognised by the State.<sup>99</sup> In order to decolonise statelessness from a neo-liberal and conservatively xenophobic perspective that sees vulnerable people (such as Mr Khoza) as unnecessary burdens that cannot be granted nationality,<sup>100</sup> it is necessary to extinguish any form of social capital that is contrary to how forbearers of the current constitutional order legislated the social contract of the South African Constitution.<sup>101</sup>

Neoliberalism is influenced by coercively applied methods through fiscal constraints,<sup>102</sup> thus seeing stateless persons as a burden that is likely to place additional weight on the existing population.<sup>103</sup> What seems misconstrued, it is submitted, is that these stateless persons parents were forced to leave their home countries due to socio-economic factors. This left them without a State and prevented them from being recognised where they are or where their parents are from, on the one hand, and from being able to be legally integrated

<sup>95</sup> *Khoza* (n 40) para 55.

<sup>96</sup> As above.

<sup>97</sup> C Drucilla and K van Marle 'Exploring ubuntu: tentative reflections' (2005) 5 *African Human Rights Law Journal* at 195.

<sup>98</sup> FK Camara 'Teaching, promoting, and implementing human rights instruments in Africa: the need to contextualize' (2014) 27 *Pacific McGeorge Global Business & Development Law Journal* at 62.

<sup>99</sup> The South African government launched its universal grant programme in response to the outbreak of COVID-19 and the closing of countries to stop the virus's spread. Initially known as the 'COVID-19 SRD Grant', this short-term initiative provided welfare funds to any individual over the age of 18 who was unemployed. The plan was exclusively intended for South Africans, but the Court ruled that it was inconceivable to believe that if asylum seekers and holders of special permits were excluded, the initiative would not be successful. Since such persons were living in poverty, like ordinary poor South Africans, the Court ordered the government to provide them with maternal care as there was no need for there to be a distinction for the provision of that grant. See, for example, *Scalabrini Centre of Cape Town and Another v Minister of Social Development and Others* (22808/2020) [2020] ZAGPPHC 308; 2021 (1) SA 553 (GP) (18 June 2020).

<sup>100</sup> M Cepo 'Illegal migration through the Practice of the Court of Justice of the European Union and the consequences for the Republic of Croatia' (2019) 3 *EU and Comparative Law Issues and Challenges Series* at 208.

<sup>101</sup> D Bilchitz 'Should religious associations be allowed to discriminate?' (2011) 27 *South African Journal on Human Rights* at 240-244.

<sup>102</sup> A Tuchten 'Law's happiness: A decolonial approach to well-being and human rights' (Unpublished LLM thesis, University of Pretoria 2021) at 16.

<sup>103</sup> L Landau et al *Xenophobia in South Africa and problems related to it. Johannesburg: Forced Migration Studies Programme* (2005) at 7.

into a new country of residence, which left them ‘rightless’, on the other hand.<sup>104</sup> It might be pertinent to acknowledge that while many stateless cases are migration-related, the majority of stateless persons have never crossed a border.<sup>105</sup> They live in the country of their birth.<sup>106</sup> According to Arch-Bishop Desmond Tutu’s view, as Buabeng-Baidoo interprets this epistemology, when stateless people are excluded, ubuntu – at the very core of humanity – becomes tainted since, as people, ‘we are interconnected within a web of interconnection’.<sup>107</sup> As a result, when people like Mr Khoza are excluded from the system and deprived of the right to enjoy constitutional prerogatives under the Bill of Rights, it is submitted that ubuntu becomes tainted, and injustice is given the authority to validate jurisprudence that contradicts deeply entrenched African pneumatologically dispensed empowerment.<sup>108</sup>

For De Beer, statelessness is not recognised in the notion of ubuntu because Africans are known for hospitality; as a result, this philosophy triggers communitarian welfare and well-being instead of individual self-interest.<sup>109</sup> As such, for the wrongs of colonial and apartheid past, the South African Constitutional Court has shaped constitutionalism based on communitarian welfare,<sup>110</sup> notably in its

104 Tuchten (n 102) at 16.

105 Weissbrodt and Collins submit that at the very least of minimum standards that are prescribed internationally, states are forbidden by international law customary practice from making their citizens stateless. They are, therefore, required to uphold the human rights of stateless individuals and must grant citizenship to all children born within their borders. See, for example, DS Weissbrodt & C Collins ‘The human rights of stateless persons’ (2006) 28 *Human Rights Quarterly* at 276.

106 Bhatnagar K ‘Citizens of the world but non-citizens of the state: The curious case of stateless people with reference to international refugee law’ (2019) 16 *Social Change and Development* at 6.

107 J Buabeng-Baidoo “‘Human Rights do not stop at the border’: A critical examination on the fundamental rights of regular migrants in South Africa’ (Unpublished LLD thesis, University of Pretoria 2021) at 5, 10. See also, Tuchten (n 102) at 16.

108 V Magezi *Ubuntu in flames-Injustice and disillusionment in post-colonial Africa: A practical theology for new ‘liminal ubuntu’ and personhood* (2017) at 120. Some schools of thought argue that Africans are deeply spiritually connected to the land and its surroundings, and that any system that seeks to separate a person from the environment in which he has spent his entire life can have a disastrous impact on their well-being and welfare when they are forced to leave. See, for example, M Getui ‘Land and Spirituality in the African Socio-Cultural Context’ (2022) *Ontent* at 21; JI Onebunne & NI Chijioke ‘African sacrality and eco-spirituality. *African Ecological Spirituality: Perspectives in Anthroposophy and Environmentalism a Hybrid of Approaches* (2021) at 90; MC Kgari-Masondo ‘A superstitious respect for the soil’?: environmental history, social identity and land ownership-a case study of forced removals from Lady Selborne and their ramifications, c. 1905 to 1977’ (Unpublished Doctoral dissertation, Stellenbosch 2008) at 90; BO Igboin ‘Colonialism and African cultural values’ (2011) 3 *African Journal of History and Culture* at 102.

109 S de Beer ‘Ubuntu is homeless: An urban theological reflection’ (2015) 36 *Verbum et Ecclesia* at 1.

110 AK Wing ‘Communitarianism vs. individualism: Constitutionalism in Namibia and South Africa’ (1992) 11 *Wisconsin International Law Journal* at 349-373.

protective endeavour on vulnerable and marginalised groups.<sup>111</sup> In decolonising the notion of statelessness by a Western normative view that is based on self-centred national interests of protecting individual citizens against outsiders, Mahleza submits that African communalism in South Africa is intertwined with the spirit of ubuntu for the welfare of Abantu, which permeates deeply in philosophical discourse that no man is an island.<sup>112</sup> According to Monono, there are several benefits to working together to solve the issue of statelessness, starting with identifying its effect on: ‘... historical and political factors such as colonialism and state succession, historic migration, conflicts and forced displacement, elimination of political rivals, ethnic nationalism and regional integration’.<sup>113</sup>

In a contemporary African setting, States have imitated European and Western-led liberal systems, which some Critical Legal Studies practitioners have perceived as racist and xenophobic by depriving those who are stateless of nationality in the phase of self-seeking national interests.<sup>114</sup> The unfortunate part of statelessness in Africa is that it tends to affect second and third-generation descendants of migrants more adversely because, as systems become digitised,<sup>115</sup> the more intricate they become, thus making it impossible to outmanoeuvre the control of bureaucracy.<sup>116</sup> For example, the *Nubian Children in Kenya v Kenya* case<sup>117</sup> offers significant advice on matters of nationality and statelessness, despite not unswervingly pinpointing the rights of asylum seekers and refugees. In this case, the African Children Committee’s first ruling was based on the Kenyan government’s failure to advance the children’s human rights because of their socioeconomic status, which made them vulnerable to mistreatment when travelling, having access to the justice system, and running into issues with being expelled because they were deprived of nationality, despite having lived there all their lives.<sup>118</sup>

State sovereignty, according to Batchelor, must be protected by the government to the extent that it can grant, deny, or revoke

111 K Saaremael-Stoilov ‘Liberal communitarian interpretation of social and equality rights: A balanced approach’ (2006) 11 *Juridica Int’l* at 88.

112 Y Mahleza ‘The interplay of citizenship, nationality and statelessness: interrogating South Africa’s legal framework in light of its international obligations’ (Unpublished LLD thesis, University of South Africa 2022) at vii.

113 D Monono ‘Peoples’ right to nationality and the eradication of statelessness in Africa’ (2021) 3 *Statelessness & Citizenship Review* at 49.

114 I Piccioli ‘European Integration and stateless Minorities. The trajectory of Basque Nationalism’ (Unpublished LLD thesis, Libera Università Internazionale degli Studi Sociali Guido Carli 2010) at 55.

115 J Milbrandt ‘Stateless’ *Cardozo Journal of International and Comparative Law* at 99-100; MS Volodymyrovych & OV Liulov ‘The impact of digitalization on the transparency of public authorities’ (2022) 6 *Business Ethics and Leadership* 104.

116 G Bekker ‘The protection of asylum seekers and refugees within the African regional human rights system’ (2013) 13 *African Human Rights Law Journal* at 1.

117 Communication 002/2009. See also Bekker (n 116) at 26.

118 *Nubian Children* (n 117) para 46. See also, Bekker (n 116) at 26.

citizenship.<sup>119</sup> Article 1 of the 1930 Hague Convention, for example, asserts:

It is for each State to determine under its own law who its nationals are. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised about nationality.<sup>120</sup>

The International Court of Justice held in the crucial *Nottebohm Case* that it is the State's authority to decide who shall be its citizens, with the qualification that the act may not necessarily have an international impact.<sup>121</sup> According to the Court:

[A] State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with the general aim of making the legal bond of nationality accord with the individual's genuine connection with the State.<sup>122</sup>

That does not mean, however, that the State should use its protective constituents and territorial integrity as means to further delegitimise stateless persons.<sup>123</sup> In the domain of such delegitimation, the concept of 'statelessness', according to the case of *Pham v Secretary of State for the Home Department (No 2)*, was described as follows:

Citizenship should not be arbitrarily withdrawn or withheld, as occurred in Europe in the twentieth century, where people fleeing their country have had their citizenship removed or where people have not been granted citizenship when their state was created. The 1961 Convention protects a national against the arbitrary deprivation of his nationality and aims at reducing statelessness.<sup>124</sup>

The case of *Khoza* is unique because the Department of Home Affairs made an effort to fabricate arbitrary and unreasonable justifications.<sup>125</sup> Additionally, for individuals who do not possess nationality due to unforeseeable events – for example, when their

119 C Batchelor 'Stateless persons: Some gaps in international protection' (1995) 7 *International Journal of Refugee Law* at 235.

120 As above.

121 *Nottebohm Case (Liechtenstein v Guatemala)*; *Second Phase*, International Court of Justice (ICJ), 6 April 1955, ICJ Reports 1955 at 4; General List, No 18 available at: <http://www.refworld.org/cases/ICJ,3ae6b7248.html> (accessed 26 November 2023).

122 *Nottebohm Case* (n 110) at 4.

123 D Thompson 'Scaling statelessness: absent, present, former, and liminal states of Somali experience in South Africa' (2017) 40 *PoLAR: The Political and Legal Anthropology Review* at 99.

124 [2019] 4 All ER 199 para 59.

125 Preston argues that statelessness applications, like asylum refugee applications, must be well-reasoned when they are decided. This means that, when considered objectively, their procedures should adequately address individualisation (handle the case on its particular facts as a unique case, despite existing jurisprudence that may be legalised in a particular practice), rather than necessarily relying on preconceived collective biases that aim to quench the applicant's application through unreasoned conclusion. R Preston 'Asylum adjudications: do State department advisory opinions violate refugees' rights and U.S. international obligations' (1986) 45 *Maryland Law Review* at 128.



parents or guardians passed away in a foreign nation without the required paperwork and the child was too young to properly identify their home country at the time<sup>126</sup> – circumstantial evidence must be taken into account.<sup>127</sup> The concept of circumstantial evidence centres on the disregard for formal and technical procedures, with the implication being that the State where the applicant may believe his or her parents originated from does not acknowledge the applicant as its national.<sup>128</sup>

Nationality is intended to protect a person's international legal identity, and, therefore, recognition gives one the power of existence, which is ultimately intertwined with the provisions that make Chapter Two's Bill of Rights in the Constitution central to dignity, *inter alia*.<sup>129</sup> Although the concept of ubuntu is African by nature, the British case of *Secretary of State for the Home Department v Al-Jedda* ("Al-Jedda") offered a universalistic approach to this African doctrine, when the court held that:

Statelessness has been estimated to affect up to 12 million people worldwide. Possession of nationality is essential for full participation in society and a prerequisite for the enjoyment of the full range of human rights. Those who are stateless may, for example, be denied the right to own land or exercise the right to vote. They are often unable to obtain identity documents; they may be detained because they are stateless; and they can be denied access to education and health services or blocked from obtaining employment.<sup>130</sup>

It is submitted that the *Al-Jedda* case is significant to the cause of the ubuntu doctrine, because it reflects the State's capacity to take affirmative international obligations.<sup>131</sup> The Court ultimately held that the applicant could not be deprived of British citizenship as such a stance would render him stateless.<sup>132</sup>

In connecting this contention with the *Khoza* case, it is submitted that transformative constitutionalism and ubuntu, when interpreted together, require policies that bring forth dignity to powerless

126 M Fullerton 'Comparative perspectives on statelessness and persecution' (2015) 63 *University of Kansas Law Review* at 876.

127 P Farci 'TP Minister of Home Affairs (Sentence no 9140, 22 April 2014) (Tribunal of Rome)' (2021) 3 *Statelessness & Citizenship Review* at 96.

128 P Farci (n 127) at 96.

129 J Robinson 'Children's rights in the South African Constitution' (2017) 6 *Potchefstroom Electronic Law Journal* at 39.

130 [2014] 1 All ER 356 para 13.

131 P Nevill 'Reconciling the clash between UK obligations under the UN charter and the ECHR in domestic law: Towards systemic integration?' (2008) 67 *The Cambridge Law Journal* at 447-450.

132 G Goodwin-Gill 'Mr Al-Jedda, deprivation of citizenship, and international law', (In Revised draft of paper presented at a Seminar at Middlesex University, London, February 2014) at 1.

persons.<sup>133</sup> Interestingly, South African jurisprudence on the issue of statelessness was subject to a person who was deemed 'stateless' to swear allegiance, if, on reasonable grounds, it was found that such a person had lost their native country's nationality.<sup>134</sup> Nonetheless, due to its apartheid practices, South Africa, like Israel, was more proactive in issuing nationality to people of European ancestry than Africans.<sup>135</sup> People of European ancestry can still easily obtain South African nationality and permanent residency status,<sup>136</sup> whereas people like Mr Khoza face intensely chauvinistic and xenophobic scrutiny because of their race; even in their statelessness, they are viewed as an unnecessary burden.<sup>137</sup>

The issue of statelessness was that, according to the case of *Re P (G E) (an infant)*, a stateless person ought to be viewed holistically and possibly from a humanistic perspective, and this is seen when a stateless person does not possess travel documents, identification document and ultimately deprived of nationality on either end.<sup>138</sup> In South Africa, the Constitution is premised on the condition that a child's best interest is of paramount importance.<sup>139</sup> Unfortunately, the Constitutional Court held in *Centre for Child Law v Director General: Department of Home Affairs and Others* that the cycle of statelessness is exacerbated by a child of a foreigner who is born in a foreign territory, and whose existence comes into enquiry when a birth certificate is in dispute.<sup>140</sup> Interestingly in *G v G (Secretary of State for the Home Department and others intervening)*, the Court held that refugee applications may be easily used to deprive people of nationality and, therefore, the Court pinpointed that under international law, subsidiary (circumstantial) means can be used to assist stateless persons with a more dignified protection.<sup>141</sup> The *Khoza* case is significant because it reflects an innate inclination to view statelessness subjectively.<sup>142</sup> After all, once reliance is placed on objectivity, ethics surrounding the

133 O Kgabo 'Re-Imagining culture of justification through transformative constitutionalism and the philosophy of ubuntu' (2017) 11 *Pretoria Student Law Review* at 25.

134 *Ex parte Lowen* 1938 TPD 504.

135 R Kasrils et al *Israel and South Africa: The many faces of apartheid* (2015) at 170, 315.

136 K Laloo 'Citizenship and place: Spatial definitions of oppression and agency in South Africa' (1998) 45 *Africa Today* 446.

137 B Berkeley 'Stateless people, violent states' (2009) 26 *World Policy Journal* at 4.

138 [1964] 3 All ER 977 at 987.

139 B Bekink & M Bekink 'Defining the standard of the best interest of the child: Modern South African perspectives' (2004) 37 *De Jure* at 26.

140 2020 (8) BCLR 1015 (ECG) paras 4-5.

141 [2021] 4 All ER 113 para 87.

142 *Khoza* (n 38) para 36.54. Poignantly, even though the Court was objective in its analysis, it pointed out that the Department's allegations were not real, genuine, bona-fide, and as such, the Court had to reject Defendant's contention.

emotional state of affairs, caring for one another, and limitations for universal humanism towards one another diminish.<sup>143</sup>

In place of the above-mentioned factors analysed, it is submitted that in the case of *Khoza*, when construed properly, a person who is stateless and undocumented often lacks access to fundamental human rights.<sup>144</sup> Ubuntu in the phase of globalisation, submits Petersen, would require a system ensuring that the evidence which proves a person lacking documentation should not be something that is coercively weaponised. Instead there must be a reassurance of security, human rights protection and application of international law in a substantively sound manner.<sup>145</sup> The case of *Khoza*, when applied with *European Roma Rights Centre and Others v Immigration Officer at Prague Airport and another (United Nations High Commissioner for Refugees Intervening)*, significantly coincides with ubuntu because the Court held that a stateless person's position ought to be observed in good-faith and minimise reluctance of the self-centred position that is influenced by territorial security of the State.<sup>146</sup>

Many mainstream international law academics believe that a well-founded concern, particularly of refugees' vulnerability, is an underlying reason for sheltering them in a foreign state.<sup>147</sup> However, in the Australian Federal Court's case of *Savvin v Minister for Immigration and Multicultural Affairs*, Dowsett J held that stateless persons only had to prove that they were disinclined or unable to return to their native State of previous habitual residence.<sup>148</sup> When the case of *Khoza* is considered, the epistemology of ubuntu came to the forefront when the question of borders and territorial integrity gained traction. When *Savvin* gained international pull, the UN Secretary-General wrote letters to all UN member States cautioning them that migration will always be there and that human rights

143 K Staples *The ethics of statelessness* (2020) at 148-159.

144 Mahleza (n 112) at v.

145 A Petersen 'Statelessness as a failure of international law: A critical analysis of the effects of statelessness on gender rights' (Unpublished LLD thesis, University of Western Cape 2019) at 76.

146 [2005] 1 All ER 527 para 19.

147 A Dowty & G Loescher 'Refugee flows as grounds for international action' (1996) 21 *International Security* at 46; E Newman & J Van Selm 'Refugees and forced displacement' *International Security, Human Vulnerability, and the State*, UNU Press, Tokyo Japan (2003) at 10; JC Hathaway & WS Hicks 'Is there a subjective element in the Refugee Convention's Requirement of Well-Founded Fear' (2004) 26 *Michigan Journal of International Law* at 536; E Adjin-Tettey 'Reconsidering the criteria for assessing well-founded fear in refugee law' (1997) 25 *Manitoba Law Journal* at 129. Interestingly, well-founded fear does not have to be politically oriented to government policy, but can include 'natural disasters, wars, famines' which 'could be equally compelling reasons of necessity since they can induce a well-founded fear of harm'. See, for example, N Nathwani 'The purpose of asylum' (2000) 12 *International Journal of Refugee Law* at 377.

148 [1999] FCA 1265; (1999) 166 ALR 348 (*Savvin*). See, also, M Foster et al 'Part one: The protection of stateless persons in Australian law – the rationale for a statelessness determination procedure' (2016) 40 *Melbourne University Law Review* at 425.

protection for stateless persons could not be diminished at the expense of national interests.<sup>149</sup>

The local case of *Dzenisiuk and Others v Minister of Home Affairs and Others* is important within the jurisprudence of foreign and international case law, wherein the Court held that where ‘everyone’ appears in the Constitution, the Bill of Rights must be constitutionally universalised and cater not only to citizens, but also to foreigners, including those who have not been granted formal permission to remain.<sup>150</sup> It submitted that this is reflected by section 28(1)(a) of the Constitution, which supports the right of a child to be given name and nationality. For example, there is truth in the claim that organs of State, including the Department of Home Affairs in South Africa, have at times failed to grant nationality to stateless individuals.<sup>151</sup> Statelessness can arise due to various reasons, such as gaps in national laws, administrative challenges, discrimination, or lack of proper documentation.<sup>152</sup> These failures often leave affected individuals unable to access their fundamental rights, despite constitutional protections, like those in South Africa’s Constitution, which guarantees the right to nationality for children born in the country under section 28(1)(a).<sup>153</sup> Furthermore, because the parents left their native country and settled in South Africa before the child’s (Khoza’s) birth, sections 28(1)(a)-(b) of the Constitution, particularly those relating to appropriate care, name and identity recognition (sheltering in South Africa), should have been handled in a depoliticised manner by the Department of Home Affairs.<sup>154</sup>

This section of the paper sought to demonstrate that Africans can never be foreigners in Africa. Although the law’s application of *uti possidetis* has not been fully reformed, balanced, or calculated to

149 GW Paton ‘A study of statelessness - book review’ (1951) 5 *Res Judicatae* at 68.

150 (2021/476782) [2024] ZAGPPHC 221 (19 March 2024) para 4. See also, for example, *Director General Department of Home Affairs and others v Link and others* 2020 (2) SA 192 (WCC) para 21.

151 *Democratic Alliance v Minister of Home Affairs and Another* 2023 (6) SA 156 (SCA) paras 34 & 36.

152 *DGLR v the Minister of Home Affairs* (GPJHC) (unreported) case number 38429/13 of 3 July 2014. See also, for example, F Khan ‘Exploring childhood statelessness in South Africa’ (2020) 23 *Potchefstroom Electronic Law Journal* at 20-21.

153 In South Africa, cases have arisen where individuals, particularly children, have struggled to obtain birth certificates or documentation that would confirm their nationality. Statelessness remains a significant issue globally, exacerbated by bureaucratic delays, restrictive immigration laws, or inconsistent application of nationality laws. The UNHCR has documented efforts by several countries, including South Africa, to address statelessness, but challenges persist in implementation.

154 Steward submits that the case of *President of the Republic of South Africa v Grootboom and Others* 2000 (11) BCLR 1169 (4 October 2000) became pivotal in making the judiciary address the factors of vulnerability between women and children and, therefore, make it impossible in a manner that is depoliticised, yet prohibiting forcibly imposed laws that are unjust and arbitrary. See, for example, L Stewart ‘The *Grootboom* judgment, interpretative manoeuvring and depoliticising children’s rights’ (2011) 26 *Southern African Public Law* at 98.

recognise its detrimental influence on the freedom of movement,<sup>155</sup> it is submitted that borders and socioeconomic considerations have harmed family bonds.<sup>156</sup> These bonds, between groups that are similar yet barricaded by borders, stem over centuries but have eventually been eliminated by systemic application of the development of international law in *uti possidetis* and self-determination. It is submitted that Mr Khoza is the product of a bond that he lost due to socioeconomic factors that led to his parents' migration to South Africa,<sup>157</sup> and to suggest that he still is stateless is to bemoan his right not only to exist, but also to live and enjoy constitutional prerogatives granted by the Bill of Rights.

## 4 International and regional law<sup>158</sup>

This segment will deal with statelessness at a regional level. As such, judgments that were written by the African Court on Human and Peoples Rights, the Permanent Court of International Justice and the European Court of Human Rights will be comparatively analysed with the case of *Khoza*. When the *Khoza* case is discussed, the issue of statelessness may not solely rely on technicalities grounded in international law. Instead, national interests, particularly as professed through the domain of Western biases, state of mind, and the potential for unreasonable or unfair conduct by administrative agencies in granting or revoking nationality, will be assessed within the doctrine of ubuntu.

### 4.1 African Court on Human and Peoples Rights

The case of *Khoza*, it is submitted, follows the same logic that the jurisprudence of the African Court on Human and Peoples' Rights (African Court) followed, which was to first ponder the right to a nationality in the pre-existing case of *Anudo Ochieng Anudo v Tanzania (Anudo)*.<sup>159</sup> Both *Khoza* and *Anudo* examine the critical intersection of nationality and human rights, demonstrating how

155 JA Evison 'Migs and monks in crimea: Russia flexes cultural and military muscles, revealing dire need for balance of *uti possidetis* and internationally recognized self-determination' (2014) 220 *Military Law Review* at 111.

156 HP Dlamini et al 'Towards understanding the Cameroon-Nigeria and the Eswatini-South Africa border dispute through the prism of the principle of *uti possidetis juris* customary international Law' (2022) 47 *Africa Development* at 251.

157 *Khoza* (n 40) para 5.

158 The author wishes to alert the readers that he could not rely nor critique some judgments about statelessness because they were either written in French, Spanish or they did not match the problem statement of what this paper sought to achieve on the website of the United Nations Refugee Agency on international law cases relating to statelessness. See, for example, <https://www.unhcr.org/publications/international-case-law-relating-statelessness> (accessed 20 January 2024).

159 African Court on Human and Peoples' Rights, App No 012/2015, 22 March 2018).

national courts and regional bodies are increasingly aligning in their recognition that denying or revoking nationality without due process constitutes a violation of fundamental rights. This alignment emphasises a broader, emerging jurisprudence aimed at protecting individuals from statelessness, reinforcing the imperative for African states to harmonise their national laws with international human rights obligations.

Mr Anudo contended that Tanzania had violated his right to nationality under the Universal Declaration of Human Rights. He had to travel to Tanzania to legally consummate his marriage, but his passport was seized upon his arrest on unsubstantiated and vague allegations.<sup>160</sup> His nationality was then arbitrarily revoked, and he was deported to Kenya, from where he was expelled back to Tanzania.<sup>161</sup> He managed to travel to Tanzania, but even in his native state of birth, he was still considered unidentifiable on the system and an unwanted alien.<sup>162</sup> Although the African Court made no mention of the international law of non-refoulement, it is submitted that Tanzania's arbitrary expulsion of the applicant desecrated Article 15(2) of the UDHR.<sup>163</sup>

In a noteworthy ruling in *Nystrom v Australia*, the United Nations Human Rights Committee ruled that, despite the applicant's non-native ties to Sweden and his presence in Australia at the time, his nationality could not be deprived if the Court was persuaded that the applicant had no strong ties to Australia and that other factors, such as the existence of his family there, his level of language proficiency, the length of time he spent there, and a credible link that strongly tied him to Australia, all played a part.<sup>164</sup>

Crawford J's ruling of the Permanent Court of Justice in the *Question concerning the Acquisition of Polish Nationality*,<sup>165</sup> when compared to *Nystrom* and synchronised with the *Khoza* case, highlights that while states may restrict who may become a national, migration and external factors play a part in that endeavour;

160 N Ndeunyema, 'Anudo v Tanzania: The African Court recognises the right to nationality under customary international law', 19 April 2018. <https://ohrh.law.ox.ac.uk/anudo-v-tanzania-the-african-court-recognises-the-right-to-nationality-under-customary-international-law/> (accessed 18 January 2024).

161 As above.

162 As above.

163 A Elligai & R Phiri 'Migration and human rights: Exploring key policy gaps' (2009) 1 *Africa Governance Insights* at 44.

164 *Nystrom v Australia*, UN Doc CCPR/C/102/D/1557/2007, 18 [7.5]. See also, M Foster et al 'Part two: the prevention and reduction of statelessness in Australia: an ongoing challenge' (2017) 40 *Melbourne University Law Review* at 502.

165 1961 Convention, especially arts 8-10; International Law Commission's (ILC's) Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, annexed to UNGA Res 55/153 (12 December 2000).

consequently, deprivation of nationality should not be weaponised but should be used judiciously.<sup>166</sup>

## 4.2 Permanent Court of International Justice

### 4.2.1 *Nationality Decrees issued in Tunis and Morocco*<sup>167</sup>

On 7 February 1923, the Permanent Court of International Justice (PCIJ) issued an advisory opinion about the nationality decrees made in Tunisia and Morocco, with specific reference to nationality and ensuring that colonial powers who had their citizens in those two colonies could not be stateless. The League of Nations Council requested the opinion judgment to settle a disagreement between France and Great Britain on the legality and consequences of the decrees that France had issued on 8 November 1921, in its protectorates of Tunis and Morocco. Numerous persons who were born in certain regions and had no other nationality were given French nationality by the decrees. In challenging the decrees, the British Government contended that France went mutually against international law and the rights of British nationals.

The PCIJ considered the protectorates' legal standing as well as the kind and extent of the decrees. The Court found that the decrees did not infringe on British nationals' rights or France's obligations under international law. It considered them valid and enforceable since France issued them in the protectorates while exercising its sovereign authority. The Court also decided that only individuals who met the requirements and gave their assent to become French nationals by the decrees could do so, and not everyone else who wanted to become a citizen without meeting the requirements. The Court further declared that, subject to the laws of the respective countries, the decrees had no bearing on the nationality of people who already held another nationality, such as British subjects, nor did they prohibit people who had acquired nationality from renouncing it and obtaining another nationality.

The significance of the threat to ubuntu and protectorate defence against colonial influence, it is submitted, was averted through building relations with powers that did not pose a significant threat to the independence of a State. For example, Lesotho sought a British protectorate against Dutch settlers as they hurdled into the interior of South Africa and, accordingly, impliedly terrorised locals and

<sup>166</sup> J McAdam 'Disappearing states', statelessness and the boundaries of international law. *Statelessness and the Boundaries of International Law* (21 January 2010). UNSW Law Research Paper at 13.

<sup>167</sup> See, for example, BO4 on <https://www.icj-cij.org/pcij-series-b> (accessed 19 January 2024). For English translation, see <https://www.refworld.org/jurisprudence/caselaw/pcij/1923/en/20991> (accessed 19 January 2024).

expropriated their land unjustly in certain parts of what may now be called the Free State, Eastern Cape, and Natal.<sup>168</sup> Additionally, Lesotho and Botswana were under British protectorate, and since the British believed that their territories were barren, they had no further interest in locating minerals.<sup>169</sup> Therefore, it is crucial to analyse this advisory opinion by drawing comparisons between Tunisia and Morocco, while delicately acknowledging that France actively engaged in diplomacy in that region instead of using tactics that were perceived as colonially insensitive to the needs of the locals.<sup>170</sup> Be that as it may, due to historical accidents that have sown the seeds of jagged individualism throughout the continent, colonialism disrupted the spirit of ubuntu for the first time in Africa, consequently distorting the continent's progressive narrative.<sup>171</sup> This jagged individualism, it is submitted, was introduced in the case of *Nationality Decrees issued in Tunis and Morocco* when foreign powers sought to prevent their nationals from being stateless. Thus, self-centred national interests in immigration gained traction in that case and this has sporadically been embraced to this day by carefully constructed systems that seek to protect citizens, even when some had naturalised, against outsiders.<sup>172</sup>

In South Africa, the Constitution's preamble is premised on 'South Africa belongs to all who live in it, black and white', and, as such, utilitarianism extends even to those who are not indigenous but have naturalised in the country.<sup>173</sup> In chastising 'hate against other Africans', Maritz AJ cautions unreasonableness as an issue of

168 MM Lelimo 'The reasons for the annexation of Lesotho 1868 a new perspective' (Unpublished PhD thesis, University of the Free State, 1998) at 158, 164 & 209.

169 O Selolwane 'Colonization by concession. Capitalist expansion in the Bechuanaland Protectorate. 1885-1950' (1980) 2 *Pula: Botswana Journal of African Studies* 75-124; B Paton (1995). Botswana: From Goromente to the Government of Labour Export. In *Labour Export Policy in the Development of Southern Africa* (pp 267-295). London: Palgrave Macmillan UK; P Robson 'Economic integration in Southern Africa' (1967) 5 *The Journal of Modern African Studies* 469-490.

170 For example, in Lesotho, King Moshoeshe saw the British as a less hostile ally strategically, since he was disturbed by the Dutch having demolished a great chapel named Morija that significantly affected tourism and religious gatherings in his region. See, for example, Lelimo (n 168) at 120.

171 Lelimo (n 168) at 120.

172 Amnesty International, for example, has once voiced concern that ubuntu is eroding, and this is attributed to policies that are contrary to the welfare of immigrants. See, for example, S Tolmay, 'Xenophobia in South Africa: What happened to ubuntu?', (30 August 2019), <https://www.dailymaverick.co.za/opinionista/2019-08-30-xenophobia-in-south-africa-what-happened-to-ubuntu/> (accessed 23 January 2024).

173 SH Chiumbu & D Moyo "'South Africa belongs to all who live in it": Deconstructing media discourses of migrants during times of xenophobic attacks, from 2008 to 2017' (2018) 37 *Communicare: Journal for Communication Sciences in Southern Africa* 136-152. See also, BA Sotonye & BA Tamunopubo 'Xenophobic Attacks on Nigerians in South Africa: Ethical Implications and Responses of the Nigerian Government' (2020) 7 *International Journal of Multidisciplinary Research and Development* at 39



administrative failure in the *Khoza* case. Yet to Mthombeni, a State acts in a thoughtlessly neglectful manner, by omitting to realise that the issue encrypting Afrophobia is seen through a systematic national policy.<sup>174</sup>

#### 4.3 European Court of Human Rights

*Kuric and Others v Slovenia*<sup>175</sup> is a case ruled by the European Court of Human Rights ('ECtHR') in 2012. About 25,000 persons had their names removed from Slovenia's civil registration (system) following the country's 1992 separation from the former Yugoslavia.<sup>176</sup> They lost their nationality, their legal standing, and access to several rights because of the expurgation from the system. According to the ECtHR, Slovenia had infringed against the applicants' – eight of the persons who had been erased – rights to an effective remedy, respect for their private and family lives,<sup>177</sup> and non-discrimination.<sup>178</sup> Additionally, the Court granted them fair satisfaction and mandated that Slovenia take broad action to address the circumstances surrounding the persons who were deleted from the system.

In the case of *Andrejeva v Latvia*,<sup>179</sup> the ECtHR found that Latvia had discriminated against Ms Andrejeva, the applicant, by denying her pension claim under the State Pensions Act on the basis of her status as a stateless non-citizen.<sup>180</sup> According to ECtHR, the absence of Latvian nationality was the only motive for depriving her of her rights and, as such, this was politicised on inhumane grounds to justify the state not to consider granting her pension.<sup>181</sup> Furthermore, the Court determined that there had been a breach of both Article 1 of Protocol No. 1, which highlights the right to the peaceful enjoyment of rights

174 Z Mthombeni 'Xenophobia in South Africa: Problematising ubuntu as an ethical response' (2022) 93 *The Thinker* at 70. Interestingly, when national interests strive to protect a specified population at the expense of outsiders, it is submitted that this creates a fear which demonises foreign nationals. See, for example, when former president Donald Trump was elected, his policy was powered by building the Southern border fence, to the extent that the budget which was meant for the Department of Defence was shifted to infrastructural development. See, for example, *Sierra Club v Trump*, 963 F.3d 874 (9th Cir. 2020).

175 *Kuric and Others v Slovenia*, Application no 26828/06, Council of European Court of Human Rights, 13 July 2010, available at: <https://www.refworld.org/cases,ECHR,4c3f01312.html> (accessed 19 January 2024).

176 *Kuric* (n 175) para 364.

177 *Kuric* (n 175) para 318.

178 *Kuric* (n 175) paras 259, 268, 399.

179 *Andrejeva v Latvia*, Appl No 55707/00, Council of Europe: European Court of Human Rights, 18 February 2009, available at: <https://www.refworld.org/cases,ECHR,49a654aa2.html> (accessed 20 January 2024).

180 Equal Rights Trust; Petrova, Dimitrina (29 September 2009). 'Letter to the Saeima' (PDF). *The Equal Rights Trust*, Microsoft Word - Latvia PisjmoDaudze \_2\_ (equalrightstrust.org) (accessed 1 January 2024).

181 Equal Rights Trust (n 180).

under the European Convention on Human Rights and Article 14, which forbids discrimination.<sup>182</sup>

In 2007, the European Court of Human Rights ('ECHR') ruled in the case of *Tatishvili v Russia*<sup>183</sup> about the complexities surrounding the issue of statelessness, housing and property rights, and proof of nationality, *inter alia*. The applicant, a stateless person residing in Moscow, stated that her daily life had become significantly more difficult and that her access to medical treatment was unclear due to the domestic authorities' arbitrary denial of registering her residency at the designated location.<sup>184</sup> According to Article 8 of the Convention, the ECHR determined that the Russian Federation had infringed upon the applicant's right to respect for her private and family life.<sup>185</sup> In violation of Article 6 § 1 of the Convention, the ECHR also concluded that the applicant had not received a fair trial from the national courts.<sup>186</sup> The applicant received 1,500 euros for fees and expenses and 3,000 euros for non-pecuniary damages from the ECHR.<sup>187</sup>

The Court further stated that, given the case's status as an exemplar of the European Court of Human Rights' jurisprudence regarding residence registration and its implications for the rights of migrants and stateless individuals, naturalisation had emerged as a crucial factor that needed to be taken into account, given the significant influence that the collapse of the Soviet Union had on population displacement.<sup>188</sup> It became necessary, therefore, for the ECHR to acknowledge that the applicant had solid interpersonal relations with Moscow,<sup>189</sup> had been there for more than 40 years and that her denial of residence registration had deprived her of several support systems and prerogatives, including voting powers, social security, health insurance, and a pension.<sup>190</sup> Along with dismissing the applicant's claim without considering the substance of her claims, the municipal courts were chastised by the ECHR for depending on procedural and immaterial reasons, such as the applicant's lack of Russian citizenship or her inability to present a migration card.<sup>191</sup>

The cases of *Kuric*, *Andrejeva*, and *Tatishvili* become imperative when reconciled with *Khoza* case because they stimulate the notion

182 Equal Rights Trust (n 180).

183 *Tatishvili v Russia*, 1509/02, Council of Europe: European Courts of Human Rights, 18 February 2007, available at <https://www.refworld.org/cases,ECHR,4667e2912.html> (accessed 20 January 2024).

184 *Tatishvili* (n 183) paras 31, 37 46, 50, 53 (registration of her residency) 34, 44, 67 (access to medical treatment).

185 *Tatishvili* (n 183) paras 14, 45

186 *Tatishvili* (n 183) paras 62-63.

187 *Tatishvili* (n 183) paras 61, 71.

188 *Tatishvili* (n 183) para 41.

189 *Tatishvili* (n 183) paras 7, 13.

190 *Tatishvili* (n 183) paras 34, 44.

191 *Tatishvili* (n 183) paras 12, 15, 19.

that nationality cannot be arbitrarily denied, nor can the system be weaponised to the extent of denying people the right to social security, arbitrarily separating family bonds for the sake of preserving territorial integrity and denying people their socioeconomic rights. Poignantly, Tanous et al submit that, should international law be acquiescent to a domestic setting, this would suggest that the circumstances surrounding statelessness would entail, both inferentially and epistemologically, stateless persons being abandoned in the wilderness, suffering from an identity crisis, and experiencing homelessness and destitution.<sup>192</sup>

## 5 Conclusion

The notion conveyed in George Orwell's *Animal Farm*, where 'all animals are equal, but some are more equal than others',<sup>193</sup> resonates in the *Khoza* case, which matches hundreds of similar circumstances.<sup>194</sup> The problem stems from the perspective of those who are thought undeserving of accelerated administrative assistance, as seen by how authorities such as the Department of Home Affairs treat foreign nationals, stateless individuals, asylum applicants, and undocumented persons.<sup>195</sup> Be that as it may, the contribution of this paper sought to reflect the implications of being a stateless person. In that endeavour, the case of *Khoza*, as was shown, disclosed the possibility of regularising the jurisprudence of statelessness. Moreover, although statelessness is an international law theme, it is submitted that the case of *Khoza* formalised it in a domestic law context; to the extent of the recognition that balances ubuntu and humanistic centred approach that sees people such as the applicant worthy of being afforded nationality. Although Department of Home Affairs insisted that the applicant did not meet the requirements to be classified as a stateless person, Maritz AJ's contribution is commendable because no evidence could be legitimately sustained to confirm the authenticity of proof that would imply the applicant was deceiving the Department.

192 O Tanous et al 'Beyond statelessness: 'Unchilding' and the health of Palestinian children in Jerusalem' (2022) 4 *Statelessness & Citizenship Review* at 101.

193 Harkins & Lugo-Ocando (n 3) at 3.

194 *Mulowayi v Minister of Home Affairs* [2019] ZACC 1, *inter alia*. The author cannot quote every case-law since this is a conclusion, but to the readers, may this inference be drawn in light of domestic, international and foreign case-laws that were presented in this paper.

195 *Scalabrini Centre of Cape Town and Another v Minister of Social Development and Others* (22808/2020) [2020] ZAGPPHC 308; 2021 (1) SA 553 (GP) (18 June 2020); *Magadzire and Another v Minister of Home Affairs and Others* [2023] ZAGPPHC 2249; 2022-006386 (28 June 2023); *Helen Suzman Foundation and Another v Minister of Home Affairs and Others* [2023] ZAGPPHC 1607; 32323/2022 (10 February 2023); *African Amity NPC and Others v Minister of Home Affairs and Others* [2023] ZAGPPHC 2252; 51735/2021 (29 June 2023).

Furthermore, this paper sought to evoke the ubuntu concept, which holds that stateless people should not be treated unwelcomingly while seeking shelter or permanent status, and that they ought to be recognised as worthy of having a nationality. Ubuntu and communitarianism are inextricably linked, to the degree that Africans have never imposed colonial practices, such as enforcing the protection of a State's territorial integrity against unwelcome persons in need of support, refuge, and care. As such, this paper has proven how the South African government can still readily give nationality and residency to foreigners who are of European descent, whereas individuals like Mr Khoza – despite being black African – are subjected to treatment that is consistent with xenophobic sentiments. Given these problems, this paper advocated for the inclusion of decolonised procedures in stateless person applications. This entails implementing indigenous ubuntu systems that do not seek to alienate persons only because of their origins, but rather prioritise the recognition of needs resulting from a lack of documents and a desire for naturalisation as a citizen. Hence, in the case of *Chisuse and Others v Director-General, Department of Home Affairs and Another*, it was held that:

... Citizenship is not just a legal status. It goes to the core of a person's identity, their sense of belonging in a community and, where xenophobia is a lived reality, to their security of person. Deprivation of, or interference with, a person's citizenship status affects their private and family life, their choices as to where they can call home, start jobs, enrol in schools and form part of a community, as well as their ability to fully participate in the political sphere and exercise freedom of movement.<sup>196</sup>

When the aforementioned case is reconciled with the *Khoza* case, it is submitted that these two cases are factually identical in the sense that they both focus on how the deprivation of nationality causes inferiority and identity crisis in people who confront such challenges. The purpose of Maritz AJ's decision, as shown, was to bring international law, particularly the significance of statelessness, closer to domestic law by drawing the inference that people cannot be loosely left in the wilderness and suffer from an identity crisis, as this does not reflect the sentiments of what ubuntu embodies.

In achieving its proposition, this paper explored the significance of the *Khoza* judgment and its jurisprudential development to international law was seen when ubuntu was advocated at the domestic level. Accordingly, the evidence was analysed to determine how the procedures used undermined the assessment of whether the applicant was South African and entitled to nationality. Additionally, ubuntu paved the way for observing the receptive nature of how Africans view stateless persons. Therefore, the international law concept of statelessness was decolonised to promote Africanism. This decolonisation, as the paper unfolded, showed how Mr Khoza, like any

196 [2020] ZACC 20 para 28.

rightless person, ought to be sheltered, rather than choosing the trajectory of isolation and deprivation of nationality based on unsound, unreasonable, and arbitrary procedures.

The final part focused on regional statelessness. This regionalism, as it was contended, was built on the *Khoza* case, and personified by foreign judgments decided by the African Court on Human and Peoples Rights, the Permanent Court of International Justice, and the European Court of Human Rights. Rightly stated, statelessness was comparatively analysed to demonstrate how ubuntu is a worldwide phenomenon that was previously unknown, but rather a historic African customary practice that can be measured on a global and regional scale.

What is importantly novel about this paper is that it decolonises how stateless persons are viewed. States tend to prioritise their citizens to the disadvantage of foreign nationals, asylum seekers, and stateless persons. This novelty was personified by extensive existing literature on ubuntu. As such, this novelty provided flexibility for individuals like Mr Khoza to be viewed not as burdens to national interests, but as individuals deserving of recognition as nationals, entitled to live dignified lives with access to basic necessities through their interactions with the State.

# LIMITATIONS AND OPPORTUNITIES OF CHILD PARTICIPATION IN CLIMATE CHANGE LITIGATION IN AFRICA

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*by Gift Gawanani Mauluka*



## Abstract

*Climate change legal frameworks call upon countries to mitigate and adapt to the adverse effects of climate change. These frameworks have influenced the creation of policies and laws addressing climate change across the globe. Activists, individuals, and civil society organisations have utilised campaigns, demonstrations, and climate change litigation to compel countries to adhere to their climate change obligations provided in these frameworks. However, climate change litigation is still in its infancy and progressing slowly in African countries. Additionally, children's involvement in such litigation is limited despite international and domestic legal frameworks permitting their participation. This article argues that children's participation in climate change litigation in African countries is currently tokenistic and does not afford them meaningful involvement in the decision-making processes in climate change matters. Having presented the importance of child participation, it examines the opportunities and limitations of children's participation in climate change litigation.*

**Key words:** climate change; litigation; child participation, child rights

# 1 Introduction

Africa is disproportionately affected by climate change.<sup>1</sup> This is due to the continent's social, economic, and political constraints and low levels of development, which limit its ability to cope with the effects of climate change and render it more dependent on natural resources.<sup>2</sup> Despite this state of affairs, few cases directly related to climate change have been litigated in African tribunals.<sup>3</sup> Scholars and activists have attributed this to a need for more technical and financial growth and a failure to treat climate change as an immediate challenge.<sup>4</sup>

Children's engagement as litigants or as essential stakeholders in global issues is equally limited, as they are considered too immature to make meaningful contributions to the decision-making process.<sup>5</sup> This is so despite the existence of policy and legal frameworks that allow children to participate in international, regional, and domestic protection frameworks.<sup>6</sup>

From the dearth of climate change-related cases, more pronounced elsewhere but limited in Africa, this paper explores the limits and possibilities of child participation in such litigation.<sup>7</sup> It argues that while international and domestic laws in African countries give children the right to participate, their provisions are merely tokenistic and do not facilitate meaningful child participation in an array of matters that affect them – including climate change litigation.

To situate the discussion, the current status of climate change has been provided, which is followed by an exploration of the impact of climate change, particularly on children. This discussion will be followed by a brief exploration of the obligations that States have in order to address climate change. To ensure that these obligations are met, citizens have resorted to engaging courts through climate change litigation, which has also been discussed. The subsequent section details how the principle of child participation is presented in

1 L Kotzé & A du Plessis 'Putting Africa on the stand' (2020) 50 *Environmental Law* at 615.

2 M Berhanu & W Alemayehu 'Review on climate change impacts and its adaptation strategies on food security in Sub-Saharan Africa' (2019) 19 *Agricultural Socio-Economics Journal* at 146.

3 S Adelman 'Climate change litigation in the African system' in I Alogna, C Bakker & J Gauci (eds) *Climate Change Litigation: Global Perspective* (2021) at 2.

4 J Setzer & L Benjamin 'Climate litigation in the Global South: Constraints and innovations' (2020) 9 *Transnational Environmental Law* at 82.

5 J Josefsson & J Wall 'Empowered inclusion: Theorizing global justice for children and youth' (2020) 17 *Globalizations* at 1049.

6 J Aldridge 'Introduction to the issue: Promoting children's participation in research, policy and practice' (2017) 5 *Social Inclusion* at 89.

7 Sabin Center for Climate Change Law 'Climate change litigation databases' <https://climatecasechart.com> (accessed 9 March 2024).

the United Nations Convention on the Rights of the Child ('UNCRC') and how it manifests within some African countries. Thereafter, it provides an overview of how participation is viewed from a theoretical perspective and its manifestation. The final section focuses on the opportunities and limitations of child participation in climate change litigation.

## 2 Current climate change status

Despite the presence of legal frameworks on climate change, actions taken by State parties in ratifying these frameworks, and the commitment of States to use the maximum available resources to curb emissions in line with the Paris Agreement, climate change seems to be getting worse.<sup>8</sup> The 2021 Nationally Determined Contributions ('NDC') synthesis report indicates that the current greenhouse gas ('GHG') emissions would correspond to a temperature rise of about 2,7°C by the end of the century.<sup>9</sup> The report contends that unless there are immediate, rapid, and large-scale reductions in GHG emissions, limiting global warming to below 1,5°C will no longer be possible.<sup>10</sup> These findings have further been echoed by the High-Level Climate Champions,<sup>11</sup> who opined that actions by individual actors will not lead to the reduction of GHG emissions, and will not meaningfully keep the 1,5°C temperature limits for a resilient future.<sup>12</sup>

The Intergovernmental Panel on Climate Change ('IPCC') has reported that human-induced climate change is already disrupting the natural world and the lives of billions across the planet.<sup>13</sup> For instance, at least 2,8 million people have been affected, at least 603 lives lost, and more than 2,500 injured by the floods in 2022 in Nigeria alone.<sup>14</sup> Similarly, devastating events were caused by tropical storms Gombe and Ana in Malawi, Mozambique, and Madagascar in the same

8 Article 9 of the Paris Agreement provides for financing adaptation and mitigation. Whether this is working effectively or not is outside the scope of the current discussion.

9 United Nations Climate Change 'Marrakech Partnership 2021' <https://unfccc.int/climate-action/marrakech-partnership/reporting-and-tracking> (accessed 9 March 2023).

10 As above.

11 United Nations Climate Change, 'Meet the champions, climate action', <https://unfccc.int/climate-action/marrakech-partnership/actors/meet-the-champions> (accessed 7 March 2023).

12 United Nations Climate Change 'Marrakech', <https://unfccc.int/climate-action/marrakech-partnership-for-global-climate-action> (accessed 08 March 2023).

13 UNFCCC 'Yearbook of global climate action 2022 Marrakech Partnership for global climate action' [https://unfccc.int/sites/default/files/resource/Yearbook\\_GCA\\_2022.pdf](https://unfccc.int/sites/default/files/resource/Yearbook_GCA_2022.pdf) (accessed 17 March 2023).

14 International Federation of Red Cross and Red Crescent Societies (IFRC) 'Emergency Appeal, Nigeria, Africa Floods' <https://www.ifrc.org/emergency/nigeria-floods> (accessed 17 March 2023).



year.<sup>15</sup> The catastrophic effects of the storm rendered families destitute and were reported to have claimed the lives of 46 people; 18 went missing, and 206 were injured in Malawi.<sup>16</sup> Furthermore, Cyclone Freddy reportedly killed over 300 people in Malawi, with thousands displaced.<sup>17</sup>

Globally, the IPCC reports that some of the impacts related to climate change include extreme hot weather on land and oceans, heavy rainfall, droughts and fires.<sup>18</sup> Additionally, the IPCC reports that rising sea levels and widespread deterioration of ecosystems are attributed to human-induced climate change. Subsequently, these have affected food production and access to food compounded by decreased diet diversity, which has increased malnutrition, especially for indigenous peoples, small-scale food producers and low-income households with children, elderly people and pregnant women particularly impacted.<sup>19</sup>

Despite this, it has been contended that the financing mechanism for climate change adaptation and mitigation has various challenges. These include an unwillingness to commit to financing developing countries, a lack of transparency – particularly for domestic and private sector finance – and the fact that the pledges made towards this financing are hardly met.<sup>20</sup> It is further reported that although climate finance has been on an upward trajectory from \$52.4 billion in 2013 to \$83.3 billion in 2020, reaching the promised \$100 billion remained doubtful, prompting a further extension to 2025, for which a new goal will be set.<sup>21</sup> Therefore, more robust and ambitious steps towards climate financing must be set and acted upon if meaningful climate change mitigation and adaptation is to be achieved.

Nonetheless, there is hope that there will be increased recognition of the catastrophes that climate change has on humankind as different stakeholders act to find tangible solutions. Among other

15 Department of Disaster Management Affairs (DODMA) 'Malawi: Tropical Storm Ana, Situation Report-2' <https://reliefweb.int/report/malawi/malawi-tropical-storm-ana-department-disaster-management-affairs-situation-report-2-15> (accessed 15 January 2023).

16 As above.

17 Al Jazeera Staff 'Malawi's president appeals for immediate aid after Cyclone Freddy' 16 March 2023 <https://www.aljazeera.com/news/2023/3/16/malawis-chakwera-appeals-for-immediate-aid-after-cyclone-freddy> (accessed 17 March 2023).

18 Intergovernmental Panel on Climate Change (IPCC), 'Climate change 2022: Impacts, adaptation and vulnerability, summary for policymakers' [https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC\\_AR6\\_WGII\\_FinalDraft\\_FullReport.pdf](https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FinalDraft_FullReport.pdf) (accessed 7 March 2023).

19 IPCC (n 18) 9.

20 Organisation for Economic Co-operation and Development (OECD) 'Aggregate trends of climate finance provided and mobilised by developed countries in 2013-2020' <https://www.oecd.org/climate-change/finance-usd-100-billion-goal> (accessed 17 March 2023).

21 As above

efforts, activists have been holding protests and demonstrations, campaigning against the use of fossil fuels, changing their diets, and even seeking remedies through legislation and litigation on climate change.<sup>22</sup> As Luhandjula argues, States can no longer overlook their obligations to address climate change to safeguard human rights effectively.<sup>23</sup> She further claims that States will have to be pushed through climate litigation to enhance and adopt laws to increase climate action on mitigation and adaptation through a broad spectrum of stakeholders.<sup>24</sup> This is exactly what has been done by different players, as discussed in a later section. But before that, the following section discusses the impact that climate change has, with a special focus on children.

### 3 The impact of climate change on children

Despite efforts to ameliorate the effects of climate change, the IPCC reports that human-induced climate change is causing dangerous and widespread destruction in the natural world and negatively affecting the lives of billions of people worldwide.<sup>25</sup> This report is particularly pertinent, as floods, droughts, and unpredictable weather patterns affecting people across the globe with increased frequency and intensity are indisputably caused by climate change.<sup>26</sup>

Besides, it has been contended that in as much as climate change has devastating effects on everyone in the world, it disproportionately affects the welfare and development of children.<sup>27</sup> This assertion has also been echoed in an analytical study on the relationship between climate change and the effective enjoyment of children's rights by the United Nations ('UN'). This UN report contends that altering the social and physical settings can have far-reaching and disproportionate effects on children and the enjoyment of a broad array of their rights, including the right to life, survival and development, the highest attainable standards of health, adequate standard of living, education, freedom from any form of violence or exploitation, recreation and play, among others.<sup>28</sup>

22 International Bar Association (IBA) 'Model Statute' (2020) <https://www.ibanet.org/Climate-Change-Model-Statute> (accessed 2 February 2023).

23 Y Luhandjula 'Assessing the prospects for climate action in the form of climate litigation as a tool to safeguard human rights' unpublished LLM Mini Dissertation, University of Pretoria, 2020.

24 As above.

25 IPCC (n 18).

26 V Satgar 'Worsening climate crises and the challenge of red-green alliances for labour: introducing the climate justice charter alternative in South Africa' (2009) *ICDD Working Papers*, University of Kassel, Fachbereich Gesellschaftswissenschaften (Social Sciences) at 8.

27 A Sanson & S Burke 'Climate change and children: An issue of intergenerational justice' in DC Marion (ed) *Children and Peace* (2020) at 368.

28 Report of the Office of the United Nations High Commissioner for Human Rights (4 May 2017) UN Doc A/HRC/35/13 (2017).

It has also been reported that the effects of climate change are associated with socioeconomic disruptions, such as increased poverty,<sup>29</sup> amplified displacement and migration.<sup>30</sup> Thus, when disasters associated with climate change impact communities, children are more likely to experience long-lasting health, educational, psychological, and developmental harm than adults.<sup>31</sup> In the same vein, Nicholas and Anthony have asserted that when extreme weather conditions associated with climate change disrupt social amenities, children are disproportionately affected and are often taken advantage of either by being given work beyond their capacity or through sexual exploitation and a plethora of exploitative forms of labour.<sup>32</sup>

Furthermore, climate change contributes to the depletion of potable water sources, resulting in women travelling greater distances in search of water that is fit for consumption.<sup>33</sup> In the African setting, where such an issue is exacerbated by the existing water challenges, this causes a transfer of the mothers' productive role to children, who must now assume or actively participate in taking care of siblings and doing other household chores.<sup>34</sup> Thus, traditional roles that are mostly done by women either increase in intensity and take a longer time to finish or are shifted to children as a coping mechanism. Even though it is tradition for children to help with light work within a majority of African households, their compromised situation pushes the nebulous line between light work and child labour so thin, so much so that the work that they are involved in can potentially be termed as child labour. This is because the work is either light but done over a long time or done in conditions that affect the well-being of the children.

Therefore, it is undoubted that even though climate change affects everyone on Earth, children are more adversely affected by the global issue than adults.<sup>35</sup> The dire socioeconomic conditions children face are compounded by the fact that they are physiologically more susceptible to the harmful effects of climate change than adults, as their developing physical and biological makeup is not well equipped to cope with the changing

29 J Magrath & E Sukali 'The winds of change: Climate change, poverty and the environment in Malawi (2009) 9 *Oxfam Policy and Practice: Agriculture, Food and Land* at 43.

30 R Black et al 'The effect of environmental change on human migration' (2011) 21 *Global environmental change*.

31 Sanson & Burke (n 27) 368.

32 R Nicholas & D Anthony 'Unless we act now: The impact of climate change on children' *United Nations International Children's Fund* (UNICEF, 2015).

33 R Nicholas & D Anthony (n 32) 54.

34 SK Yadav & G Sengupta, 'Environmental and occupational health problems of child labour: Some issues and challenges for future' (2009) 28 *Journal of Human Ecology* at 144.

35 UN Doc A/HRC/35/13 (n 28) 3.

environment.<sup>36</sup> Additionally, children's diets differ from those of adults, and their explorative behaviour makes them even more vulnerable to harm and infections.<sup>37</sup> Furthermore, their reliance on adults compromises their ability to survive during disasters.

Premised on the discussion and findings above, it is likely undisputable that climate change affects children's socioeconomic conditions and development more disproportionately than it affects adults. This is amidst reports that the current climate situation is a dire warning about the consequences of inaction and calls for cooperation in risk reduction, equity, and justice in decision-making and investment.<sup>38</sup> To tackle these pressing problems, States use international legal frameworks on climate change to protect people from its effects. The following section will discuss these frameworks while briefly highlighting how they include the protection of children.

## 4 States' obligations in climate change

The 1992 United Nations Framework Convention on Climate Change ('UNFCCC') is the first key climate change document, and it acknowledges that climate change has adverse effects on natural ecosystems and humankind.<sup>39</sup> Global engagement through the UNFCCC is one method of addressing the effects of climate change.<sup>40</sup> This Convention has informed the development of key legal instruments on climate change by State parties.<sup>41</sup>

Among other things, UNFCCC emphasises the principle of intergenerational equity in Article 3.<sup>42</sup> Here, State parties are called upon to protect the climate system for the benefit of present and future generations of humankind, based on the principles of equity, their common but differentiated responsibilities, and respective capabilities.<sup>43</sup> It is most likely that the intergenerational equity principle is rooted in the reality that the children of the present generation will inherit an environment strikingly different from the previous generations, where an estimated 125 million children will face the socioeconomic challenges discussed above by 2030.<sup>44</sup> This is

36 SK Yadav & G Sengupta (n 34) 146.

37 P Sheffield & P Landrigan 'Global climate change and children's health: Threats and strategies for prevention' (2011) 119 *Environmental Health Perspectives* at 293.

38 As above.

39 United Nations Framework Convention on Climate Change ('UNFCCC').

40 Satgar (n 26) 6.

41 A Solntsev 'Climate Change: international legal dimension' (2018) 1 *Moscow Journal of International Law* at 62.

42 UNFCCC (n 39) art 3.

43 UNFCCC (n 39) art 3(1).

44 R Fambasayi & M Addaney 'Cascading impacts of climate change and the rights of children in Africa: A reflection on the principle of intergenerational equity' (2021) *African Human Rights Law Journal* at 31.

even more reason to act to ensure that the present children are protected and the future children are assured protection from the harms imposed by climate change by living up to the standards of this principle. By acting so, the States will ensure that the unfortunate situation of children disproportionately affected by climate change is avoided. In doing so, the States will realise the aspiration of Article 3 and live up to its moral principle that no generation has priority over another.<sup>45</sup>

The second key document is the Kyoto Protocol. It was adopted by parties to the UNFCCC in 1997 to operationalise UNFCCC, as the Convention only asked countries to adopt policies and measures on mitigation and periodic reporting requirements.<sup>46</sup> The Kyoto Protocol went a step further by instructing industrialised countries to reduce GHG emissions through the creation of binding targets.<sup>47</sup> The 1990 targets set out in Kyoto Protocol aimed to reduce GHG emission levels by at least 5% from 2008 to 2012.<sup>48</sup> In 2012, the parties to the Kyoto Protocol adopted an amendment to the Protocol, which resulted in a second commitment to reduce GHG emissions from 2013 to 2020.<sup>49</sup> The amendments included ambitious plans for committing parties to reduce GHG emissions by 18% below the 1990 levels between 2013 and 2020.<sup>50</sup>

Although the Protocol does not directly mention the protection of children and their rights, it is meant to operationalise UNFCCC's aspirations. Thus, an expansive reading of it would likely entail that the principle of intergenerational equity provided for in UNFCCC will be achieved through the different mechanisms set in this Protocol. For instance, reducing GHGs to curb climate change, as is provided for in the Protocol, is more than just benefiting future generations; it's about securing a sustainable world for everyone, the current world population and the children to come.<sup>51</sup>

A third key document is the Paris Agreement, which was adopted in 2015 to replace the Kyoto Protocol.<sup>52</sup> Bodansky argues that replacing the Kyoto Protocol was necessary to find a middle ground for

45 D Shelton 'Intergenerational equity' in R Wolfrum & C Kojima (ed) *Solidarity: A structural principle of international law* (2010) at 125.

46 United Nations Climate Change 'What is the Kyoto Protocol?' [https://unfccc.int/kyoto\\_protocol](https://unfccc.int/kyoto_protocol) (accessed 9 March 2024).

47 A Nukusheva et al 'Global warming problem faced by the international community: International legal aspect' (2021) 21 *International Environmental Agreements: Politics, Law and Economics* 223.

48 Kyoto Protocol art 3.

49 United Nations Climate Change (n 46).

50 Doha Amendment to the Kyoto Protocol art 1(c).

51 R Patil 'Kyoto Protocol: Control of CO<sub>2</sub> emissions' (2020) 1 *Jus Corpus Law Journal* at 105.

52 United Nations Climate Change 'The Paris Agreement' <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> (accessed 2 June 2023).

addressing its prescriptive nature by allowing non-binding nationally determined contributions ('NDC') and establishing common transparent frameworks for financing, which are arrangements provided for through the Paris Agreement but were not available or unclear in the previous document.<sup>53</sup>

The Paris Agreement established a global objective to keep the rise in global temperatures well below the pre-industrial 2°C threshold and to strive to limit the temperature increase to 1,5°C compared to pre-industrial levels.<sup>54</sup> It further enhances the efforts to strengthen the global response to the threat of climate change in the context of sustainable development and efforts to eradicate poverty.<sup>55</sup> The Paris Agreement also calls upon State parties to undertake domestic mitigation measures to set up continuous NDCs to reduce GHG emissions.<sup>56</sup>

In addition to the above, the Paris Agreement provides that developing countries must continue enhancing their mitigation efforts and are encouraged to move towards economy-wide emission reduction or limitation targets.<sup>57</sup> As per the principle of common but differentiated responsibility, the Paris Agreement also highlights that developing countries will receive financial support, technology transfer, and capacity building to help them implement programmes that contribute to the Convention's aspirations.<sup>58</sup>

Unlike its predecessor, the Paris Agreement is linked, through its preamble, to human rights principles, which can serve as a basis for climate change litigation and children's participation.<sup>59</sup> Furthermore, it is contended that the reference to human rights in the Paris Agreement's preamble provides a basis for understanding and applying its provisions from a human rights perspective.<sup>60</sup> This potential to litigate climate matters using a human rights-based approach is guaranteed through the human rights provisions of different countries' domestic legislation and a provision in African Charter on Human and People's Rights ('ACHPR') that recognises the right to a satisfactory environment.<sup>61</sup>

In tandem with the observation above, in their communication to the UNCRC through *Sacchi v Argentina, Brazil, France, Germany and*

53 D Bodansky 'Paris Agreement' (2021) *United Nations Audiovisual Library of International Law* [https://legal.un.org/avl/pdf/ha/pa/pa\\_e.pdf](https://legal.un.org/avl/pdf/ha/pa/pa_e.pdf) (accessed 9 March 2024).

54 United Nations Paris Agreement art 1(a).

55 United Nations Paris Agreement (n 54) art 2(1).

56 United Nations Paris Agreement (n 54) art 4(3).

57 United Nations Paris Agreement (n 54) art 4(4).

58 United Nations Paris Agreement (n 54) art 4(5).

59 UNFCCC (n 39) Preamble.

60 AO Jegede 'Climate change in the work of the African Commission on Human and Peoples' Rights,' (2017) 31 *Speculum Juris* at 138.

61 African Charter on Human and People's Rights ('ACHPR') art 42.

Turkey,<sup>62</sup> the children claim that the State party has violated their rights by failing to prevent and mitigate the consequences of climate change. These rights include the right to life, enjoyment of the highest attainable standard of health, the right of the child to enjoy his or her own culture, and the best interests of the child.<sup>63</sup> In its observation, the Committee referred to the preambular section of the Paris Agreement, which provides for human rights consideration, noting that the State party had the capacity to live up to the Paris Agreement's expectations, and that the children have experienced significant harm.<sup>64</sup>

UNFCCC and its associated Protocols identify climate change mitigation and adaptation as options for addressing climate change.<sup>65</sup> Mitigation comprises all human activities to reduce emissions or enhance the sinks of GHGs such as carbon dioxide, methane, and nitrous oxide.<sup>66</sup> Adaptation refers to any adjustment that takes place in natural or human systems aimed at moderating harm or using beneficial opportunities in response to actual or expected impacts of climate change.<sup>67</sup> Subsequently, through articles 4 and 11, the UNFCCC provides for the transfer of technology and financial support to developing countries to address climate change.<sup>68</sup> These aspirations are put into practice through the Kyoto Protocol and the Paris Agreement.

Therefore, one can confidently assent with a certain level of confidence that the UNFCCC and its associated Protocols have provisions for addressing climate change with a consideration of children. Thus, in all the efforts that State parties take to address the impacts of climate change, whether it be mitigation or adaptation, specific attention has to be made to ensuring that there are special mechanisms targeted at children. This will not only protect the children's array of rights but will also guarantee that the principle of intergenerational equity, as provided for in these instruments, is fulfilled. Such attention has to be paid as a matter of urgency in light of the toll that climate change has on the world, and direly so on children. Where this is not fully met, or when States are complacent in meeting their obligations, citizens are prompted to resort to courts through climate change litigation, as discussed below.

62 CRC/C/88/D/104/2019 ('*Sachhi Case*') para 1.1.

63 *Sachhi Case* (n 62) paras 3.3-3.6.

64 *Sachhi Case* (n 62) para 10.11.

65 UNFCCC (n 39) art 4(8); Kyoto Protocol (n 46), arts 2(3) & 3(14); United Nations Paris Agreement (n 54) art 9 (4) & 11 (1).

66 KJT Richard et al 'Integrating mitigation and adaptation into climate and development policy: three research questions' (2005) 8(6) *Environmental Science & Policy* at 580.

67 As above.

68 UNFCCC (n 39) Art 4 & 11.

## 5 Climate change litigation trends

Climate change litigation refers to the legal actions usually taken by the applicants, in which they seek the Court's intervention to enforce or clarify the integration of existing laws to climate change issues.<sup>69</sup> Affirmed most recently in the Paris Agreement, it is regarded as an invaluable strategy when governments have failed to live up to their promises to prevent dangerous interference with the climate system.<sup>70</sup> Setzer & Vanhala have also supported this assertion, arguing that the growing interest in climate change litigation is also a consequence of frustration with the inadequacy of government action.<sup>71</sup>

According to the Global Trends on Climate Change Litigation Report of 2021, climate change litigation continues to grow in importance as a means of either advancing or delaying effective action on climate change.<sup>72</sup> Additionally, litigation influences policy outcomes and the behaviour of society and corporate entities.<sup>73</sup> While recognising that the need for courts' intervention varies from case to case, particularly for Global North and Global South countries, climate change litigation is being sought as a mechanism to pressure governments and industries into responding to climate change problems.<sup>74</sup>

Furthermore, climate change activists are using litigation to claim that a failure to act on climate change or protect related natural resources results in a failure to protect human rights.<sup>75</sup> Climate litigation cases have mainly been filed using the provisions in the UNFCCC and associated agreements, as well as regional human rights instruments such as the ACHPR.<sup>76</sup> For instance, Article 24 of ACHPR recognises a collective right to a satisfactory environment for development. While the definition of this right in the ACHPR is unclear, it is opined that a general satisfactory environment encompasses the whole ecosystem and the enjoyment of all the rights

69 T Okonkwo 'Protecting the environment and people from climate change through climate change litigation' (2017) 10 *Journal of Politics and Law* at 67.

70 T Khan, 'How climate change battles are increasingly being fought, and won, in court' 8 March 2017 <https://www.theguardian.com/environment/2017/mar/08/how-climate-change-battles-are-increasingly-being-fought-and-won-in-court> (accessed 8 March 2023).

71 J Setzer & L Vanhala 'Climate change litigation: A review of research on courts and litigants in climate governance' (2019) 10 *Wiley Interdisciplinary Reviews: Climate Change* at 7.

72 J Setzer & C Higham 'Global trends in climate change litigation: 2021 snapshot' (2021) *London School of Economics and Political Science* at 5.

73 O Rumble & A Gilder 'Climate change litigation on the African continent' [https://www.kas.de/documents/282730/0/Climate\\_Litigation\\_Africa.pdf/1450e939-d100-a70e-8a9d-315161f96024](https://www.kas.de/documents/282730/0/Climate_Litigation_Africa.pdf/1450e939-d100-a70e-8a9d-315161f96024) (accessed 14 March 2023).

74 Okonkwo (n 69) 74.

75 J Setzer & C Higham (n 72) 5.

76 O Rumble & A Gilder (n 73) 5.



provided for in the ACHPR, including non-discrimination, pursuing an education, and all situations where people are free to exercise their right to economic, social, and cultural progress.<sup>77</sup> This provides an argumentative basis for more ethical economic growth that minimises damage to the environment for current and future generations.<sup>78</sup> It would be more plausible, therefore, that when this is not done through self-realisation and deliberate effort, some form of pressure from the courts would be sought to ensure that the rights as provided for in different legislation are met and that obligations are fulfilled.

This view is further reflected by the African Commission in its deliberation of cases before it.<sup>79</sup> The right to a satisfactory environment for development is one of the violated rights claimed in *Social and Economic Rights Action Centre (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*.<sup>80</sup> In the case, the Commission concluded that the Nigerian government violated the right to a clean environment as provided for in the ACHPR, which affected the Ogoni people's right to life (article 4) and right to health (article 16).

Despite varying reasons for seeking redress, it has been argued that the common idea of these lawsuits is to bring policy changes that conform to international and national actions for climate change mitigation.<sup>81</sup> However, it is reported that out of the 1,841 ongoing or concluded cases of climate change litigation worldwide, over 75% were filed in the United States alone, while the remaining few were in other regions by May 2021.<sup>82</sup> Surprisingly, the numbers are low in Africa and other developing countries, where climate change impacts will reportedly have more devastating effects.<sup>83</sup> In other words, despite being the most vulnerable to the impacts of climate change, Africa has the least climate litigation cases. This is true for domestic courts and cases within the African region (regional courts and tribunals).

The low number of climate change litigation in African countries has mainly been attributed to weak legislative and regulatory frameworks, poor governance and enforcement mechanisms, limited access to finances, and the absence of robust human rights protections.<sup>84</sup> Specifically, the International Bar Association ('IBA')

77 MO Ikeke 'The African Charter's right to a general satisfactory environment and socio-economic development: An eco-philosophical discourse' (2020) 3 (2) *Journal of African Studies and Sustainable Development* at 56.

78 Ikeke (n 77) 60.

79 ACHPR (n 61) art 24.

80 African Commission on Human and Peoples' Rights *The Social and Economic Rights Action Center for Economic and Social Rights v Nigeria*, Communication 155/96.

81 Okonkwo (n 69) 2.

82 Setzer & Benjamin (n 4) 5.

83 Sabin Center for Climate Change Law (n 7).

84 Adelman (n 3) 5.

asserts that African climate change litigation could only be described as nascent.<sup>85</sup> It is contended that increased financial resources and specific expertise, standing, causation, and enforceability are required to increase climate change-centred cases in Africa.<sup>86</sup>

Despite these challenges, activists, organisations, and groupings have instituted actions related to climate change against their governments and big corporations. For instance, in *Earthlife Africa, Johannesburg v Minister of Environmental Affairs*,<sup>87</sup> activists stopped a coal-fired power generation project in South Africa. In the case, the Court recognised that considering climate change impacts are relevant, and their absence in deciding authorisation for the construction of a coal-fired power station and the consequential appeal made the authorisation unlawful.<sup>88</sup> The Court remitted the authorisation for reconsideration with climate change and paleontological impact assessment reports, including comments from interested and affected parties, and set aside the Minister's appeal decision.<sup>89</sup>

In *Tsama William v Uganda's Attorney General*,<sup>90</sup> the applicants filed a suit against the government and other related authorities, alleging that they failed to put adequate machinery in place to prevent landslides in the Bududa district and that the respondents' acts and/or omissions violated the applicant's fundamental rights.<sup>91</sup> In the case, the applicants asked the Court to determine whether the government of Uganda failed to fulfil its positive obligations under climate change and disaster management laws to manage the risk of landslides in the Bududa district.<sup>92</sup>

Another climate litigation-related action by citizens is seen in the *Save Lamu* case in Kenya. In this case, the claimants alleged that the respondents did not involve the communities in carrying out an Environmental Impact Assessment ('EIA'), even though it was licensed to construct the first coal-fired power plant in Kenya. Here, the company was ordered to conduct a new EIA that addressed the

85 IBA (n 22).

86 As above.

87 2017 3 All SA 187 (WCC).

88 *Earthlife* (n 87) 126.

89 InforMEA '*EarthLife Africa Johannesburg v The Minister of Environmental Affairs and Others*' <https://www.informea.org/en/court-decision/earthlife-africa-johannesburg-vs-minister-environmental-affairs-and-others> (accessed 20 March 2023).

90 2020 24 UHC.

91 Climate Change laws of the World '*Tsama William and Others v Uganda's Attorney General and Others*' [https://climate-laws.org/geographies/uganda/litigation\\_cases/tsama-william-and-others-v-uganda-s-attorney-general-and-others](https://climate-laws.org/geographies/uganda/litigation_cases/tsama-william-and-others-v-uganda-s-attorney-general-and-others) (accessed 20 March 2023).

92 *Tsama William* (n 90) 4.

adverse effects on human health and biodiversity caused by climate change.<sup>93</sup>

In Malawi, the *Salima-Lilongwe Water Pipeline*<sup>94</sup> case demonstrates the importance of civil society and other interested stakeholders in addressing environmental concerns and ensuring the accountability of relevant authorities.<sup>95</sup> In this case, it is alleged that a proper EIA was not conducted and that the project subsequently failed to address the community's environmental needs. The project is expected to pump water over a 130-kilometre distance between Lake Malawi and Lilongwe.

Typically, an EIA is conducted on major projects such as hydro dams, mining and road construction, which are likely to harm the environment but do not incorporate climate change impacts.<sup>96</sup> However, Amankwah proposes using EIAs to integrate climate change resilience through regulating every major project that has the potential to release carbon dioxide and other GHGs, eventually contributing to the reduction of GHG emissions.<sup>97</sup> Thus, much as no argument related to climate change was explicitly made in the *Salima-Lilongwe Water Pipeline* case, this is a major construction that will most likely involve machinery that will produce a lot of carbon dioxide and warrant an EIA that considers potential climate change ramifications. This resonates with the opinion that climate change matters are ingrained in other matters, and litigation is more likely to address localised environmental issues that may have climate-related elements, rather than climate change *per se*.<sup>98</sup>

A Ugandan case involves Client Earth, Survie, and four Ugandan civil society organisations that demanded companies to act on environmental damages and climate change.<sup>99</sup> The plaintiffs opposed the construction of the East African Crude Oil Pipeline ('EACOP'). The civil society organisations claimed that the company was not vigilant in protecting communities and addressing environmental risks associated with the construction.<sup>100</sup> Despite the commitments made by TotalEnergies, one of the companies sued, investigations

93 *Save Lamu et al v National Environmental Management Authority and Amu Power Co. Ltd* ('*Save Lamu*') 2016 196 KNET 155.

94 2017 MWHC 135.

95 G Makanje 'The Environmental Management Act (2017) and natural resource regulation in Malawi: Opportunities for and limitations to effective enforcement' (2017) *Environment| Africa* at 404.

96 E Amankwah 'Environmental Impact Assessment (EIA); A useful tool to address climate change in Ghana' (2013) 1 (4) *International Journal of Environmental Protection and Policy* at 96.

97 As above.

98 Adelman (n 3) 5.

99 L Caramel, 'Total Energies back in court over its mega-project in Uganda' 8 December 2022 [lemonde.fr/en/environment/article/2022/12/08/totalenergies-back-in-court-over-its-mega-project-in-uganda\\_6006954\\_114.html#](https://lemonde.fr/en/environment/article/2022/12/08/totalenergies-back-in-court-over-its-mega-project-in-uganda_6006954_114.html#) (accessed 20 March 2023).

100 As above.

conducted by Friends of the Earth France and Survie, and information provided by numerous local partners, NGOs, and institutions concluded that the EACOP projects entail serious guaranteed and potential violations of human rights and fundamental freedoms, the health and safety of persons and the environment.<sup>101</sup>

It is reported that the oil exported by the EACOP is anticipated to produce roughly 34 million metric tons of additional carbon emissions per year, which is not aligned with the ambitions of reducing GHGs to curb climate change.<sup>102</sup> The case highlights the challenges in litigation when organisations are fighting multi-billion dollar projects run by governments and transnational cooperation partners. Moreover, the case was heard in France rather than Uganda or Tanzania, which reinforces the issue of limited financial capacity for African climate change litigation.

In the cases above, though at different stages, there are no specific instances where the involvement of children is prominent or explicit. The applicants are usually representatives of communities or organisations working on their own accord but not specifically for or on behalf of children, as was the case in *Mbabazi v The Attorney General and National Environmental Management Authority*<sup>103</sup> in Uganda, where relief was sought on behalf of four minors seeking government action in climate change mitigation.<sup>104</sup> The absence of children in climate litigation is unsurprising, as climate litigation is in its infancy in most African countries.<sup>105</sup> Despite the low levels of participation, international, regional, and domestic legal frameworks provide for children's participation in matters that affect them, including climate change.

## 6 Legal frameworks and children's participation

The UNCRC recognises that the child, because of their physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before and after birth.<sup>106</sup> Specifically, article 12 of UNCRC provides that children should be allowed to express their views on matters that impact them in judicial and administrative proceedings.<sup>107</sup> According to the UN Committee on the Rights of the Child ('Committee on CRC'), article 12 has been

101 Survie 'Serious Breaches of the Duty of Vigilance Law: The Case of Total in Uganda' [https://survie.org/IMG/pdf/report-totaluganda-foefrance-survie-2019\\_.pdf](https://survie.org/IMG/pdf/report-totaluganda-foefrance-survie-2019_.pdf) (accessed 20 March 2023).

102 I Mugabi 'The Potential Impacts of the East African Crude Oil Pipeline ('EACOP') on Human Rights in Uganda' 2023 *Social Sciences Research Network* at 3.

103 2012 KHC 283.

104 As above.

105 Setzer & Higham (n 72) 5.

106 United Nations Convention on the Rights of the Child ('UNCRC') Preamble para 9.

107 UNCRC (n 106) art 12.

identified as one of the general principles of UNCRC.<sup>108</sup> Thus, as climate change disproportionately affects the welfare and development of children, they should be allowed to express their views and opinions through any appropriate means, including climate change litigation.

Equally important is Article 2 of UNCRC, which provides that States are obliged to ensure that children enjoy their rights without discrimination of any kind.<sup>109</sup> Furthermore, Article 4 of UNCRC also calls upon State parties to undertake all appropriate legislative, administrative, and other measures to implement the rights recognised in the UNCRC, including the right to participation.<sup>110</sup> It can, therefore, be argued that apart from providing children the right to participate in matters that affect them, the UNCRC also protects children from any acts that potentially stop them from taking part in matters like climate change litigation.

Additionally, the UNCRC explicitly links the right to life to the obligation of States to ensure the survival and development of the child to the maximum extent possible.<sup>111</sup> According to the Office of the United Nations High Commissioner for Human Rights ('OHCHR'), climate change and human rights are linked, and the adverse effects of climate change threaten the right to life as it affects the right to food and clean water.<sup>112</sup> Similarly, the IPCC contends that the devastating effects of climate change have had a disproportionate impact on children, as they are vulnerable members of society whose status and rights are affected when the adverse effects of climate change are dire.<sup>113</sup> Furthermore, mental health issues such as stress and anxiety among children are also reported to increase due to climate change.<sup>114</sup>

Article 4 of African Charter on the Rights and Welfare of the Child ('ACRWC') also provides for children's participation in all matters that concern them at the regional level.<sup>115</sup> ACRWC provides that children shall voice their opinions and be considered during legal and administrative proceedings. This is particularly important in an African setting where children are only sometimes accorded an opportunity to participate in the decision-making process.<sup>116</sup> Furthermore, article 7 provides for the right to all children's

108 Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights (15 January 2009) UN Doc A/HRC/10/61 (2009)

109 UNCRC (n 106) art 2.

110 UNCRC (n 106) art 4.

111 UNCRC (n 106) art 6 (2).

112 UN Doc A/HRC/35/13 (n 28) 14.

113 IPCC (n 8) 15.

114 As above.

115 The African Charter on the Rights and Welfare of the Child ('ACRWC') art 4.

116 As above.

expression, and that the State must ensure children are accorded this right and that their views are given the necessary attention.<sup>117</sup>

Through African Children's Committee General Comment 5, it is recommended that the right to participation for children should be enshrined in all national legislation and that States should ensure that the participation is done through processes that are transparent and informative, voluntary, respectful, relevant, child-friendly, inclusive, supported by training for adults, safe and sensitive to risk, and accountable.<sup>118</sup>

Significantly, children's right to participate has been provided for in several African constitutions, including Malawi, South Africa and Kenya. According to the African Children's Committee, widespread practice has emerged at regional and national levels and has been conceptualised as participation.<sup>119</sup> For instance, participation is widely used to describe information sharing, dialogue, and processes where children can voice their views.<sup>120</sup> In this vein, child participation, conceived as freedom of expression, has been provided for through section 28 of the Constitution of the Republic of South Africa, section 35 of the Constitution of the Republic of Malawi, and section 33 of the Constitution of the Republic of Kenya.<sup>121</sup>

Relatedly, African States have established legal frameworks to remedy human rights violations effectively. Section 22(1) of the Constitution of the Republic of Kenya, 2010 provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or threatened.<sup>122</sup> It provides that children can also bring an action as individuals or as a group through representation.<sup>123</sup> Similar provisions are provided for in the Constitution of the Republic of Malawi under section 46,<sup>124</sup> as well as section 50 of the Constitution of the Republic of Uganda,<sup>125</sup> and section 38 of the Constitution of the Republic of South Africa.<sup>126</sup>

117 ACRWC (n 115) art 7.

118 African Children's Committee General Comment 5 at 14.

119 UN Doc A/HRC/35/13 (n 28).

120 UNCRC General Comment 12 2009 para 5.

121 These have been stated differently from the regional frameworks but they are in the spirit of participation. See Article 28 of the South African Constitution, Article 35 of the Constitution of the Republic of Malawi, and Article 33 of the Constitution of the Republic of Kenya.

122 Constitution of the Republic of Kenya, 2010 art 22 (1).

123 Constitution of the Republic of Kenya (n 122) art 22 (2).

124 Constitution of the Republic of Malawi, 1994 (rev 2017) art 46.

125 Constitution of the Republic of Uganda, 1995 art 50.

126 Constitution of the Republic of South Africa, 1996 sec 38.

Concerning climate change, participation entails establishing measures ensuring that this right is upheld, especially when the State is formulating climate change adaptation programmes at all levels.<sup>127</sup> In this regard, particular importance needs to be attached to the involvement of children in the implementation stages of adaptation programmes about climate change and rebuilding communities affected by its effects.<sup>128</sup> Such involvement will ensure that the intentions of participation, as provided for in these instruments, are materialised. Thus, through participation at this stage, children can give their opinions and views on protecting their safe spaces. Furthermore, if provided with relevant and inclusive information, they can hold the government accountable for failure to implement some climate change adaptation or mitigation programmes. Let alone, they can provide their views on how they would like to participate in climate change litigation at different stages.

Some organisations have invoked the above provisions for a legal remedy to climate change. For example, in the *ClientEarth* case,<sup>129</sup> people affected by landslides in the Bududa district of Uganda took the country's government to court for failing to protect local villagers from climate risks.<sup>130</sup> Similarly, in *Earthlife*, youth climate activists and coal-affected community activists called upon the South African government to abandon plans to build a new coal-fired power generation, as doing so would be a threat to their right to a healthy environment, the best interests of the child, and the rights to life.<sup>131</sup> Besides, another example of climate change litigation was taken by Malawian citizens, and pertains to the banning of thin plastic and several campaigns surrounding this action.<sup>132</sup>

Through the provisions above and specific domestic legislation, State parties to the UNCRC acknowledge and affirm their commitment to fulfilling the rights of children or their representatives and must be held accountable by them. A typical and more recent example would be the communication to the Committee on the Rights of the Child, which included allegations from children, including three from Nigeria, South Africa, and Tunisia, that Argentina, Brazil, France, Germany, and Turkey have violated children's rights by failing to

127 T Kaime 'Children's rights and the environment' in U Kilkelly & T Liefwaard (ed) *International children's rights law* (2018) at 13

128 As above

129 EACJ, Ref. 9/2012, 11.

130 Q Schiermeier 'Climate science is supporting lawsuits that could help save the world' 8 September 2021 <https://www.nature.com/articles/d41586-021-02424-7> (accessed 7 March 2023).

131 *Earthlife* case (n 87) para 1 (22).

132 C Pensulo 'Malawi wins battle against business to reinstate ban on plastic bags' 2 August 2019 <https://www.theguardian.com/global-development/2019/aug/02/malawi-reinstates-ban-thin-plastic-bags-campaigners-hail-fantastic-victory> (accessed 25 March 2023).

prevent and mitigate the consequences of climate change.<sup>133</sup> Other than this, instances of climate change litigation, which is gradually expanding in its regional reach through cases in the Global South gaining visibility,<sup>134</sup> those directly involving children seem to be limited. This limited children's participation reflects the limited climate change litigation in most African countries at national and regional levels.<sup>135</sup>

## 7 Participation: A theoretical explanation

The international, regional, and domestic legal frameworks discussed above provide children with the right to participate. This section discusses how participation has been theorised from other perspectives and argues that it manifests differently.<sup>136</sup> These manifestations, as discussed below, provide a basis for the claim that children's current involvement in climate change litigation might not be meaningful and is misaligned with the UNCRC, as it is mainly in the less impactful strands of participation and, therefore, tokenistic.

In her ladder of participation theory, White argues that as participation is a process of power; it should consider who is involved, what is on the agenda and how many people are allowed to participate in the process.<sup>137</sup> She identifies and distinguishes between four significant forms of participation, namely: nominal, instrumental, representative, and transformative.<sup>138</sup> Regarding the importance of these approaches, Nylund argues that knowledge of participation procedures will determine when and how children will participate.<sup>139</sup> This, however, does not mean that children need to know which of these forms of participation is being employed. Rather, practitioners and those advocating for children's rights can use them to ensure that children's participation is more meaningful and that all measures guaranteeing children's representation are met.<sup>140</sup>

133 *Sachhi Case* (n 62) para 1.1.

134 United Nations Environment Programme (2023). *Global Climate Litigation Report: 2023 Status Review*. (UNEP Nairobi, 2023) 12.

135 E Boshoff & SG Damtew 'The potential of litigating children's rights in the climate crisis before the African Committee of Experts on the Rights and Welfare of the Child' (2022) 22 *African Human Rights Law Journal* at 329.

136 S White 'Depoliticising development: the uses and abuses of participation' (1996) 6 *Development in practice* at 15.

137 As above.

138 White (n 136) 7.

139 A Nylund 'Children's right to participate in decision-making in Norway: Paternalism and autonomy' in T Haugli and others (eds) *Children's constitutional rights in the Nordic countries* (2019) 214.

140 UNICEF, 2007 *Implementation Handbook for the Convention on the Rights of the Child* at 172.



In nominal participation, White asserts that less powerful people become involved just for the sake of inclusion.<sup>141</sup> Regarding child participation, Nylund claims that children legitimise adults' decision-making process in this approach. Often, this type of participation concentrates on the number of people involved to give the impression that many people participated. It is considered tokenistic participation, with no meaningful contribution to change.<sup>142</sup> For instance, this type of participation might be common when institutions and informal organisations seek the endorsement of a candidate, an opinion, or a petition. Through such endorsement, people, including children, might state their opinion without really thinking about what they are appending their names to. This might still be considered as participation, even though it is the lowest level of participation.

Instrumental participation is a means to an end. Those in power use it to their advantage to achieve a particular outcome.<sup>143</sup> In this form of participation, people working with children gain information from them to enable adults to make informed decisions that are considered to be in the child's best interest.<sup>144</sup> However, Nigel refers to this type of participation as manipulation, decoration, and tokenism, as it does not involve the child as a subject of change.<sup>145</sup> In this approach, children are treated as beneficiaries or welfare cases. This participation is contrary to the idea of participation provided for in UNCRC, as it maintains the notion of a child as a charity beneficiary, rather than a subject of rights with the ability to enjoy the benefits of specific rights and freedoms.<sup>146</sup>

Representative participation is where people have a voice in executing a decision or a project; consequently, the decisions are potentially sustainable.<sup>147</sup> This form of participation allows children to be consulted in dialogue where their opinions are taken seriously.<sup>148</sup> In climate change litigation, this type of participation might possibly see children giving evidence on cases that involve them or even directly moving the courts for particular declarations and orders.

White asserts that transformative participation allows people to weigh out the available options and take collective action to fight

141 White (n 136) 8.

142 Nylund (n 139) 203.

143 White (n 136) 8.

144 T Nigel 'Towards a theory of children's participation' (2007) 15 *International Journal of Children's Rights* at 199.

145 Nigel (n 144) 203.

146 T Kaime 'The foundations of rights in the African Charter on the Rights and Welfare of the Child: A historical and philosophical account' (2009) *African Journal of Legal Studies* at 123.

147 White (n 136) 8.

148 Nylund (n 139) 203.

injustice. Furthermore, this form of participation empowers people, as it involves reflection regarding the root causes of a particular problem.<sup>149</sup> This is in tandem with J Josefsson & J Wall's argument on inclusive participation, where they opine that inclusive empowerment appears where participation is not only rhetorically based on a current issue but also an open platform for empowering marginalised people to change policy, legislation, and even culture.<sup>150</sup> Thus, this form of participation will most likely involve children seeking remedies in the courts, calling on the government to enact climate change-related legislation. They will seek climate change litigation for future generations and not solely for their immediate and short-lived benefit.

According to Save the Children, facilitating children's participation means involving them in identifying an issue, setting the agenda, defining priorities, assessing gaps in services and commitments, dialogues with duty bearers, and monitoring actions to address the problems identified.<sup>151</sup> While not all children can participate at all times, meaningful participation should ensure that the process is transparent and informative, voluntary, respectful, relevant, child-friendly, inclusive, supported by training, safe and sensitive to risk, and accountable.<sup>152</sup>

Therefore, in climate change litigation, child participation will surely entail involving children in identifying gaps and neglected actions and spotlighting areas where the government needs to fulfil its obligations to address climate change. These gaps might be those that are often ignored or considered irrelevant from adults' perspectives, especially in climate change adaptation programmes where recovery plans are being implemented within communities affected by climate change damages.<sup>153</sup> Furthermore, participation will imply providing children with child-friendly information on climate change to facilitate their participation in the whole litigation process. It is contended that where the litigation is presumed to be risky and uncondusive for child participation, necessary measures must be implemented to ensure that children are protected from any perceived harm through, for example, children's representation by adults.<sup>154</sup>

149 White (n 136) 8.

150 Josefsson & Wall (n 5) 1052.

151 F Sheahan et al 'How to do Child-Centred Social Accountability' (Save the Children, 2022) at 4.

152 Save the Children 'The basic nine requirements for meaningful and ethical Children's participation' <https://resourcecentre.savethechildren.net/pdf/basic-requirements-english-final.pdf> (accessed 23 March 2023).

153 Kaime (n 127) 15.

154 H Tolonen 'Children's right to participate and their developing role in Finnish proceedings' (2019) *Children's Constitutional Rights in the Nordic Countries* at 225.

However, it has been contended that understanding children's participation in rungs or categories, as discussed by White above, should not bar flexibility in the participation process, especially in an African environment where unregulated participation occurs.<sup>155</sup> It is further submitted that the model of child participation has evolved. Such an evolution has produced lessons that should encourage children's participation, allowing more meaningful consideration of their views and ideas compared to earlier years when participation meant doing things for them and around them.<sup>156</sup>

Consistently, it is submitted that formalising the participation process for children should not just create a conducive environment where the children's participation is controlled by the adults or institutions working with children.<sup>157</sup> If this is done, a strongly controlled environment for participation is created that is purposive and only suits the objectives of adults.<sup>158</sup> In other words, formalising participation in climate change litigation might probably entail a strict dictation of what children will say if given a chance to speak. This will be under the guarded conditions and terms of adults. If such is the case, this will not be empowering, as the children will only parrot what adults have instructed them to say, and it will fit into instrumental participation, which achieves adults' needs and not necessarily those of the children.<sup>159</sup>

Contrary to the understanding of child participation as proposed by the theories above and as set out in the legal frameworks, Imoh proposes that children's participation should allow them to act independently, or alongside adults, and be self-represented, thus transcending legal frameworks or theories of participation.<sup>160</sup> She further assents that by going beyond theories and provisions in the legal frameworks, a more transformative and meaningful change is assured.<sup>161</sup> Furthermore, meaningful participation should at least be broad enough to include children from all areas, have intergenerational relations, understand that participation might require children to be independent and sometimes work jointly with adults, be open to new methods of participation, and account for the demands on children and young people.<sup>162</sup>

155 L Ehlers & F Cheryl 'Child participation in Africa' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2016) at 115.

156 As above.

157 ATD Imoh 'Adults in Charge: The Limits of Formal Child Participatory Processes for Societal Transformation' in *The Politics of Children's Rights and Representation* (Cham: Springer International Publishing, 2023) at 60.

158 Imoh (n 157) 60.

159 White (n 136) 8.

160 Imoh (n 157) 76.

161 As above.

162 Nigel (n 144) 216.

Since children make up 50% of all people affected by disasters and are likely to experience the worst effects of climate change, their participation in climate change litigation cannot be overemphasised.<sup>163</sup> Therefore, children's participation in climate change litigation can be more meaningful if it is through representative and transformative participation models, which are classified as genuine forms of participation.<sup>164</sup>

## 8 Participation: Opportunities and limitations in practice

### 8.1 Opportunities

The IPCC summary report for policymakers of 2022 indicates that climate change has caused substantial damages and increasingly irreversible losses.<sup>165</sup> It further suggests that unless drastic and innovative approaches are taken, global warming levels will be higher than anticipated, and the effects will be devastating.<sup>166</sup> Unfortunately, these effects will mostly be felt by vulnerable members of society, like children, who are susceptible to harm arising from environmental pollution, which is undoubtedly causing irreversible damage to their vital organs.<sup>167</sup> Regrettably, the youth and children will inherit the society modelled by the adults of today, who exclude them from decisions on some of the critical challenges facing the globe, such as migration, child labour, and climate change.<sup>168</sup>

However, according to the United Nations Population Fund ('UNFPA'), the high numbers of youth in the world present an opportunity for their energies, ideas, and innovations to transform the future.<sup>169</sup> In this context – even using nominal participation in White's theory, where numbers matter – an opportunity arises for children to bring class actions against their States through climate change litigation. This can be seen as participation, although it will not be sustainable or empower children.

Another opportunity rests in the existing legal frameworks that recognise the child's rights at different levels. Article 12 of UNCRC

163 K Zhanda et al 'Children climate change activism and protests in Africa: Reflections and lessons from Greta Thunberg' (2021) 41 *Bulletin of Science, Technology & Society* at 93.

164 White (n 136) 8.

165 IPCC (n 18).

166 As above

167 UNCRC General Comment 26 (2023) at 24.

168 J Josefsson & J Wall (n 5) 1047.

169 United Nations (UN) 'Envoy of youth' (2015) <https://www.un.org/youthenvoy/2015/04/10-things-didnt-know-worlds-population/> (accessed 13 February 2023).

provides for the right of participation of the child in matters that affect them,<sup>170</sup> while Article 13(1) provides the child with the right to freedom of expression.<sup>171</sup> The same is provided for in article 4(2) of ACRWC, section 46 (2) of the Malawian Constitution, section 38 of the Constitution of the Republic of South African, and section 50 of the Constitution of the Republic of Uganda. Thus, through the use of these human rights provisions, children have a starting point to bring a class action against their States or companies where they have taken inadequate or no steps to protect them from the harms of climate change or have limited their participation in decisions and actions that affect them. This also recognises that, in most cases, their standing is limited by age, which has been liberalised by statutory rules, at least in the case of South Africa.<sup>172</sup> Moreover, despite age limitations, children's participation can be guaranteed either through adults or older children who can approach the courts acting in the interest of children.<sup>173</sup>

Furthermore, apart from the substantive provisions in these human rights instruments, the African Children's Committee and its responsibilities provide other opportunities for children to participate in climate change litigation through its mandate of promoting and protecting children's rights enshrined in ACRWC.<sup>174</sup> Among its other duties, the African Children's Committee is mandated to receive State reports and adopt Concluding Observations (article 43), monitor the implementation and ensure the protection of children's rights enshrined in the Charter (article 42), receive communication concerning matters covered in the Charter, and investigate children's rights violations within the State parties (article 44). These are potential avenues that can meaningfully allow children to participate in matters that affect them, including climate change litigation. For instance, in its Concluding Observation of Malawi's State report for 2018-2021, the African Children's Committee, in its general implementation measures, recommended that Malawi should strengthen structures for the participation of children in judicial and administrative procedures concerning them, especially at the community level.<sup>175</sup> Through this observation, one of the measures that the Malawian government could have taken could include measures that allow children to learn more about climate change and the work of the African Children's Committee through community-

170 UNCRC (n 106) art 12.

171 UNCRC (n 106) art 13 (1).

172 A Moyo 'Child participation under South African Law: Beyond the Convention on the Rights of the Child? (2015) 31 (1) *South African Journal on Human Rights* at 179.

173 As above

174 ACRWC (n 115) art 32.

175 African Union 'Concluding Observations and Recommendations for Malawi' <https://www.acerwc.africa/sites/default/files/2022-09/Malawi%20CO%20-2-17.pdf> (accessed 16 March 2023).

based structures. This access to knowledge and information about climate change, as well as the children's enhanced knowledge about the mandate of the African Children's Committee, could provide an opportunity for children to seek redress on matters that affect them, including human rights violations related to climate change, either by communicating with the African Children's Committee or local courts.<sup>176</sup>

Relatedly, the presence of regional justice institutions such as the East African Court of Justice, which has a human rights jurisdiction, accords children an opportunity to seek remedies over climate change matters where domestic redress has failed.<sup>177</sup> The regional court provides an avenue for child participation since it does not require the exhaustion of domestic remedy, as in *Venant Masenge v Attorney General of the Republic of Burundi*.<sup>178</sup> The regional court affords children an opportunity to seek representation through organisations in their respective countries when local remedies seem to be challenging.

Additionally, institutions such as African Committee of Experts on the Rights and Welfare of the Child ('ACERWC') at the regional level also provide an opportunity for children's participation. Drawing its mandate from articles 32-46, one of the functions of ACERWC is to monitor the implementation and ensure the protection of the rights enshrined in the African Charter, which includes the right of the child to be heard.<sup>179</sup> Apart from the substantive provisions, Boshoff & Damtew opine that ACERWC has the potential to facilitate successful climate change litigation based on its procedural safeguard measures and the potential remedies it provides for child rights violations.<sup>180</sup>

At the domestic level, constitutional bodies such as Human Rights Commissions guarantee a right to participate in protecting and promoting children's rights.<sup>181</sup> Using such a mandate and the constitutional powers of such institutions, children can hold their States accountable for matters involving their participation and violations of their rights.<sup>182</sup> If this fails or proves challenging at the domestic level, they could communicate with regional and international bodies such as ACERWC and the Committee on the Rights of the Child.<sup>183</sup>

176 UNICEF (n 140) 172.

177 Adelman (n 3) 7.

178 EACJ (n 129) 11.

179 ACRWC (n 115) arts 32-46.

180 Boshoff & Damtew (n 135) 331.

181 Constitution of Malawi (n 124) sec 130.

182 Constitution of Malawi (n 124) sec 129.

183 Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC), Article 5. This provides for individual communication submissions to the Committee.

Additionally, there is an opportunity for children to participate in climate change litigation through civil societies with *locus standi* and observer status provided for under Article 5(3) of Protocol to the ACHPR.<sup>184</sup> This opportunity can help in addressing both financial and *locus standi* challenges for children from the 34 African countries that have ratified the Protocol of the African Court on Human and People's Rights and the eight States – namely, Burkina Faso, Gambia, Ghana, Guinea-Bissau, Mali, Malawi, Niger, and Tunisia – that have accepted the competence of the Court and subsequently allowed for individuals or non-governmental organisations to access the court.<sup>185</sup>

## 8.2 Limitations

Children will face limitations in climate change litigation because of their status, amongst other reasons. Firstly, in a majority of African countries, children are viewed as a vulnerable population whose views are almost non-existent.<sup>186</sup> Abdullah and Cudjoe further present that in an African setting, the widely held belief is that a child should listen and not be listened to.<sup>187</sup> For instance, in Ghana, children are socialised not to talk during meetings between adults.<sup>188</sup> In Malawi, children express their views indirectly to adults through intermediaries, recitals, songs, and role play, as addressing adults directly might be interpreted as being disrespectful.<sup>189</sup>

Even though the above might be considered a form of participation, it is limited in the spirit of UNCRC, which states that children have a right to be heard.<sup>190</sup> That is likely why the Committee on CRC argues that Article 12 of UNCRC should be read with other Articles in the Convention, for instance, Article 2 on discrimination.<sup>191</sup> The Committee on CRC notes that while it is provided that children have the right to be heard, some cultural and traditional practices, values, and beliefs are discriminatory and place severe limitations on the enjoyment of this right. Thus, more is needed to have children present so that their views can be heard and considered.<sup>192</sup> While this is true, its practical implementation is

184 ACHPR (n 61) art 5 (3).

185 African Court 'Basic information' <https://www.african-court.org/wpafc/basic-information/> (accessed 29 March 2023).

186 H Mugadza et al 'The concept of a child within sub-Saharan African migrant homes: Reconciling culture and child rights' (2019) 24 *Child & Family Social Work* at 523.

187 A Abdullah et al 'Barriers to children's participation in child protection practice: The views and experiences of practitioners in Ghana' (2018) 34 *Children Australia* at 273

188 As above

189 T Kaime, *The Convention on the Rights of the Child: A cultural legitimacy critique* (2011) at 123.

190 UNCRC (n 106) art 12.

191 UNCRC General Comment 12 (2009), para.76.

192 As above

limited, especially in most African countries where the notion of child participation, at least in the aspiration of UNCRC and the African Children's Charter, is yet to be fully realised. Again, this is also particularly difficult when climate change litigation for children is associated with challenges such as a lack of resources and constrained ability to effectively engage with legal processes, coupled with prohibiting procedures and unreasonably time-consuming cases.<sup>193</sup>

Lack of access to courts and limited awareness of climate change litigation model statutes have also been seen as one of the limitations for accessing justice.<sup>194</sup> This is one of the reasons that motivated the IBA to launch its Model Statute for proceedings challenging the government's failure to act on climate change.<sup>195</sup> Article 4(5) of this Model Statute provides that any person may bring government-related climate change proceedings on behalf of minors or future generations.<sup>196</sup> Nevertheless, awareness and adoption of models like these are still limited in African countries, coupled with challenges in implementing policies and enforcing legislation.<sup>197</sup>

While there are possibilities for children's participation in climate change litigation in Africa, these possibilities are not closer to the successes registered in the *Urgenda* case,<sup>198</sup> and *Juliana v United States* case,<sup>199</sup> in the Global North where children were vital in the whole litigation process, and their presence was not only in the document filed on their behalf but also physical. Nevertheless, hope rests in the understanding that human rights are universal, and the principles used in these cases can potentially be adapted by litigants in African countries, even though this might be challenging given other compounding challenges facing the continent.

Additionally, children's participation in litigation in general and in climate change litigation, in particular, is characterised by threats of intimidation, financial challenges, and lack of know-how, which remain a challenge, especially to vulnerable groups, including Indigenous Peoples, women and those from a lower socioeconomic status.<sup>200</sup> The arrest of nine students who participated in a peaceful demonstration supporting the EU resolution stopping the East African

193 A Nolan 'Children's Rights and Climate Change at the UN Committee on the Rights of the Child: Pragmatism and Principle in *Sacchi v Argentina*' <https://www.ejiltalk.org/childrens-rights-and-climate-change-at-the-un-committee-on-the-rights-of-the-child-pragmatism-and-principle-in-sacchi-v-argentina/> (accessed 11 March 2024).

194 IBA (n 22) 2.

195 As above.

196 IBA (n 22) art 4 (5).

197 World Bank 2017. *World Development Report 2017: Governance and the Law* (Washington, DC: World Bank) 4. See also <https://www.bloomberg.com/news/articles/2021-08-18/climate-litigation-victories-face-enforcement-problems>

198 HDC, Case C-09/456689, (2015) 13-1396 (*Urgenda*) at 11.

199 *Juliana v United States* 947 F.3d 1159 (2020).

200 UNEP (n 134) 28.



Crude Oil Pipeline ('EACOP') implementation in Uganda is an example of this.<sup>201</sup> Such actions not only violate the students' right to assembly but also infringe on their right to participate. Even though these are legally not children, it potentially instils fear in children who would have otherwise participated in such or similar actions, as arrests are a strategy to silence critical and dissenting views.

## 9 Conclusion

It is undeniable that climate change is affecting the fabric of society in many ways. It is also undisputed that children are most affected by the adverse effects of climate change. These conditions have led to the rise of activism, which includes climate change litigation. Most cases brought to courts have relied on international law to call upon governments to act based on their obligations in the UNFCCC, the Paris Agreement, and other human rights treaties.

However, climate change litigation has been scant in Africa compared to developed countries. The low numbers have also been mirrored in children's participation in climate change litigation. These trends have been attributed to limited resources in light of other immediate challenges and poor or lack of enforcement of existing climate change legislation. Likewise, children's participation in climate litigation is a challenge, as cultural beliefs continue undermining them as incapable of making sound decisions. In limited cases, children are present through representatives such as parents, guardians, and civil society organisations, which is tokenistic. Such representation is arguably not transformative, and it is not the aspirations of participation presented in different international, regional, and domestic legislations on children's rights.

Nevertheless, the existence of normative and procedural frameworks that provide children with a right to participate, coupled with the availability of institutions, civil society organisations and children's majority in African countries, presents an opportunity for them to contribute and participate meaningfully in climate change litigation.

201 Juliet Kigongo 'Business and Human rights Resource Centre, 24 October 2022' <https://www.business-humanrights.org/en/latest-news/uganda-9-students-arrested-for-supporting-eu-resolution-on-halting-controversial-eacop-project-over-human-rights-environmental-concerns/> (accessed 28 March 2023). See T Weber 'Are climate activists protected by the Aarhus Convention? A note on Article 3(8) Aarhus Convention and the new Rapid Response Mechanism for environmental defenders' (2023) 32 (1) *Review of European, Comparative & International Environmental Law* 67-76 for more on environmental defenders, the challenges they face, and the strategies that they use to bring about action from governments. The problems they face are similar to climate change litigants, including children.

# DECOLONISING EXPROPRIATION, SYSTEMS THEORY & RADICAL POLITICAL THEORY THROUGH THE LENS OF *BUSINESS VENTURE INVESTMENTS 900 (PTY) LTD V CITY OF EKURHULENI METROPOLITAN MUNICIPALITY*

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## Abstract

*The objectives of land reform, as per section 25 of the Constitution of the Republic of South Africa, 1996, are limited by conservative property conditions that maintain the status quo. As such, subjecting land expropriation to compensation is unjust and fortifies the brutality of apartheid and colonialism instead of addressing these historical injustices. This article argues that just and equitable nil compensation challenges the status quo. It will analyse Business Venture Investments 900 (Pty) Ltd v City of Ekurhuleni Metropolitan Municipality, to illustrate that just and equitable redress can be brought forth through a decolonial approach to nil compensation. It will then problematise Niklas Luhmann's framework, contending that it perpetuates the status quo by undermining the role that positive law can play in correcting the injustices of the past. The article further asserts that the status quo is bolstered by positive law, such as South Africa's Constitution, which helps keep marginalised groups landless.*

**Keywords:** *expropriation; nil compensation; just and equitable; decolonisation, dispossession, status quo.*

# 1 Introduction

Those on the margins of society experience the law differently from those who hold privileged property positions and [...] their marginal perspective could be instructive in thinking about the tension between stability and change in the transformational contexts and the need for and the possibilities of meaningful change.<sup>1</sup>

During the apartheid and colonial eras, land in South Africa was pilfered from black people<sup>2</sup> then sold, donated, and illicitly given to white people.<sup>3</sup> This process of dispossession - wherein no payment was provided to those deprived of their land - casts doubt on the justiciability of the requirement that current landowners receive compensation for expropriation.<sup>4</sup>

Over the past 30 years, viewpoints suggesting that people of colour are unfit to make productive use of land<sup>5</sup> and should be relegated to townships and informal settlements have been used to circumvent land reform initiative<sup>6</sup>s. This, coupled with the country's history of dispossession and the legislature's failure to enact the Expropriation Bill or amend section 25 of the Constitution of the Republic of South Africa, 1996 ('the Constitution') to facilitate land expropriation without compensation with greater ease,<sup>7</sup> has led

- 1 ZT Boggempoel 'Property and Access: Inequality of Land Relations and the Continued Vulnerability of Women' (2023) *South African Law Journal* at 387.
- 2 D McKenzie & B Swails 'Land was stolen under apartheid. It still hasn't been given back' 20 November 2018 <https://edition.cnn.com/2018/11/20/africa/south-africa-land-reform-intl/index.html> (accessed 6 June 2024).
- 3 M Mohwaduba 'Towards Land Restitution through an African Perspective on Justice: A critical Analysis of Land Reform and the Role of Re-Imagination' (2018) *Pretoria Student Law Review* at 79.
- 4 AD Smith 'Apartheid land reforms in chaos as Blacks sell farms back to whites' 03 September 2011 <https://www.independent.co.uk/news/world/africa/apartheid-land-reforms-in-chaos-as-blacks-sell-farms-back-to-whites-2348437.html> (accessed 24 January 2014); T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution' (2017) *Stellenbosch Law Review* at 141-142; WR Hinson & E Robinson E "'We Didn't Get Nothing": The Plight of Black Farmers' (2008) *Journal of African American Studies* at 294; V Stull et al 'Environmental apartheid: Eco-health and rural marginalization in South Africa' (2016) *Journal of Rural Studies* at 372.
- 5 J Pienaar et al 'Land matters and rural development: 2011' (2011) *Southern African Public Law* at 523, 535; A England 'South Africa's black farmers struggle with land reform' 5 December 2013 <https://www.ft.com/content/efb94b78-5bf2-11e3-931e-00144feabdc0> (accessed 12 June 2024); M Ngubane 'Obstacles facing a young black farmer in South Africa: A personal story' 12 April 2018 <https://theconversation.com/obstacles-facing-a-young-black-farmer-in-south-africa-a-personal-story-94037> (accessed 12 June 2024).
- 6 A Desai *We are the poor: Community struggles in post-apartheid South Africa* (2002) at 20.
- 7 The Citizen 'Malema ignites debate in parliament on expropriation of land without compensation' 27 February 2018 <https://www.citizen.co.za/news/south-africa/watch-malema-ignites-debate-in-parliament-on-land-expropriation-without-compensation/> (accessed 6 June 2024).

many to argue that political parties are controlled by the private sector, which limits the extent to which land expropriation without compensation can gain traction.<sup>8</sup>

This article crafts a decolonised perspective on land expropriation without compensation. It will reflect on the *Business Venture Investments 900 (Pty) Ltd v City of Ekurhuleni Municipality*<sup>9</sup> ('*Business Venture*') case through the systems theory and promote utilitarianism against capitalism.<sup>10</sup>

The article diverges from interpretations that demonise land expropriation without compensation.<sup>11</sup> Some view nil compensation as a threat to liberal principles embedded in the current constitutional property values.<sup>12</sup> For instance, property owners often claim that South Africa was their 'promised land'.<sup>13</sup> On the other hand, the poor and the proletariat justify the reclamation of all land as 'thousands were evicted, and many died' from their land.<sup>14</sup>

*Business Venture* proves that nil compensation does not have to be demonised. Nil compensation tests constitutional land reform against a jurisprudential discourse between the status quo,<sup>15</sup> 'capital influence and liberal thoughts surrounding property ownership' and redistribution of land as a tool to address landlessness. Nil

8 FS McChesney *Money for nothing: Politicians, rent extraction, and political extortion* (1997) at 71; B Cousins 'Land reform in South Africa: The politics of expropriation without compensation' in H Chitonge & R Harvey *Land tenure challenges in Africa: Confronting the Land Governance Deficit* (2022) at 100; A Mthembu 'Reflections on expropriation-based land reform in Southern Africa' (2019) 75 *Town and Regional Planning* at 58; JW Van Rensburg 'Land Reform Without Compensation in South Africa: A Critical Analysis of the Taxation Policy' (LLM dissertation, North-West University, 2019) at 18.

9 (20/28475) [2021] ZAGPJHC 544 (13 October 2021).

10 H Lubbe & E du Plessis 'Compensation for expropriation in South Africa, and International law: The leeway and the limits' (2021) *Constitutional Court Review* at 80 fn 2; ZT Boggenpoel 'Politics or Principle?: Making Sense of the Expropriation Without Compensation Debate' in O Zenker et al (eds) *Beyond Expropriation Without Compensation: Law, Land Reform and Redistributive Justice in South Africa* (2024) at 35.

11 J Gerber 'National Assembly adopts Expropriation Bill, but opposition parties object for different reasons' 29 September 2022 <https://www.news24.com/news24/politics/parliament/national-assembly-adopts-expropriation-bill-but-opposition-parties-object-for-different-reasons-20220929> (accessed 6 June 2024).

12 MA Christians 'Elite consensus: The case of land reform in South Africa' (Unpublished PhD thesis, Stellenbosch University, 2021) at 2.

13 D James "'After years in the wilderness": The discourse of land claims in the New South Africa' (2000) *The Journal of Peasant Studies* at 158; C Boisen 'From land dispossession to land restitution: European land rights in South Africa' (2017) *Settler Colonial Studies* at 327.

14 W Beinart & P Delius 'The historical context and legacy of the Natives Land Act of 1913' (2014) *Journal of Southern African Studies* at 667.

15 The word 'status quo' refers to capitalism, existing property ownership, the private sector's role in hindering the government's land reform programmes, and property ownership based on race and apartheid-colonial land dispossession.

compensation must be ‘just and equitable’ and encompass the factors listed in section 25(3) of the Constitution.<sup>16</sup>

## 2 Discussing the facts in *Business Venture*

Expropriation can be defined as a process through which the state acquires property without the owner’s consent and transfers it to another entity for a justifiable public purpose<sup>17</sup>. Expropriation without compensation was the central issue in *Business Venture*. The applicant, Business Venture Investment 900 (Pty) Ltd, argued that section 10(3) of the Expropriation Act required the respondent, Ekurhuleni Metropolitan City (‘the Municipality’), to give it reasonable particulars in terms of section 10(7) of the Expropriation Act, as its farm was seized and expropriated by the Municipality<sup>18</sup>y.

However, the Municipality’s Notice of Expropriation did not expressly state that it would monetarily reimburse the applicant through section 9 of the Expropriation Act, which states that ‘an affected property owner whose property has been subjected to expropriation, is entitled, within sixty days of the Notice, to be informed about the amount demanded as compensation’.<sup>19</sup>

The Court had to determine the degree to which land can be expropriated without compensation for the benefit of people in need of housing as per section 9(3) of the Housing Act.<sup>20</sup>

## 3 Autopoietic systems theory and the theorisation of radical political theory

Autopoietic systems theory is a doctrine that views social systems as self-replicating systems of communication<sup>21</sup>. Every institution finds its roots in the fundamental elements of social systems that self-replicate through communication<sup>22</sup>n. Specific forms of communication

16 Lubbe & Du Plessis (n 10) at 80 fn 2; M Van Staden ‘*Fraus Legis* in Constitutional law: The case of expropriation “without” or for “nil” compensation’ (2021) 24 *Potchefstroom Electronic Law Journal* at 1. Although nil compensation and expropriation of land without compensation are different legal concepts, the author will provocatively use them as interchangeable terms.

17 B Hoops ‘Expropriation without compensation: A yawning gap in the justification of expropriation?’ (2019) *South African Law Journal* at 265.

18 *Business Venture* (n 9) paras 1 & 2.

19 *Business Venture* (n 9) para 4.

20 Act 107 of 1997; *Business Venture* (n 9) para 3.

21 D Michailakis ‘Law as an Autopoietic System’ (1995) 38 *Acta Sociologica* at 329; E Keyes ‘Two Conceptions of Judicial Integrity: Traditional and Perfectionist Approaches to Issues of Morality and Social Justice’ (2008) 22 *Notre Dame Journal of Law, Ethics & Public Policy* at 235.

22 Michailakis (n 21) 333.

thrive within these social systems, thus leading to the formation of autonomous subsystems.<sup>23</sup> Autopoietic law, owing to its self-referential nature, implies that law sets up internal models of social reality meant to reflect reality and other subsystems in its own terms.<sup>24</sup> Within these legal systems, there are assumed models about what social reality or other systems (should) look like.<sup>25</sup>

Buitendag and Van Marle were among the first legal scholars in South Africa to spark a jurisprudential discussion about the systems theory. Niklas Luhmann is credited with creating this philosophy, particularly the idea that the law is an autopoietic system.<sup>26</sup> A self-referential legal system based on autopoietic theory, coupled with judges' commitment to the separation of powers doctrine,<sup>27</sup> allows the law to protect itself against the moral aspects of the justice system and maintain the status quo.<sup>28</sup>

The systems theory in the sociology of law is perceived as negative dialectics of law.<sup>29</sup> It exceeds the constitutionalist warfare of law by protecting the status quo and favouring 'stability, consistency and justice' for the privileged in lieu of transformation.<sup>30</sup> Luhmann submits that the political system arranges itself under the false notion that coordinated political action can solve all the world's problems.<sup>31</sup>

Luhmann's assertion ignores the fact that the political theorisation of establishing an orderly society may be legitimised by the people who support it and have democratically elected it to power to address long-standing social inequalities. When issues of national interest - such as addressing historical injustices perpetuated by government - arise, the radical political theorisation of transformation is undermined by capital. Transformation is seen as a threat and theft by those who have financial capital.<sup>32</sup>

As such, capital spends ample resources to monitor those in power who have the potential to threaten the interests of the status quo. This is seen in the hostility surrounding property valuation and the monopolistic acquisition of property, from which white people benefit.<sup>33</sup>

23 Michailakis (n 21) 328.

24 As above.

25 As above.

26 N Buitendag & K van Marle 'Afriforum v Malema: The limits of law and complexity' (2014) *Potchefstroom Electronic Law Journal* at 2893.

27 B Jessop *State Power* (2007) at 27 & 33.

28 N Buitendag & K van Marle (n 26) 2893.

29 R Cordero 'The negative dialectics of law: Luhmann and the sociology of juridical concepts' (2020) *Social & Legal Studies* at 4.

30 As above.

31 M King & C Thornhill (eds) *Luhmann on Law and Politics: Critical appraisals and applications* (2006) at 4.

32 MM Shirley 'Institutions and development' in *Handbook of New Institutional Economics* (2005) 612.

To challenge the state lawfully, submits Luhmann, it is essential to withdraw ethics and equalitarianism of political values<sup>34</sup>. Withdrawing ethics and egalitarianism facilitates a compromise in the autopoietic legal system, which allows illegitimate power to create a constitutional order more proficiently than an elected government<sup>35</sup>. For example, section 25 of the Constitution requires the state to provide compensation when expropriating property and safeguards private property rights against arbitrary deprivation and expropriation, thus impeding the effect on land reform<sup>36</sup>.

The African National Congress ('ANC') prioritised acquiring political power in 1994. Anticipating the National Party's ('NP') democratic overthrow, the United States of America weaponised the World Bank's 'willing buyer, willing seller' model against the ANC<sup>37</sup> to coerce it into guaranteeing property and economic power for the white populace.<sup>38</sup>

The political theorisation of law does not serve the interests of the majority since compromised constitutionalism subverts democracy.<sup>39</sup> It instead protects the interests of the minority.<sup>40</sup> For instance, section 25 protects minority property by allowing the minority to hold vast tracts of land while governing the property conditions of a dispossessed majority.<sup>41</sup>

According to Luhmann's autopoietic authority, silence is a form of communication that projects itself into society.<sup>42</sup> Silence is not factual, even though it is accurate, when a systematic pattern of power is transferred.<sup>43</sup> The silence of power in South Africa is seen through the Constitution.

The Constitution is regarded as the 'best in the world' by the rich and resourced in the country.<sup>44</sup> Yet, the majority lack property ownership, inequality remains rampant, and the state is struggling to

33 N Luhmann 'Globalization or world society: How to conceive of modern society?' (1997) *International Review of Sociology* at 67.

34 J Příbáň 'Law as a Social System' (2005) *Journal of Law and Society* at 331.

35 As above.

36 BV Slade 'Towards a clearer understanding of the difference between the obligation to pay compensation and the validity requirements for an expropriation' (2019) *Speculum Juris* at 3.

37 D James 'The return of the broker: Consensus, hierarchy, and choice in South African land reform' (2011) *Journal of the Royal Anthropological Institute* at 325.

38 J Herbst 'Creating a New South Africa' (1994) *Foreign Policy* at 135.

39 R Dworkin 'Constitutionalism and Democracy' In *Constitutionalism and Democracy* (2017) at 3-12; H Klug *Constituting democracy: Law, globalism and South Africa's political reconstruction* (2000) at 133; H Klug 'Decolonisation, compensation and constitutionalism: Land, wealth and the sustainability of constitutionalism in post-apartheid South Africa' (2018) *South African Journal of Human Rights* at 16.

40 J Seekings & N Nattrass *Class, race, and inequality in South Africa* (2008) at 398.

41 J Dugard 'Unpacking Section 25: What, if any, are the legal barriers to transformative land reform?' (2019) 9 *Constitutional Court Review* at 138.

42 R Anchor 'Whose Autopoiesis?' (2000) *History and Theory* at 113.

43 As above.

combat unemployment.<sup>45</sup> For example, white people own 72% of all farms and agricultural land owned by individuals, while Coloureds own 15%, Indians own 5%, and Africans own a meagre 4%.<sup>46</sup> Hence, Philippopoulos-Mihalopoulos submits that:

[...] silence remains communication. Society does not recognise what cannot be verbalised because it does not deal with it. In silence, society only sees the threat, the ignorance of what cannot be communicated. Silence, according to Luhmann, "is the mirror which society comes to see that what is said is not said."<sup>47</sup>

Constitutionalism, when it does not serve people equally, becomes a remnant of political detachment from reality.<sup>48</sup> Therefore, when constitutionalism is 'non-pro-nationalist' as a socialist pact, its theorisation 'of law' remains disconnected from the constituency to which it is supposed to be answerable.<sup>49</sup>

Restorative justice and the 'functional differentiation' in property - that is, the commercial value of the property - should restore dignity to those who were wrongfully deprived of it<sup>50</sup>. Functional differentiation is a system<sup>51</sup> that is seen through white socio-economic prowess and classicism.<sup>52</sup> As such, restorative justice remains intangible because the system is designed to protect minority property interests rather than address the colonial roots of dispossession and property owners' ship.<sup>53</sup> This approach leads to power materialising as wealth and creates spatial injustices, making substantive equality difficult to achieve.<sup>54</sup>

'There is no law outside the law', argues Luhmann, and law, which is self-referential, is unpredictable<sup>55</sup>. However, to extinguish its unpredictability, positive law is used by parliamentarians to ensure the self-referentiality of the law.<sup>56</sup> When defining constraints and

44 T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution' (2017) *Stellenbosch Law Review* at 139.

45 R Calland 'Why South Africa's Constitution is under attack' 17 March 2017 <https://theconversation.com/why-south-africas-constitution-is-under-attack-74763> (accessed 21 June 2024).

46 Department of Rural Development and Land Reform 'Land Audit Report' [https://www.gov.za/sites/default/files/gcis\\_document/201802/landauditreport13feb2018.pdf](https://www.gov.za/sites/default/files/gcis_document/201802/landauditreport13feb2018.pdf) at 2 (accessed 21 June 2024).

47 A Philippopoulos-Mihalopoulos 'The vociferous rupture: Silence, law and ignorance' (2005) *Organdi Revue* at 7.

48 C Schmitt *Constitutional theory* (2008) at 10.

49 MA Wilkinson 'Political Constitutionalism and the European Union' (2013) *The Modern Law Review* at 210.

50 R Koen 'All Roads Lead to Property: Pashukanis, Christie and the Theory of Restorative Justice' (2017) *Potchefstroom Electronic Law Journal* at 196-197.

51 N Luhmann *The differentiation of society* (1982) at xiv.

52 CI Harris 'Whiteness as property' (1993) *Harvard Law Review* at 1781.

53 J Modiri 'Law's Poverty' (2015) 18(2) *Potchefstroom Electronic Law Journal* at 249.

54 Modiri (n 53) 251.

55 G Teubner *Law as an Autopoietic System* (1993) at 2.

56 As above.



rights at stake, the law establishes the conditions that must be met before one may refer to a legally significant incident or legitimate stand<sup>57</sup>rd. As Teubner submits:

[...] law is self-constituting in that legal rules begin to take on a 'life of their own'. They no longer appear as 'legal' means to a 'social' end, but as an end in themselves [...] it seems as if the law begins to lead a life of its own and stops merely a reflex of other aspects of society.<sup>58</sup>

Luhmann believes that illegitimate power can create a constitutional order.<sup>59</sup> Yet, questionably created law should be separated from politics and economics.<sup>60</sup> South Africa must undertake tremendous rebuilding work,<sup>61</sup> as state resources are limited and wealth is concentrated in the private sector, which is detrimental to black people.<sup>62</sup>

According to the systems theory, property is part of economics and the banking financialization thereof is based on the value and dignity that lies therein for the property owner<sup>63</sup>. To create wealth and distribute it fairly among citizens, the government, not the private sector, must be in contro<sup>64</sup>l. However, the ANC was captured by the private sector, which led to the creation of the current section 25 constitutional clau<sup>65</sup>se, whose limits economically marginalise the p<sup>66</sup>oor.

## 4 Section 25 of the Constitution, property ownership and the systems theory

In the midst of debates regarding land expropriation without compensation<sup>67</sup>, some argue that it is not necessary to amend section 25 of the Constitutio<sup>68</sup>n. In *Arun Property Development (Pty) Ltd v*

57 Teubner (n 55) 33.

58 Teubner (n 55) at 40.

59 K Sideri 'Questioning the neutrality of procedural law: internet regulation in Europe through the lenses of Bourdieu's notion of symbolic capital' (2004) *European Law Journal* at 63.

60 M Deflem 'The boundaries of abortion law: systems theory from Parsons to Luhmann and Habermas' (1998) *Social Forces* at 780.

61 N Friedman 'The South African common law and the Constitution: Revisiting horizontality' (2014) *South African Journal on Human Rights* at 67.

62 As above.

63 A Bell & G Parchomovsky 'Theory of property' (2005) *Cornell Law Review* at 537.

64 Bell & Parchomovsky (n 63) 582.

65 S Booysen 'The ANC and the regeneration of political power, 1994-2011' (2011) *1 One Hundred Years of the ANC: Debating liberation histories and democracy today* at 20-24.

66 J Dugard et al 'Rights-compromised or rights-savvy? The use of rights-based strategies to advance socio-economic struggles by Abahlali baseMjondolo, the South African shack-dwellers' movement' (2015) *Social and Economic Rights in Theory and Practice: Critical Inquiries* at 23-34; L Mhlana 'To remain' unpublished PhD thesis, University of the Free State, 2022 at 3, 138, 140.

*City of Cape Town*,<sup>69</sup> Moseneke DCJ held that state coercion through expropriation becomes effective when the state does not request the consent of an owner.<sup>70</sup> *City of Cape Town v Helderberg Park Development*<sup>71</sup> found that expropriation is acceptable if the owner is deprived of ownership by a regulatory authority that seeks to advance the welfare of the public.<sup>72</sup>

The state must advance the acquisition of expropriated land without compensation. To this end, the Expropriation Bill was slated to substitute the 1975 Expropriation Act.<sup>73</sup> Its expropriation provisions mirror those found in the Constitution.<sup>74</sup>

In 2018, Parliament issued a draft Bill introducing clause 12(3) that enumerates the conditions under which it 'may be just and equitable for nil compensation to be paid when land is expropriated in the public interest'.<sup>75</sup> This showed Parliament's intention to explore the constitutional legitimacy of 'nil compensation' even though it did not intend to expropriate vast tracts of productive agricultural land.<sup>76</sup>

Utilitarianism is based on the welfare of the majority.<sup>77</sup> It fulfils worth and dignity.<sup>78</sup> When law and property traverse, irrespective of the liberal stance on the fulfilment of compensation, expropriation must be for the welfare of the people who need land.<sup>79</sup> Through utilitarianism, the state can provide housing at an opportune time of need.<sup>80</sup>

However, in South Africa, centralised power that is focused on defending individual rights against untrammelled power has brought forth statist individualism.<sup>81</sup> This approach is accepted in South Africa

67 MA Mubecua & MW Mbatha 'Expropriation of Land in the Pre and During Democratic South Africa: Compensation or Nil Compensation?' (2021) 18 *African Renaissance* at 172-173.

68 Mubecua & Mbatha (n 67) at 172.

69 2015 (2) SA 584 (CC) ('Arun').

70 Arun (n 69) para 58.

71 2008 (6) SA 12 (SCA) para 58.

72 *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC); B Hoops 'The Legitimate Justification of Expropriation: A Comparative Law and Governance Analysis by the Example of Third-Party Transfers for Economic Development' (2017) at 375-376, 399-511.

73 J Coetzee & J Marais 'Expropriation without compensation - it is not the end of the road and is still on the table' 15 December 2021 <https://www.fasken.com/en/knowledge/2021/12/15-expropriation-without-compensation> (accessed 14 June 2024).

74 As above.

75 As above.

76 As above.

77 ST Leal 'Constitutional Scapegoat: The Dialectic between Happiness and Apartheid in South Africa' (2016) *Fundamina* at 303.

78 WJ Du Plessis 'The usefulness of Michelman's utilitarian approach to compensation for expropriation in South Africa' (2013) *Stellenbosch Law Review* at 360-362.

79 Du Plessis (n 78) 363-364.

80 Du Plessis (n 78) 366.

because expropriation, even for a public purpose, must be informed by sound practices that endorse compensation.

Luhmann submits that ‘functional differentiation’ is seen through capitalism and classicism<sup>82</sup>. Property is intrinsically linked to intergenerational class hierarchies and advantages in a capitalist framework, which are deeply racialised in South Africa<sup>83a</sup>. Hence, property ownership remains stratified by class and race, with white people owning a lion’s share of the land<sup>84</sup>. As a result, capital further subverts the ideals of utilitarianism to the detriment of the majority<sup>85</sup>.

According to Luhmann, in a legalistic normative theory, an autopoietic self-referential system indicates a degree of sovereignty that will respect a constitution that upholds identities and distinctions<sup>86</sup>. In terms of the legal interpretation of the law, this sovereignty implies that attorneys and judges accept the reality of how Parliament established the Constitution rather than creating a hypothetical environment in which they believe it should be construed<sup>87</sup>.

Luhmann’s interpretation of Buitendag and van Marle’s autopoietic systems theory states that the law becomes self-referential by separating itself from the present and impacting people.<sup>88</sup> This is done through selective reasoning and instrumentalisation, which makes it unclear whether the law should be used as a weapon.<sup>89</sup>

Amid the uncertainty inherent in autopoietic systems, the law can become a source of oppression.<sup>90</sup> This is particularly true as those with financial resources can defend their interests using laws that favour consistency through conservative constitutional and property conditions.<sup>91</sup> Such interests are defended at the expense of the

81 KJ Malan ‘The Foundational Tenets of Johannes Althusius’ Constitutionalism’ (2017) *Potchefstroom Electronic Law Journal* at 4.

82 C Wolfe ‘Making contingency safe for liberalism: the pragmatics of epistemology in Rorty and Luhmann’ (1994) *New German Critique* 107.

83 JM Modiri ‘Race as/and the trace of the ghost: jurisprudential escapism, horizontal anxiety and the right to be racist in *BoE Trust Limited*’ (2013) 16 *Potchefstroom Electronic Law Journal* at 597.

84 T Weinberg ‘Property of the People? Black Land Buyers’ Imaginings of Property Ownership, 1900-1994’ unpublished PhD thesis, University of Michigan, 2023 at 58.

85 CJ Webster & LWC Lai ‘Property rights, planning and markets: Managing spontaneous cities’ (2003) at 13, 22.

86 N Luhmann ‘The autopoiesis of social systems’ (2008) 6 *Journal of Sociocybernetics* at 85.

87 Luhmann (n 86) 85.

88 Buitendag & van Marle (n 26) 2893.

89 Buitendag & van Marle (n 26) 2898.

90 A Philippopoulos-Mihalopoulos ‘Critical autopoiesis and the materiality of law’ (2014) *International Journal for the Semiotics of Law* at 410.

91 Modiri (n 53) 228.

utilitarian aspirations of the majority, as the self-referentiality of the law divorces the law from ethics by emphasising positive law.<sup>92</sup>

Despite the role of the Natives Trust and Land Act<sup>93</sup> played in the dispossession of black people<sup>94</sup>, the current government has no radical plan to significantly empower them to achieve a balanced and economically clear racial parity of land allocation.<sup>95</sup>

To address historical injustice caused by land dispossession, it is necessary to balance restitution with redistribution to empower those who were forcefully removed.<sup>96</sup> Those who claim restitution tend to be awarded compensation, while those who claim for redistribution may be given their land.<sup>97</sup> Mostert submits that restitution is a form of reparation.<sup>98</sup> In autopoietic systems theory, capital has a greater bargaining position because it knows that dispossessed people do not have the bargaining power to maintain the land and, as such, it portrays restitution as a worthy cause as compared to redistribution.<sup>99</sup>

The 'economically clear' standard requires the use of the Land Bank to empower and dignify previously disadvantaged persons,<sup>100</sup> especially those who have been denied access to land by giving them housing at an opportune time of need. Even with such systems in place, the past thirty years have seen a regression in respect of claims that are not expeditiously dealt with at the Land Claims Commission ('LCC').<sup>101</sup>

This situation has been exacerbated by high poverty levels and resource scarcity<sup>102</sup>, making black people subjects of the status quo, as they do not own the means of production - that is, land.<sup>103</sup> To overcome such barriers, the law must address the socio-political reality.<sup>104</sup> Constitutionalism and the theorisation of the law must

92 G Teubner "“And God Laughed...” Indeterminacy, Self-Reference and Paradox In Law' (2011) *German Law Journal* at 377.

93 Act 18 of 1936.

94 H Kloppers and GJ Pienaar 'The historical context of land reform in South Africa and early policies' (2014) 17 *Potchefstroom Electronic Law Journal* at 684-685.

95 Kloppers & Pienaar (n 94) 690.

96 C Walker 'The limits to land reform: Rethinking "the land question"' (2005) 31 *Journal of Southern African Studies* at 805.

97 JL Gibson *Overcoming historical injustices: Land reconciliation in South Africa* (2009) at 107.

98 H Mostert 'Land restitution, social justice and development in South Africa' (2002) 119 *South African Law Journal* at 422.

99 K Boudreaux 'Land reform as social justice: The case of South Africa' (2010) 30 *Economic Affairs* at 18.

100 Pienaar et al (n 5) 523, 535.

101 C Walker *Landmarked: Land claims and land restitution in South Africa* (2008) at 19.

102 V Jaichand 'In transition? the struggle for socio-economic justice in South Africa' (2017) 7(1) *Notre Dame Journal of International & Comparative Law* at 16.

103 M Milazzo 'On White Ignorance, White Shame, and other Pitfalls in Critical Philosophy of Race' (2017) 34(4) *Journal of Applied Philosophy* at 561.

reflect the needs and interests of the citizenry as a unit and not as a separate entity.<sup>105</sup>

The utility of constitutionalism for expropriation is a growing concern.<sup>106</sup> In places like South Africa, land reform is broadly recognised as essential, but there are sceptics with divergent views on how it should be implemented.<sup>107</sup> While the ANC's policy on land reform has been murky,<sup>108</sup> the Democratic Alliance calls for state land to be redistributed first,<sup>109</sup> while the Economic Freedom Fighters persistently call for the state to be the custodian of all land in South Africa, thus enabling the state to expropriate land without compensation.<sup>110</sup>

Constitutionalism preserves the status quo in society by codifying its predispositions to the detriment of marginalised groups.<sup>111</sup> It upholds individuality, protects property rights, takes a firm stance in favour of the Bill of Rights, and works to defame any communal structure that attempts to promote true utilitarianism.<sup>112</sup>

In his critique of the Constitution and its impact on Critical Legal Studies, Mpofo-Walsh argues that the Constitution inadequately narrates historical dispossession.<sup>113</sup> He submits that this is a fundamental flaw in both the text and subtext of the Preamble.<sup>114</sup> For him, an inadequate starting point leads to a fundamentally flawed outcome.<sup>115</sup> Thus, he argues that if society cannot explicitly acknowledge the brokenness of the Constitution or recognise the crimes against humanity that were apartheid and colonialism in frank terms, the Constitution must be uprooted in its entirety.<sup>116</sup>

Due to the systemic power imbalances institutionalised by global superpowers interfering in the affairs of other countries, poverty and

104 K Malan 'Deliberating the Rule of Law and Constitutional Supremacy from the Perspective of the Factual Dimension of Law' (2015) 18(4) *Potchefstroom Electronic Law Journal* at 1231-1232.

105 As above.

106 GC Christie 'What Constitutes Taking of Property under International Law' (1962) 38 *British Year Book of International Law* at 312, 322 & 331.

107 R Hall 'The legacies of the Natives Land Act of 1913' (2014) *Scriptura: Journal for Contextual Hermeneutics in Southern Africa* at 10.

108 C Matseke 'Land reform in South Africa' (2021) 88(3) *The Thinker* at 41.

109 Democratic Alliance 'Our land reform plan' <https://www.da.org.za/our-land-reform-plan> (accessed 15 June 2024).

110 Lubbe & du Plessis (n 10) 97.

111 S Surajpal 'Dismantling the Status Quo: Prohibiting Unfair Discrimination on the Ground of Poverty under Capitalism' (2020) 14(2) *Pretoria Student Law Review* at 266, 267.

112 T Mfete 'Neoliberalism and inequality in post-apartheid South Africa' (2020) 14(2) *Pretoria Student Law Review* at 274-275.

113 Video: SMWX 'Dr Ntando Sindance on ANC-DA+coalition, Constitution, EFF, Jacob Zuma, MK Party, Steve Biko, racism' 16 June 2024 <https://www.youtube.com/watch?v=bTcBnZzZrU&t=2352s> (accessed 6 June 2024).

114 As above.

115 As above.

116 As above.

the law have been used to deprive states and their citizens of the ability to legitimately challenge historical land disposessions<sup>117</sup>. In South Africa, this status quo is best illustrated by the ‘willing-buyer-willing-seller’ model, which is rooted in Western capitalism and was used to defend existing property owners’ property right<sup>118</sup>s. It is important to question how utilitarianism threatens liberal democracy in a contemporary constitutional order, in light of land dispossession and capitalism.

Instead of dispossession, non-constitutional pluralism is centred around capitalism and the establishment of utilitarianism based on equal empowerment of all citizens is treated with scepticism.<sup>119</sup> This scepticism, Bader contends, threatens liberal democracy because it directly violates ‘strict separationism’ that seeks to defend the status quo.<sup>120</sup> *Business Venture* dealt with whether the applicant was entitled to more information in terms of section 10 of the Expropriation Act.<sup>121</sup> Here, the Judge signified that ‘just and equitable’ compensation allows for expropriation without compensation.<sup>122</sup>

In what follows, an attempt to justify the notion of a ‘just and equitable’ dilemma in nil compensation through section 25(3) of the Constitution will be explored.

## 5 What is ‘just and equitable’ in the context of nil compensation?

In *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*, the Constitutional Court held that section 25(3) of the Constitution must be interpreted purposively.<sup>123</sup> The purposive interpretation in section 25, when read with *Haffeejee NO v Ethekwini Municipality*<sup>124</sup> and *First National Bank of SA Ltd t/a Wesbank v Minister of Finance*,<sup>125</sup> balances the protection of existing property owners’ interests with those of the public.<sup>126</sup>

117 N Fraser ‘Social exclusion, global poverty, and scales of (in) justice: Rethinking law and poverty in a globalizing world’ (2011) 22(3) *Stellenbosch Law Review* at 452-453; E Lahiff ‘“Willing buyer, willing seller”: South Africa’s failed experiment in market-led agrarian reform’ in *Market-Led Agrarian Reform* (2013) at 1578.

118 E Du Plessis ‘Silence is golden: The lack of direction on compensation for expropriation in the 2011 Green Paper on Land Reform’ (2014) 17(2) *Potchefstroom Electronic Law Journal* at 803-804.

119 V Bader ‘Religions and States. A New Typology and a Plea for Non-Constitutional Pluralism’ (2003) 6 *Ethical Theory and Moral Practice* at 55-91.

120 As above.

121 *Business Venture* (n 9) paras 1, 8-9, 14, 17.

122 *Business Venture* (n 9) paras 6-7, 18.

123 2007 (6) SA 199 (CC) paras 51 fn 46 & 49.

124 2011 (6) SA 134 (CC) para 31.

125 2002 (4) SA 768 (CC) para 50.

In *Du Toit v Minister of Transport* ('*Du Toit*'), the court held that a 'just and equitable' formulation of expropriation should be accompanied by compensation and followed by a reasonable balance between the public interest and the interests of those affected<sup>127</sup>. According to section 25(3) of the Constitution, compensation must be 'just and equitable' when considering the property's market value, usage, history (of expropriation and otherwise), and extent of state investment<sup>128</sup>t.

In *Business Venture*, the applicant claimed that its property was subject to expropriation without compensation, which, in its opinion, was not just and equitable in terms of section 25 of the Constitution.<sup>129</sup> However, the court held that nil compensation was 'just and equitable'.<sup>130</sup>

Land reform, particularly in the context of 'just and equitable' compensation, is an expensive restorative justice tool<sup>131</sup>. A clear example of the high costs connected to 'just and equitable' compensation is *Mhlanganisweni Community v Minister of Rural Development and Land and Land Reform and Others* ('*Mala-Mala*'<sup>132</sup>), where the state had to settle over one R1 billion as compensation for expropriation<sup>133</sup>on. Xaba and Roodt submit that *Mala-Mala* shows that 'just and equitable' compensation signifies the state's failure to advance its section 25 expropriation power<sup>134</sup>ers. Although the *Mala-Mala* case had reached the Constitutional Court for guidance on defining 'just and equitable' compensation, then-Minister Gugile Nkwinti withdrew it, ultimately deciding to compensate a large sum to a single white family - an amount that consumed a third of the national budget<sup>135</sup>dget. To this day, the government continues to uphold populist rhetoric that suggests that land will be expropriated without compensation<sup>136</sup>ation.

126 *Moloto Community v Minister of Rural Development and Land Reform and Others* (LCC 204/2010) [2022] ZALCC 4 (11 February 2022) para 20.

127 2006 (1) SA 297 (CC) ('*Du Toit*') para 83.

128 D Iyer 'Is the Determination of Compensation a Pre-requisite for the Constitutional Validity of Expropriation? Haffajee NO and Others v Ethekweni Municipality and Others' (2019) 9 *Speculum Juris* at 69.

129 *Business Venture* (n 9) para 6.

130 *Business Venture* (n 9) para 7.

131 E du Plessis 'No expropriation without compensation in South-Africa's Constitution - for the time being' 9 December 2021 <https://verfassungsblog.de/no-expropriation-without-compensation-in-south-africas-constitution-for-the-time-being/> (accessed 14 January 2024).

132 (LCC 156/2009) [2012] ZALCC 7 (19 April 2012).

133 Du Plessis (n 131).

134 MB Xaba & M Roodt 'The Populist Rhetoric Around Land Acquisition in South Africa Obscures a Number of Significant Factors on Land Reform' (2018) 72 *The Thinker* 33.

135 As above.

136 As above.

Costs are more likely to be exorbitant if the expropriation is time-consuming, the property's market value is not properly calculated, or if it involves legal or political challenges.<sup>137</sup> As early as 2000, land expropriation with compensation contributed to the slow pace of land reform, leading to legal and political challenges.<sup>138</sup> This slow pace resulted in courts being overwhelmed with land claim matters and the dissipation of political aspirations aimed at redressing land dispossession.<sup>139</sup> Administering land reform through state agencies - such as the Land Bank and LCC - and mediation involving private banks made land reform expensive, bureaucratic, and prone to profiteering.<sup>140</sup>

Some argue that the mere fact that property tends to be expensive causes slow land reform<sup>141</sup>. Hence, the court in *Mwelse and Others v Director-General for the Department of Rural Development and Land Reform and Another*<sup>142</sup> urged the LCC to expedite land reform through legislative and constitutional development.

Blame for the stunted pace of land reform cannot be placed squarely on the shoulders of the LCC, as the government has contributed to this issue.<sup>143</sup>

It is important to distinguish land reform from expropriation. The rules of land reform pertain to land tenure and the lawful restoration of property to its previous owner, whereas expropriation focuses on the acquisition of land by the state.<sup>144</sup> Expropriation is not land reform. It is a way of acquiring land, not buying it.

The court in *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces* had to freeze new

137 L Cliffe 'Land Reform in South Africa' (2000) 27 *Review of African Political Economy* at 277-278.

138 As above.

139 As above.

140 As above.

141 A Gildenhuys 'The Debate about Full, Partial or Nil Compensation in Expropriations for Land Reform Purposes in South Africa' (2019) 8 *European Property Law Journal* 143; T Kotzé 'Developing Criteria for the Identification of Suitable Agricultural Land for Expropriation and Redistribution in South Africa: Lessons Learnt from Namibia' (2021) 32 *Stellenbosch Law Review* 200; S Viljoen 'Expropriation without compensation: principled decision-making instead of arbitrariness in the land reform context (part 1)' (2020) 1 *Journal of South African Law* at 37; W Du Plessis 'Valuation in the Constitutional Era' (2015) 18 *Potchefstroom Electronic Law Journal* at 1727.

142 [2019] ZACC 30 para 41.

143 'South Africa: Govt will turn to alternative legislation to redistribute land - Justice Minister says' 08 December 2021. <https://www.africanews.com/2021/12/08/south-africa-govt-to-turn-to-alternative-legislation-to-redistribute-land/> (accessed 09 June 2024)

144 T Head 'Land expropriation and land reform: What's the difference?' 14 March 2018 <https://www.thesouthafrican.com/news/what-is-land-expropriation-land-reform/> (accessed 18 June 2024).



land claims applications when it declared the Restitution of Land Rights Amendment Act invalid.<sup>145</sup>

Some analysts have suggested that it might take two centuries and R600 billion to process South Africa's land claims, owing to uncertainties surrounding expropriation and disputes over how the state can expropriate property and then dispute the price afterwards.<sup>146</sup> To ameliorate such backlogs, a proposal to amend section 25 was made.<sup>147</sup> This amendment would explicitly clarify that, in some instances, it may be 'just and equitable' to pay nil compensation.<sup>148</sup>

Land is largely protected from devaluation, even when it is unproductive.<sup>149</sup> The land in *Business Venture* was barren and not used for its land use zone designation, yet the property owner claimed that it was entitled to compensation.<sup>150</sup> Molahlehi J noted that the nil compensation *in casu* was influenced by three factors. Firstly, R3 358 101,71 was owed by the applicant to the municipality.<sup>151</sup> Secondly, the applicant utilised the land, which was zoned for agriculture, as a mining dump.<sup>152</sup> Finally, determining the toxicity of the chemicals present in the slime dams required financial outlays, which were disadvantageous to the municipality.<sup>153</sup>

According to Fuo, the Spatial Planning and Land Use Management Act ('SPLUMA',<sup>154</sup>) empowers municipalities to designate spatial and land use management. This allows citizens to gain just access to land and enables the realisation of the right to adequate food, housing and water.<sup>155</sup> Put differently, SPLUMA has empowered municipalities to decide matters related to rezoning and township development.<sup>156</sup>

145 2016 (5) SA 636 (CC); M Florentinos 'New Land Claims put on ice after Constitutional Court ruling' 24 August 2016 <https://www.dmlaw.co.za/new-land-claims-put-ice-constitutional-court-ruling/> - :~:text=All%20new%20land%20claim%20applications%20have%20been%20frozen,of%20the%20National%20Council%20of%20Provinces%20and%20Others. (accessed 18 June 2024).

146 'It could take 200 years and R600 billion to process South Africa's current land claims' 5 October 2018 <https://businesstech.co.za/news/government/275211/it-could-take-200-years-and-r600-billion-to-process-south-africas-current-land-claims/> (accessed 18 June 2024). K Khumalo 'Thirty-year backlog of land claims will cost R170 bn' 29 May 2023 <https://www.businesslive.co.za/bd/national/2023-05-29-thirty-year-backlog-of-land-claims-will-cost-r170bn/> (accessed 18 June 2024).

147 E du Plessis 'South Africa has another go at an expropriation law. What it's all about' 1 November 2020 <https://theconversation.com/south-africa-has-another-go-at-an-expropriation-law-what-its-all-about-148379> (accessed 18 June 2024).

148 Du Plessis (n 131).

149 C Tilly 'Does modernization breed revolution?' (1973) *Comparative Politics* at 444; U Özsü 'Grabbing land legally: A Marxist analysis' (2019) 32(2) *Leiden Journal of International Law* at 232.

150 *Business Venture* (n 9) para 13.

151 *Business Venture* (n 9) para 20.

152 As above.

153 As above.

154 Act 16 of 2013 ('SPLUMA').

Nil compensation is 'just and equitable' when the private property owner failed to adhere to zoning regulations, protect environmental resources, or mitigate environmental risks<sup>157</sup> and/or incrementally development of land for its intended purpose<sup>158</sup>s.

In *Business Venture*, the applicant used land that was designated as agricultural land as a mining dump, in contravention of municipal zoning provisions.<sup>159</sup> Penalties for violating SPLUMA include fines, imprisonment, demolition orders and legal actions.<sup>160</sup> The applicant should have paid the fine for the expenses that the municipality incurred instead of demanding compensation.

The 'Final Report of the Presidential Advisory Panel on Land Reform and Agriculture' ('Final Report') is particularly significant. Land can be subjected to 'just and equitable compensation' if it falls into one of the following categories:

- (a) abandoned land;
- (b) hopelessly indebted land;
- (c) land held purely for speculative purposes;
- (d) unutilised land held by state entities;
- (e) land obtained through criminal activity;
- (f) land already occupied and used by labour tenants and former labour tenants;
- (g) informal settlement areas;
- (h) inner city buildings with absentee landlords;
- (i) land donations (as a form of Expropriation Without Compensation); and
- (j) farm equity schemes.<sup>161</sup>

The Final Report remains important for purposes of expropriation without compensation. Since expropriation bills have been rejected continuously, the courts may award expropriation without compensation, where necessary and justifiable. However, because it is only a report, the Final Report only has persuasive value.

For Van der Walt and Viljoen, constitutionalism must acknowledge that the right to housing symbolises not just material prosperity but the right to shelter<sup>162</sup>. Marginalised persons tend to organise in order

155 ON Fuo 'A Critical Investigation of the Relevance and Potential of IDPS as a Local Governance Instrument for Pursuing Social Justice in South Africa' (2017) 16 *Potchefstroom Electronic Law Journal* at 245.

156 N Raboshakga & O Fuo 'Appropriate Internal Appeal Mechanisms for Approval of Building Plans: Exploring the Gaps Left by the Constitutional Court' (2020) 23 *Potchefstroom Electronic Law Journal* at 11.

157 J de Visser & XS Poswa 'Municipal Law Making under SPLUMA: A Survey of Fifteen "First Generation" Municipal Planning By-Laws' (2019) *Potchefstroom Electronic Law Journal* at 2.

158 J de Visser & XS Poswa (n 157) 18.

159 *Business Venture* (n 9) para 20.

160 SPLUMA (n 154) secs 32 & 58.

161 T Kotze 'Developing criteria for the identification of suitable agricultural land for expropriation and redistribution in South Africa: Lessons learnt from Namibia' (2021) 32(2) *Stellenbosch Law Review* at 206; Advisory Panel on Land Reform and Agriculture 'Final Report of the Presidential Advisory Panel on Land Reform and Agriculture' Government of South Africa at 80.

162 A Van der Walt & S Viljoen 'The Constitutional Mandate for Social Welfare - Systemic Differences and links between Property, Land Rights and Housing Rights' (2015) 18(4) *Potchefstroom Electronic Law Journal* at 1060-1073.

to compel the government to provide housing, and, if formal housing is not made available, they build informal houses on vacant land.<sup>163</sup> Thus, municipalities are responsible for allocating housing to indigenes.<sup>164</sup>

Although land reform and urban housing are dealt with in different departments, according to the Final Report, these two departments should not be viewed in isolation as they both advance the right to housing in order to correct past injustices.<sup>165</sup>

As such, the legitimacy of nil compensation is somewhat redefined for land reform and progressive realisation of section 26(1) of the Constitution.<sup>166</sup> Hence, in *Port Elizabeth Municipality v Various Occupiers*, Sachs J held that homeless and destitute people should not be seen as a burden, nor should those with resources institutionally isolate such persons.<sup>167</sup> This transformative care was also apparent in *Diepsloot Residents and Landowners Association v Administrator, Transvaal*, where the Court held that ‘expropriation, designation and settlement are part and parcel of the attempted resolution of the squatter problem brought about by the increased urbanisation’.<sup>168</sup>

In *Msiza v Director-General, Department of Rural Development and Land Reform (Msiza)*, the LCC held that a purposive interpretation of section 25 requires monetary settlements for expropriation to be informed by rational public purpose and not the commercialisation of the property.<sup>169</sup> The LCC held that it is not necessary ‘to compensate every potential loss of commercial opportunity’.<sup>170</sup> Determination of land requires a two-step approach: one must find a determined market value and then equitably adjust the compensation.<sup>171</sup>

The LCC in *Msiza* determined that the market value did not achieve an equitable balance, so it reduced the market value. The

163 J Strydom & S Viljoen ‘Unlawful Occupation of Inner-City Buildings: A Constitutional Analysis of the Rights and Obligations involved’ (2017) 36 *Potchefstroom Electronic Law Journal* at 1211, 1217, 1246-1247.

164 O Fuo ‘Local government indigent policies in the pursuit of social justice in South Africa through the lenses of Fraser’ (2014) 25(1) *Stellenbosch Law Review* at 197.

165 B Meyersfeld ‘The South African Constitution and the human-rights obligations of juristic persons’ (2020) 137(3) *South African Law Journal* at 467; L Royston ‘Security of urban tenure in South Africa: Overview of policy and practice’ in A Durand-Lasserve & L Royston (eds) *Holding Their Ground Secure: Land Tenure for the Urban Poor in Developing Countries* (2002) at 165-170.

166 Viljoen (n 141) 39.

167 2005 (1) SA 217 (CC) para 37.

168 1994 (2) All SA 299 at 307.

169 2016 (5) SA 513 para 47. *Msiza* appeared to hold the view that expropriation should not be affirmed by an extreme capitalist system that prioritises profiteering in a manner that is not just and equitable. Expropriation must be rational, sound and should not embrace exorbitant demands for market value; RC Wesley ‘Expropriation challenge in Latin America: Prospects for accord on standards and procedures’ (1971-1972) 46 *Tulane Law Review* at 257 fn 128

170 *Msiza* (n 169) para 47.

171 *Msiza* (n 169).

*Msiza* case was important because it established that compensation may be 'just and equitable' even when it is reduced or non-existent, as was the case in *Business Venture*. Unfortunately, the Supreme Court of Appeal overturned *Msiza*,<sup>172</sup> which, to a considerable extent, stunted the potential growth of nil compensation jurisprudence.<sup>173</sup>

*Business Venture* affirms the importance of the right to housing in terms of section 26 of the Constitution. This section limits property owners' rights proportionally and fairly. For instance, the Judge *in casu* noted that because the applicant failed to pay outstanding municipal taxes and used the land incorrectly, public purpose had to reign supreme.<sup>174</sup>

Some believe that because section 25 of the Constitution permits expropriation without compensation.<sup>175</sup> It need not be amended. This is so in terms of section 25(2)(a) of the Constitution, which declares that property may be expropriated only in terms of a law of general application for public purposes.<sup>176</sup>

Because of this legal uncertainty, the legislature has failed to outline the foundation of section 25's amendment and diffuse confusion, 'to make explicit what is implicit in the Constitution to allow expropriation without compensation'.<sup>177</sup> To amend this section and create legal certainty, the legislature may follow *Agri South Africa v Minister for Minerals and Energy*,<sup>178</sup> where it was held that the Constitution must ensure that land reform accomplishes 'equitable distribution of land and wealth to all'.

In the NP and ANC's discussions before the formal end of apartheid, the NP wanted to safeguard private property from arbitrary state interference, while the ANC negotiated for expropriation against 'just and equitable' compensation<sup>179</sup>. The ANC believed that 'just and equitable' compensation should not be

172 *Uys & Another v Msiza & Others* 2018 (3) SA 440 (SCA).

173 Expropriation Bill (B23-2020. See also, for example, ANC Parliamentary Caucus 'ANC Study Group Welcomes the passing of the Expropriation Bill [B23 2020] in the National Assembly' 29 March 2024, <https://www.ancparliament.org.za/anc-study-group-welcomes-the-passing-of-the-expropriation-bill-b23-2020-in-the-national-assembly/> accessed 12 October 2024; M Merton 'Contested Expropriation Bill closer to becoming law, but don't hold your breath' 19 March 2024, <https://www.dailymaverick.co.za/article/2024-03-19-contested-expropriation-bill-closer-to-becoming-law-after-ncop-approval-but-dont-hold-your-breath/> (accessed 12 October 2024).

174 *Business Venture* (n 9) para 20.

175 S Mpofu-Walsh *The New Apartheid* (2021) at 136.

176 Parliament of the Republic of South Africa 'Ad Hoc Committee on amending section 25 of the Constitution' <https://www.parliament.gov.za/project-event-details/285> (accessed 11 June 2024).

177 J Gerber 'Expropriation without compensation: This is how the Constitution could be amended' 07 November 2024 <https://www.news24.com/News24/expropriation-without-compensation-this-is-how-the-constitution-could-be-amended-20191107> (accessed 11 June 2024).

178 2013 4 SA 1 (CC) at para 60.

construed solely through market value, but on the basis of public interest and land reform<sup>180</sup>m.

*Business Venture* challenges the status quo by amplifying the need for housing as a source for utilitarianism and justification for public purpose in the expropriation of the property.<sup>181</sup> During the 'deconstructionist logic' phase, according to Critical Legal Studies, a judge must employ 'scientific thinking' to utilise realism to overcome mechanisms designed to preserve the status quo at the risk of utilitarianism.<sup>182</sup>

The law may be a social contract for the citizens of a country, but it can also be oppressive when it does not serve people equally.<sup>183</sup> *Business Venture* criticises the government's inability to expedite land reform when people need land for public purposes and shows a willingness to support redistribution and restitution initiatives.<sup>184</sup>

The significance of calculating the market value of property slated for expropriation<sup>185</sup>n was found in *Khumalo and Others v Potgieter and Others* ('Khumalo',<sup>186</sup>), where a two-stage approach was utilised. To comply with section 25(3) of the Constitution, the court must first determine the market value of the property to be expropriated by adjusting compensation on four criteria.<sup>187</sup>ia.

An alternative approach is found in *Du Toit*<sup>188</sup>t wherein it was decided that market value could not be given priority in shaping what is 'just and equitable' in terms of section 25(3) of the Constitution.<sup>189</sup>n. Market value cannot take preponderance over expropriation because these factors were heavily influenced by socio-economic factors listed in section 25(<sup>190</sup>3).

Greater emphasis must be placed on justice and equity, which is emphasised through the calculation of the market value in the current Constitution.<sup>191</sup> Although there are contrasting views in the *Du Toit*

179 E du Plessis 'Land expropriation: Where law and politics collide' 20 July 2018 <https://www.news24.com/News24/land-expropriation-where-law-and-politics-collide-20180720> (accessed 25 January 2024).

180 Du Plessis (n 179).

181 *Business Venture* (n 9) para 20.

182 GE White 'From realism to critical legal studies: A truncated intellectual history' (1986) *South Western Law Journal* at 825.

183 O Lobel 'The paradox of extralegal activism: Critical legal consciousness and transformative politics' (2006) 120(4) *Harvard Law Review* at 957-958.

184 JL Gibson 'Land redistribution/restitution in South Africa: A model of multiple values, as the past meets the present' (2010) 40(1) *British Journal of Political Science* at 161.

185 BM Gibson 'Expropriation of land without compensation: an analysis of the history of the acquisition of property as a factor in determining just and equitable compensation' LLM thesis, University of Johannesburg (2022) at 2.

186 2000 2 All SA 456 (LCC).

187 *Khumalo* (n 186) paras 29-31.

188 *Du Toit* (n 127).

189 *Du Toit* (n 127) para 36.

190 As above.

two-stage approach, it is essential to question the market value calculated through section 12 of the Expropriation Act.<sup>192</sup> When calculating market value in terms of section 12 of the Expropriation Act, credence must be given to section 25(3) of the Constitution's determination of what is 'just and equitable'.<sup>193</sup>

Section 25 of the Constitution is filled with contradictions. On the one hand, it aims to address land dispossession by affirming the government's commitment to redistributing land equally.<sup>194</sup> On the other hand, it seeks to protect existing property owners.<sup>195</sup> To remedy this contradiction, courts can play a constructive role during the judicial review process.

The applicant in *Business Venture* may have argued that the state must consider market value, since it is a listed factor in the Constitution. However, market value should not be considered in isolation<sup>196</sup> as it must be considered along with other public purposes and interests.<sup>197</sup>

Du Plessis's interpretation of *Business Venture* affirms that market value is not an obligatory consideration. The court stated that it was not a compulsory factor, but the municipality had the discretion to determine the range of 'five open-ended' factors that may be considered when interpreting section 25(3) of the Constitution.<sup>198</sup> For example, Strydom and Viljoen submit that the property's market value should be determined by its present use, irrespective of how small or large it is.<sup>199</sup>

Viljoen submits that expropriation should not be viewed as arbitrary but as principled decision-making that reflects a redistributive approach.<sup>200</sup> This redistributive approach through nil compensation is echoed by the recent 'failed' Bill as follows:

It may be just and equitable for nil compensation to be paid where land is expropriated in the public interest, having regard to all relevant circumstances, including but not limited to:

Where the land is not being used and the owner's main purpose is not to develop the land or use it to generate income, but to benefit from the appreciation of its

191 As above.

192 Gibson (n 185) 2.

193 As above.

194 A Rudman 'Re-defining national sovereignty: The key to avoid constitutional reform? Reflections on the 2011 Green Paper on Land Reform' (2012) 23(3) *Stellenbosch Law Review* at 419.

195 As above.

196 WJ du Plessis 'The (shelved) Expropriation Bill B16-2008: An unconstitutional souvenir or an alarmist memento?' (2011) 22(2) *Stellenbosch Law Review* at 370.

197 As above.

198 J Dugard & N Seme 'Property rights in court: An examination of judicial attempts to settle section 25's balancing act re restitution and expropriation' (2018) *South African Journal on Human Rights* at 41-42.

199 Strydom & Viljoen (n 163) 1327-1328.

200 Viljoen (n 141) 259.

market value;

Where an organ of state holds land that is not using it for its core functions and is not reasonably likely to require the land for its future activities and is not likely to require the land for its future activities in that regard, and the organ of state acquired the land for no consideration;

Notwithstanding registration of ownership in terms of the Deeds Registries Act, 1937 (Act No. 47 of 1937), where an owner has abandoned the land by failing to exercise control over it;

Where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land; and

When the nature or condition of the property poses a health, safety or physical risk to persons or other property.<sup>201</sup>

Colonial land dispossession, submits Mawere, was facilitated by European settlers.<sup>202</sup> In that process, they did not pay compensation.<sup>203</sup> For Mawere, it is unnecessary to espouse a market value-based approach since it limits the extent to which the state can correct the historical injustices of land dispossession.<sup>204</sup> Over the years, there has been mounting dissatisfaction about the extent to which land reform and expropriation are hampered by precepts - particularly in common law - that give property owners enormous power to do as they wish with their land.<sup>205</sup> For example, in *Gien v Gien*,<sup>206</sup> the Court held that property owners have unrestricted freedom to use the surface of their immovable property without unjust interference by any authority.

However, in *Port Elizabeth Municipality v Various Occupiers*, the Constitutional Court held that courts should view issues related to housing and land reform not as 'against competing values, but with deep historical roots'.<sup>207</sup> The *Business Venture* case is important as it shows the courts' unwillingness to compensate a property owner who was not using the property for its intended purpose. The property owner's desire to behave as it wished was proportionally limited, to the extent that landlessness and the housing provision corrected the historical roots of land acquisition through dispossession.

For Modiri, race informs systematic wealth deprivation and marginalisation, and, as such, Eurocentric legal systems are hurdles for decolonised and just outcomes.<sup>208</sup> Hence, it is important for every judgment to compromise between protecting the colonial status quo and transformation brought about by the new status quo.<sup>209</sup>

201 Expropriation Bill [B 23-2020] clause 12.

202 J Mawere 'The legality of land expropriation without compensation in South Africa: A comparative in international legal approach' LLM thesis, University of Venda (2020) at 162.

203 As above.

204 As above.

205 G Pienaar 'The Effect of the Original Acquisition of Ownership of Immovable Property on Existing Limited Real Rights' (2015) 18(5) *Potchefstroom Electronic Law Journal* at 1485; FI Michelman 'Expropriation, eviction, and the gravity of the common law' (2013) 24(2) *Stellenbosch Law Review* at 252.

206 1979 (2) SA 1113 (T) at 1120C-D.

207 2004 (12) BCLR 1268 (CC) para 38 fn 37.

208 Modiri (n 83) 607.

Therefore, every verdict meant to shield the law upholding the status quo acts contrary to the ideals of constitutional reform, even when it is frank or spot-on.<sup>210</sup> This constitutional reform was seen in *Pillay N.O. v The Government of the Republic of South Africa and Others*, where the LCC held that since the property was left to deteriorate until it became a slum, the market value of the property should be reduced.<sup>211</sup> This decision is unconventional, contrary to the frequent demonisation of nil compensation, and details how Critical Legal Theory should reflect constitutional reform without any form of compromise.

## 6 Conclusion

Many poor South Africans and radical political theorists who challenge the Constitution are becoming less tolerant of expropriation subject to compensation. This is because many impoverished people lack access to housing, and when they voice their displeasure are viewed as nuisances.

Niklas Luhmann's 'systems theory' has been used as an independent, self-referential regulatory system that stands apart from other normative systems. It divorces itself from religion, morality and social norms, and autonomously defines its own bounds in the course of autopoietic activities.

The first part of this contribution aimed to highlight *Business Venture's* attempt to synchronise concerns surrounding how colonialism and apartheid underwrote landlessness and the thriving capitalist system in South Africa. The justification for nil compensation is underscored by how positive law has been used to further advance colonial conquest, as section 25 of the Constitution promotes the status quo.

A decolonised perspective was inferred in the case of *Business Venture*, especially its justification of 'just and equitable' nil compensation. This article aligned itself with the judgement by analysing the Judge's construction of the Critical Legal Theory, which was infused with positive law without diluting radical political theorisation of the law.

209 As above.

210 As above.

211 (LCC 2019/42) [2022] ZALCC 21(08 August 2022) para 17.



# THE ABOLITION OF THE DEATH PENALTY

## *John Lazaro v United Republic of Tanzania* (Application 003/2016) (2023) AfCHPR 335 (7 November 2023)

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### Abstract

*On 7 November 2023, the African Court on Human and Peoples' Rights ('the Court') handed down judgment in a matter concerning the death penalty as a method of punishment in which South African Judge, Dumisa Buhle Ntsebeza and Congolese Judge, Blaise Tchikaya, provided dissenting opinions. The dissenting opinions characterised the death penalty as being inhumane, degrading, and a direct violation of Articles 4 and 5 of the African Charter on Human and Peoples' Rights ('the Charter'). The Honourable Judges further provided that the death penalty should be abolished in the legislation of the United Republic of Tanzania and that all member states of the African Union should collectively take progressive steps towards its abolition. This case discussion advances the dissenting opinions of Ntsebeza J and Tchikaya J, and further advocates for the abolition of the death penalty. The broader objective of this case discussion is to categorise the abolition of the death penalty as customary international law, meaning that even if there is no explicit rule of international law on its prohibition, courts in their interpretation can advance its abolition by adopting a human rights perspective.*

## 1 Brief introduction

*Justice is never advanced in the taking of human life. Morality is never upheld by a legalized murder ... True justice is restorative, it heals wounds, the death penalty only creates new wounds.*<sup>1</sup>

On 7 November 2023, the African Court on Human and Peoples' Rights ('the Court') handed down judgments in three matters, namely *John Lazaro*,<sup>2</sup> *Makungu Misalaba*,<sup>3</sup> and *Chrizant John*.<sup>4</sup> The common thread unifying the three matters was that they were judgments against the United Republic of Tanzania and centred on the imposition of the death penalty as a method of punishment. Of note is that the Court's session in September 2023 heard a significant number of matters relating to the imposition of the death penalty as a method of punishment. However, this case discussion will focus on the matter of John Lazaro ('Applicant') and the United Republic of Tanzania ('Respondent State'), in which South African Judge, Dumisa Buhle Ntsebeza and Congolese Judge, Blaise Tchikaya provided dissenting opinions.

The dissenting opinions characterised the death penalty as being inhumane, degrading, and a direct violation of Articles 4 and 5 of the African Charter on Human and Peoples' Rights ('the Charter').<sup>5</sup> The Honourable Judges further provided that the death penalty should be abolished in the legislation of the United Republic of Tanzania and that all member states of the African Union should collectively take progressive steps towards its abolition.<sup>6</sup> This case discussion advances the dissenting opinions of Ntsebeza J and Tchikaya J, and further advocates for the abolition of the death penalty. The broader objective of this case discussion is to categorise the abolition of the death penalty as customary international law, meaning that even if there is no explicit rule of international law on its prohibition, courts, in their interpretation, can advance its abolition by adopting a human rights perspective.

1 Equal Justice Initiative 'Dr Martin Luther King's moral opposition to the death penalty' <https://eji.org/news/dr-martin-luther-kings-moral-opposition-to-the-death-penalty/> (accessed on 02 March 2024). See also Good News '37 Important quotes about the death penalty' 09 January 2023 <https://goodgoodgood.co/articles/death-penalty-quotes> (accessed on 02 March 2024).

2 *John Lazaro v United Republic of Tanzania* (Application 003/2016) (2023) AfCHPR 335 (7 November 2023).

3 *Makungu Misalaba v United Republic of Tanzania* (Application 033/2016) (2023) AfCHPR 40 (7 November 2023).

4 *Chrizant John v United Republic of Tanzania* (Application 049/2016) (2023) AfCHPR 44 (7 November 2023).

5 *John Lazaro v United Republic of Tanzania* (Application 003/2016) (2023) AfCHPR 335 (7 November 2023) *Dissenting Opinion of Tchikaya J* para 39. See also *John Lazaro v United Republic of Tanzania* (Application 003/2016) (2023) AfCHPR 335 (7 November 2023) *Dissenting Opinion of Ntsebeza J* para 47.

6 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 39. *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* paras 3, 48.

## 2 Background of the matter

At the core of the dispute was the imposition of the death penalty as a form of punishment for the egregious crimes committed by the Applicant. The Applicant and four other accused broke into Mr Clemence Mbasa's (his neighbour) property, where they tied him up and gagged his wife when she tried raising the alarm.<sup>7</sup> The Applicant and the four others demanded money from the recent sale of coffee from the neighbour.<sup>8</sup> When they realised that he recognised them, they brutally killed him by plunging a sword through his neck and proceeded to ensure that he was dead by dragging him across the room.<sup>9</sup> The deceased's wife was tortured by the Applicant and the four other accused, demanding that she show them where the money was.<sup>10</sup> Her abdomen and shoulders were slit using a machete and she was tied by a rope around her neck.<sup>11</sup> She indicated where the money was, but the Applicant and the four other accused continued to assault her until she pretended to be dead.<sup>12</sup> They evaded the scene with the money, whilst the deceased's wife ran outside and rang the alarm, which attracted the neighbours' attention.<sup>13</sup>

The Applicant was incarcerated on the same day of the event and was charged with the offence of murder, wherein he pleaded not guilty.<sup>14</sup> On 6 August 2010, the main trial was held, and the Applicant was found guilty of murder and sentenced to death by hanging. An appeal was filed by the Applicant, which was dismissed due to a lack of merit.<sup>15</sup>

## 3 Core issue

The Applicant's allegations included that the Respondent State violated Articles 4 and 5 of the Charter through its imposition of the death penalty.<sup>16</sup> According to the Applicant, Article 4 was violated by the imposition of a mandatory death penalty without having regard to the circumstances of the offender; the imposition of the death penalty outside the category of cases to which it can be applied and

7 *John Lazaro v United Republic of Tanzania* (Application 003/2016) (2023) AfCHPR 335 (7 November 2023) *Merits and Reparation* para 3.

8 As above.

9 As above.

10 *Lazaro* (n 7) para 4

11 As above.

12 As above.

13 As above.

14 As above.

15 *Lazaro* (n 7) para 6.

16 *Lazaro* (n 7) para 7.

its imposition without a fair trial. He further alleged that Article 5 was violated by the imposition of the death penalty by hanging.<sup>17</sup>

Articles 4 and 5 provide:

- (4) Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right;
- (5) Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.<sup>18</sup>

## 4 Majority judgment

### 4.1 Violation of Article 4 of the Charter

The Court had to ascertain whether the imposition of the death penalty is tantamount to an unjustifiable deprivation of the right to life. The Court considered Article 4 of the Charter and the Applicant's grounds alleging the violation thereof.<sup>19</sup>

The Court noted that although there have been international developments sanctioning the abolition of the death penalty, it is still the law in some states, as there has not been a universal ratification of a treaty on its abolition. Comparably, only 90 out of the 173 state parties to the International Covenant on Civil and Political Rights ('ICCPR') have ratified the Second Optional Protocol to the ICCPR, which has been instrumental in international developments abolishing the death penalty.<sup>20</sup> The aforementioned signifies that although there has been international support for the abolition of the death penalty, its prohibition is still not absolute.<sup>21</sup>

The test for ascertaining whether a death sentence is unjustifiable has been well established in international human rights jurisprudence.<sup>22</sup> The criteria are:

<sup>17</sup> As above.

<sup>18</sup> African Charter on Human and Peoples' Rights (1981) Articles 4 & 5.

<sup>19</sup> *Lazaro* (n 7) paras 73-74.

<sup>20</sup> *Lazaro* (n 7) para 75.

<sup>21</sup> *Lazaro* (n 7) para 76.

<sup>22</sup> *Lazaro* (n 7) para 77. The Court makes reference to: *International PEN & Others (on behalf of Ken Saro-Wiwa Jnr) v Nigeria* (2000) AHRLR 212 (ACHPR 1998); *Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (ACHPR 2000); *Ally Rajabu & Others v United Republic of Tanzania* (Merits and Reparations) (Application 007/2015) (2019) 1 AfCLR 96 (28 November 2019); Article 6(2) of ICCPR (which provides that in states where the death penalty has not been abolished, sentence of death may only be imposed for serious crimes) and *Eversley Thompson v St Vincent & the Grenadine*, Communication 806/1998, UN Doc CCPR/C/70/D/806/1998 (2000).

- (i) whether the death sentence is provided for by law;
- (ii) whether the sentence was passed by a competent court; and
- (iii) whether due process was followed in the proceedings leading to the death sentence.<sup>23</sup>

In making an assessment based on the above criteria, the Court found that, in relation to the first question, section 197 of the Respondent State's Penal Code CAP 16.RE 2002 makes the death penalty an obligatory punishment for the offence of murder.<sup>24</sup> In relation to the second question, section 3(2)(a) of the Criminal Procedure Act and Article 107(1)(a) of the Respondent State's Constitution authorises the High Court's jurisdiction in matters where the death penalty is an obligatory punishment.<sup>25</sup> In relation to the third question, in the absence of any irregularities or perceivable errors equivalent to a transgression of due process, the Court found that due process was followed in the proceedings, irrespective of the Applicant alleging the converse due to sharing legal representation with his co-accused, who divulged information incriminating him.<sup>26</sup> The Court took into cognisance that the Applicant received new legal representation when the issue of conflict of interest became apparent.<sup>27</sup>

Although the assessment met the criteria laid down, the Court recognised that the death penalty sanctioned by the Respondent State in the offence of murder does not adhere to due process because it does not permit a judicial officer discretion to evaluate other methods of punishment.<sup>28</sup> As such, the Court concluded that the mandatory imposition of the death penalty is tantamount to the violation of the right to life as envisaged in Article 4 of the Charter.<sup>29</sup>

#### 4.2 Violation of Article 5 of the Charter

With regard to the violation of the right to dignity as envisaged in Article 5 of the Charter, the Court had to ascertain whether the Applicant's right to be treated with dignity was infringed by his sentence to death by hanging.

The Applicant contended that the manner in which the punishment was to be executed results in 'excessive suffering, which is cruel, inhumane and degrading'.<sup>30</sup> In addition, the Applicant also contended that the prison conditions he endured were tantamount to

23 *Lazaro* (n 7) para 77.

24 *Lazaro* (n 7) para 78.

25 *Lazaro* (n 7) para 79.

26 *Lazaro* (n 7) paras 80-81.

27 *Lazaro* (n 7) para 80.

28 *Lazaro* (n 7) para 83.

29 *Lazaro* (n 7) para 84.

30 *Lazaro* (n 7) para 85.

torture due to the overcrowded nature of the prison.<sup>31</sup> Furthermore, death penalty prisoners are secluded, all of which is contrary to Article 5 of the Charter.<sup>32</sup>

The Court revisited its jurisprudence on the imposition of the death penalty and reiterated that the death penalty by hanging is 'inherently degrading and encroaches upon dignity in respect of the prohibition of [...] cruel, inhuman and degrading treatment', thus constituting a violation of Article 5 of the Charter.<sup>33</sup> As such, the Court concluded that the imposition of the death penalty *by hanging* is a violation of Article 5 of the Charter.<sup>34</sup>

Of importance is that the Court found the imposition of the death penalty due to its manner of execution (i.e. hanging) is a violation of Article 5 and not that the sentence itself is a violation of the Article.

## 5 Dissenting Opinion of Ntsebeza J

### 5.1 Violation of Articles 4 & 5 of the Charter

In his dissenting opinion, Ntsebeza J finds that the mandatory imposition of the death penalty constitutes a violation of the right to life as enshrined in Article 4 of the Charter.<sup>35</sup> He further concurs with the majority that the death penalty by hanging is a direct infringement of the right contained in Article 5 of the Charter.<sup>36</sup> However, he deviates by extending the protection offered by Article 5 to the punishment itself, rather than the method of execution.<sup>37</sup> Ntsebeza J argues that the death penalty is a violation of the right to dignity, as 'it is a cruel, inhumane, degrading and torturous punishment', regardless of the manner in which it is to be executed.<sup>38</sup> He disagrees with the notion that the method of execution should exclude suffering or consist of the least suffering, where permissible.<sup>39</sup> He asserts that the death penalty as a method of punishment is 'unconscionable'.

He continues to state that at the heart of international human rights jurisprudence lies the concept of human dignity, the killing of human life in any manner and by whoever (i.e. individual or state) is

31 *Lazaro* (n 7) para 86.

32 *As above*.

33 *Lazaro* (n 7) para 90.

34 *Lazaro* (n 7) para 92, author's emphasis added.

35 *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* para 3.

36 *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* para 47.

37 *As above*.

38 *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* para 4.

39 *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* para 7.

undignified and tantamount to the infringement of the right in Article 5.<sup>40</sup> The imposition of the death penalty as a method of retribution further denies a person the most fundamental human right, which is the right to life, and regardless of the gravity of the crime committed, no person should be deprived thereof.<sup>41</sup>

Besides the death penalty's inconsistency with Article 5 of the Charter, he identifies five reasons as to why it should be abolished as a method of punishment.<sup>42</sup> First, the punishment is irreversible, and mistakes happen, as the judicial criminal system is fallible and there may be wrongful convictions.<sup>43</sup> However, when an offender is executed, there is no reversing that error.<sup>44</sup> Secondly, the punishment does not deter crime, and there is insufficient proof to show that the death penalty is an effective method of deterrence.<sup>45</sup> Thirdly, the punishment is often used in skewed justice systems.<sup>46</sup> In numerous cases, Amnesty International recorded that people were executed after trials that were 'grossly unfair', based on 'torture-tainted evidence' and with 'inadequate legal representation'.<sup>47</sup> In some countries, the sentence is imposed as mandatory retribution for certain offences and judicial officers are not given discretion to evaluate the circumstances of the crime or the offender prior to sentencing.<sup>48</sup> Fourthly, the punishment is discriminatory, as studies evidence that facts such as racial background, socioeconomic status and quality of legal representation have an impact on the prospects of receiving the death sentence.<sup>49</sup> The aforementioned subverts principles such as fairness and equal protection before the law.<sup>50</sup> Lastly, the punishment is used as a political tool, as the death penalty often punishes political opponents in some countries.<sup>51</sup>

There has been growing international jurisprudence identifying the illegality of the death penalty as a norm of customary international law within the context of the right to human dignity and the prohibition of torture and cruel, inhumane, or degrading treatment or punishment.<sup>52</sup> Ntsebeza J notes the decision of the South African Constitutional Court that pronounced the death penalty as a denial of humanity and a degrading form of retribution that is

40 Lazaro (n 5) *Dissenting Opinion of Ntsebeza J* para 8.

41 Lazaro (n 5) *Dissenting Opinion of Ntsebeza J* para 10.

42 Lazaro (n 5) *Dissenting Opinion of Ntsebeza J* para 24.

43 Lazaro (n 5) *Dissenting Opinion of Ntsebeza J* para 25.

44 As above.

45 Lazaro (n 5) *Dissenting Opinion of Ntsebeza J* para 26.

46 Lazaro (n 5) *Dissenting Opinion of Ntsebeza J* para 27.

47 As above.

48 As above.

49 Lazaro (n 5) *Dissenting Opinion of Ntsebeza J* para 28.

50 As above.

51 Lazaro (n 5) *Dissenting Opinion of Ntsebeza J* para 30.

52 Lazaro (n 5) *Dissenting Opinion of Ntsebeza J* para 15.

tantamount to the deprivation of the right to dignity.<sup>53</sup> He furthermore borrows from the Constitutional Court's analysis of international jurisprudence that signifies an inclination towards the abolition of the death penalty.<sup>54</sup>

Ntsebeza J concluded that the imposition of the death penalty as a method of retribution is an infringement of the right afforded to an individual in Article 5 of the Charter.<sup>55</sup> Accordingly, the death penalty is inconsistent with the Charter and should be struck off the Respondent State's legislation as a form of retribution.<sup>56</sup> He further urged member states of the African Union to take progressive steps towards the abolition of the death penalty and utilise other methods of punishment that respect human dignity and are in line with international human rights jurisprudence.<sup>57</sup>

## 6 Dissenting Opinion of Tchikaya J

### 6.1 Violation of Articles 4 & 5 of the Charter

Tchikaya J provides a uniform dissenting opinion for the matters of *John Lazaro*, *Makungu Misalaba* and *Chrizant John*, in which he notes that Articles 4 and 5 of the Charter provide adequate legal foundation to outlaw the death sentence on the one hand, whilst evoking the Court to make greater use of its powers of interpretation on the other hand.<sup>58</sup> Thus, he finds that the Court's reasoning in the majority judgment failed to rule on the international human rights jurisprudence relevant to the death penalty, including the opportunity to interpret the applicable African law on capital punishment.<sup>59</sup>

Tchikaya J maintains that it is contradictory to conclude that a person's dignity was not violated while simultaneously upholding their sentence to death.<sup>60</sup> The power of interpretation affords the Court the opportunity to exercise its judicial discretion to provide clarity to the rule of law.<sup>61</sup> The Court must assert its role and take a stance, 'it cannot abstain'.<sup>62</sup> Therefore, the decision rests with the Court to ascertain the meaning to be bestowed upon the provisions of Article

53 *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* para 17. See also *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

54 *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* paras 33-46.

55 *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* para 47.

56 As above.

57 *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* paras 47-48.

58 *Misalaba* (n 3); *John* (n 4) and *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 3.

59 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 9.

60 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 18.

61 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 21.

62 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 20.



4 of the Charter, in the absence of prejudice to the volition of sovereign states.<sup>63</sup>

Tchikaya J notes that what makes Article 4 of the Charter significant is that it neither prescribes nor proscribes the death sentence as a method of punishment.<sup>64</sup> However, current international trends advance its abolition, as evidenced by regional and international developments.<sup>65</sup> The most notable international developments include the United Nations,<sup>66</sup> while regional developments include the European human rights system, which further advances the abolition of the death penalty through enacted protocols such as the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>67</sup> Furthermore, at the African regional level, out of the 55 member states of the African Union, almost 40 states are abolitionist in law and practice.<sup>68</sup>

With the above having been noted, Tchikaya J finds that there is adequate regional practice by African states for the Court to exercise its judicial discretion.<sup>69</sup> This can be done by interpreting Article 4 of the Charter as prohibiting the death penalty, while making its abolition in the national legislation of African countries a requisite, to the extent that it is inconsistent with the development of human rights jurisprudence.<sup>70</sup> Tchikaya J supports his findings by further noting that the Declaration of the Continental Conference on the Abolition of the Death Penalty in Africa ('the Cotonou Declaration'), adopted in 2014 by the African Commission calls for the abolition of the death sentence in the national legislation of African states and further promotes states to ratify the Additional Protocol to the African Charter on Human and Peoples' Rights on the Abolition of the Death Penalty in Africa.<sup>71</sup> As such, the court's stance cannot be less than that of the Cotonou Declaration.<sup>72</sup>

Tchikaya J concludes that the mere existence of the death sentence undermines human rights, the issue is not why or how it is executed.<sup>73</sup> Similar to Ntsebeza J, he concludes that the death penalty is inconsistent with the Charter and should be struck off the Respondent State's legislation as a form of retribution.<sup>74</sup> He also urged member states of the African Union to take progressive steps towards the abolition of the death penalty and utilise other methods

63 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 22.

64 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 23.

65 As above.

66 As above.

67 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 24.

68 As above.

69 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 28.

70 As above.

71 As above.

72 As above.

73 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 33.

74 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 39.

of punishment that respect human dignity and are in line with international human rights jurisprudence.<sup>75</sup>

## 7 Analysis and arguments

The adoption of the Universal Declaration of Human Rights ('Universal Declaration') in 1948 by the United Nations General Assembly ('the Assembly') marked the international community's formal commitment to preserving human rights.<sup>76</sup> The reason behind the formation of international human rights law was to unite states to protect individuals internationally.<sup>77</sup> Human rights are intrinsic to every individual, and all individuals are entitled to the protection afforded by these rights, irrespective of which region of the globe they are from. Accordingly, 'the rights inherent in a person born in Africa must be the same rights inherent in a person born in Europe'.<sup>78</sup>

As mentioned in the two dissenting opinions above, there have been notable international human rights developments sanctioning the abolition of the death penalty, notably at the United Nations level. The United Nations has been instrumental in developing international human rights jurisprudence, with the World Conference on Human Rights in Vienna adopting the Vienna Declaration and Programme of Action (Vienna Declaration), which aimed to emphasise the Universal Declaration's fundamental role in advancing human rights instruments such as the ICCPR.<sup>79</sup> The Vienna Declaration provides that:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.<sup>80</sup>

<sup>75</sup> As above.

<sup>76</sup> M Robbins 'Powerful states, customary law and the erosion of human rights through regional enforcement' (2005) 35(2) *California Western International Law Journal* at 275.

<sup>77</sup> Robbins (n 76) 276.

<sup>78</sup> Robbins (n 76) 277.

<sup>79</sup> See Vienna Declaration and Programme of Action (1993).

<sup>80</sup> n 79, Article 5. The Vienna Declaration aligns with this paper's argument that the death penalty is not in line with human rights jurisprudence and must be abolished. Human rights being indivisible, interdependent and interrelated signifies that all human rights must co-exist in a fair and equal manner on all levels (international, regional and national). The imposition of the death penalty as a method of punishment infringes on the existence of the right to life and integrity of persons, the right to dignity and the right to be free from torture, cruel, inhumane or degrading punishment and treatment. Thus, necessitating its abolition on all levels.

As such, there are great international human rights obligations incumbent on states to ensure that the rights of individuals are promoted and protected. These rights encompass the right to life and integrity of persons, and the right to be free from torture, cruel, inhumane or degrading punishment and treatment.<sup>81</sup>

These rights are universally recognised human rights.<sup>82</sup> Furthermore, these rights are protected in several regions around the globe.<sup>83</sup> As noted in the two dissenting opinions above, the right to life and dignity are fundamental rights that lie at the heart of international human rights jurisprudence. The death penalty is a direct infringement of these fundamental rights, hence the necessity for its abolition.

This paper argues for the abolition of the death penalty by advancing the arguments raised in the dissenting opinions of Tchikaya J and Ntsebeza J, namely that the death penalty is outlawed by international human rights jurisprudence; that there exists sufficient regional human rights developments in line with international human rights jurisprudence to outlaw the death penalty; and that judicial decisions play a pivotal role in advancing human rights jurisprudence on the abolition of the death penalty. However, this paper takes the arguments in the two dissenting opinions further, by arguing that the three aforementioned arguments signify a rule of customary international law abolishing the death penalty.

## 7.1 What is customary international law?

The Statute of the International Court of Justice provides the definition of customary international law.<sup>84</sup> The provisions of Article 38 indicate that customary international law consists of an objective element (state practice) and a subjective element (states' attitude towards the practice).<sup>85</sup> As such, customary international law consists

81 My argument.

82 See International Covenant on Civil and Political Rights (1966) Articles 6 & 7.

83 See African Charter on Human and Peoples' Rights (1981) Articles 4 & 5; Charter of Fundamental Rights of the European Union (2000) Articles 1, 2, 3 & 4; and ASEAN Human Rights Declaration (2012) Articles 11 & 14.

84 See Article 38 of 1945. According to the provision, the court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognised by civilised nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

85 MP Scharf 'Accelerated formation of customary international law' (2014) 20(2) *Case Western Reserve University - School of Law* at 311.

of 'a general practice accepted as law' (*opinio juris sive necessitatis*).<sup>86</sup> The concept of *opinio juris sive necessitates* in the formation of a new customary rule was explained by the International Court of Justice ('ICJ') in *Northern Sea Continental Shelf* as follows:

[...]not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.<sup>87</sup>

Although customary international law consists of two elements, the objective and subjective elements, greater emphasis has always been placed on the former, as it is easier to ascertain.<sup>88</sup> However, this paper maintains that with the establishment of bodies such as the United Nations and other similar human rights regional bodies, the position changed. State practice can now be evidenced by how states vote for resolutions at international and regional bodies, which also demonstrates states' subjective attitude towards that particular rule; legislation/treaties signed by or adopted by states, which also demonstrates states' subjective attitude; and judicial decisions also impact on state behaviour thus contributing to general state practice.<sup>89</sup>

An important caveat is that general state practice does not necessitate universal acceptance.<sup>90</sup> The majority of states must undertake a consistent practice in accordance with a rule.<sup>91</sup> As such, for the development of customary international law, there is no set threshold for the number of participating states.<sup>92</sup> Scharf notes that scholars who have analysed ICJ judgments have found that some customs have been born based on practice by less than a dozen states.<sup>93</sup> Furthermore, should a prominent player in international law

86 See Article 38(1)(b) of 1945. See also International Committee of The Red Cross 'Customary international humanitarian law?' *International Committee of the Red Cross* 29 October 2010 <https://www.icrc.org/en/document/customary-inter-national-humanitarian-law-0> (accessed on 20 February 2024).

87 *Northern Sea Continental Shelf (Federal Republic of Germany v Denmark, Federal Republic of Germany v The Netherlands)* ICJ (20 February 1969) (1969) ICJ Report 1 para 77.

88 Scharf (n 85) 312.

89 As above.

90 Scharf (n 85) 315.

91 Robbins (n 76) 293. See also C Liu 'Regional customary international law related to China's historic rights in the South China Sea (2019) 7(2) *The Korean Journal of International and Comparative Law*.

92 Liu (n 91).

93 Scharf (n 85) 317. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ (27 June 1986) (1986) ICJ Reports 14, the Court clarified that state practice need not provide absolute uniformity in order to translate into customary international law, consistency and generality of the state practice is imperative. At para 186, the Court held 'it is

partake in the practice, more weight is placed on their participation, thus contributing towards the formation of a custom.<sup>94</sup>

As such, this paper asserts that the abolition of the death penalty is customary international law and state practice has manifested itself in various ways, including resolutions by the Assembly; international treaties; decisions by international courts and quasi-judicial bodies; and regional customary practice which encompasses resolutions by regional human rights jurisprudence bodies, regional treaties, and decisions by regional courts. The aforementioned is tantamount to customary international law and will be expanded on below.

### 7.1.1 Resolutions by the Assembly

As noted above, the United Nations has played a significant role in the development of international human rights jurisprudence. The Assembly's resolutions 'can constitute both the subjective and objective elements necessary to establish customary international law'.<sup>95</sup> In determining whether a resolution by the Assembly establishes a rule of customary international law, the contents of such resolutions and the circumstances surrounding its adoption are assessed.<sup>96</sup> A vote on a resolution acts to establish, fortify and

not to be expected that in the practice of states the application of the rules in question should have been perfect, in the sense that states should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs ... in order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.' Furthermore, the practice need not to have been practiced for a prolonged period of time. See *Northern Sea Continental Shelf* (n 87) para 74, the Court held that 'the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law...'

94 Scharf (n 85) 316. He continues to state that more weight is given to the most important states in a particular area because their participation will result in them contributing more towards the development of that particular custom (316). This paper argues that the European Union's ('EU') prominent participation in the abolition of the death penalty also contributes to the prohibition of the capital punishment being customary international law. The EU is one of the most powerful actors in international law.

95 Scharf (n 85) 324.

96 Scharf (n 85) 326. Scharf continues to explain that when making an assessment, courts take into cognisance the type of resolution, as it is an important factor. Resolutions considered as recommendations are given little weight, while declarations are 'used to impart increased solemnity', and affirmations are 'used to indicate codification or crystallization of law'. Furthermore, the language used in the resolution is also important, it must be evident whether it is a declaration or a mere aspiration. He cites *Nicaragua* (n 87) as an example, where the court viewed the Assembly's Resolution 2625 regarding Friendly Relations & Co-operation among states as a customary international law generating resolution (326).

reinforce a customary rule.<sup>97</sup> Furthermore, statements made by states explaining how they voted in a resolution also establishes customary law.<sup>98</sup> As noted by the ICJ in *Nuclear Weapons Advisory Opinions*, the Assembly's resolutions have normative value even though they are not binding.<sup>99</sup>

As such, resolutions taken at the Assembly concerning the death penalty signify an established rule of customary international law abolishing the death penalty. A resolution supporting a moratorium on the death penalty as capital punishment was adopted by the Assembly on 18 December 2007 where 104 states voted in favour of the resolution, 34 against and 29 abstained.<sup>100</sup> What made the 2007 resolution significant was that it was the first of its kind, since attempts to pass similar versions were rejected in 1994 and 1999, evidencing growing state practice and changes in state attitude towards the rule.<sup>101</sup> The eighth Assembly meeting held on 16 December 2020 further supports this change, where a resolution supporting a moratorium on the death penalty was passed, wherein 123 states voted in favour, 38 voted against, 24 countries abstained, and eight countries were absent.<sup>102</sup> The resolution in 2020 evidenced increased support for the abolition of capital punishment,<sup>103</sup> further cementing its abolition as a rule of customary international law.

### 7.1.2 *International treaties*

Treaties also foster the establishment of customary rules in various ways. First, treaties codify and explicate customary international law by reflecting existing customary law or contributing towards its progressive development.<sup>104</sup> Secondly, the negotiation process involved in treaty creation solidifies customary international law rules as indicated in the text before it comes into effect.<sup>105</sup> Lastly, a rule

97 As above.

98 As above.

99 *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* (8 July 1996) (1996) ICJ Report 3 at 226. See also D Pascoe & S Bae 'Latest developments in the UNGA death penalty moratorium resolutions 18 May 2021' <https://blogs.law.ox.ac.uk/research-and-subject-groups/death-penalty-research-unit/blog/2021/05/latest-developments-unga-death> (accessed on 15 May 2024), who emphasise on the 'significant moral weight' resolutions carry, together with domestic courts of abolitionist states and adherence to the ICCPR.

100 International Bar Association 'The death penalty under international law: A background paper to the IBAHRI Resolution on the Abolition of the Death Penalty' (2008) at 15 [https://www.ibanet.org/Human\\_Rights\\_Institute/About\\_the\\_HRI/HRI\\_Activities/abolition-of-the-death-penalty](https://www.ibanet.org/Human_Rights_Institute/About_the_HRI/HRI_Activities/abolition-of-the-death-penalty) (accessed 2 March 2023).

101 International Bar Association (n 100).

102 Pascoe & Bae (n 99).

103 As above.

104 Scharf (n 53) 319.

105 As above.

reflected in a treaty may suggest itself to states who then conform thereto in practice even if they are not a party.<sup>106</sup>

As noted in the majority judgment and in the two dissenting opinions, the Second Optional Protocol to the ICCPR has been instrumental in international developments abolishing the death penalty.<sup>107</sup> This paper maintains that the Second Optional Protocol codifies the abolition of the death penalty and contributes towards its progressive development. With 90 out of 173 state parties to the ICCPR, the Second Optional Protocol solidifies a rule of customary international law abolishing the death penalty and further evidence consistency in state practice abolishing capital punishment.

Internationally, there have also been trends advancing the abolition of the death penalty.<sup>108</sup> These international trends have been accepted as law in some states.<sup>109</sup> The 20th century began with only three states that had permanently abolished the death penalty, and in 2021, it was recorded that more than two-thirds of states around the world had abolished capital punishment in law or practice.<sup>110</sup> Records further show that approximately three states per year abolish the death penalty, evidencing consistency in the state practice, further solidifying the abolition of the death penalty as a rule of customary international law.<sup>111</sup>

### **7.1.3 Decisions by international courts and quasi-judicial bodies**

The role of courts in developing customary rules is pivotal, as they can analyse the significance of a resolution to determine whether it is a rule of customary law, and they can also interpret treaties to give clarity to their meaning in law and impact on states' behaviour.<sup>112</sup> Hence, this paper argues that it is also through the court's judgments

<sup>106</sup> Scharf (n 53) 320.

<sup>107</sup> See Lazaro (n 7) para 75; Lazaro (n 5) *Dissenting Opinion of Ntsebeza J* para 18; Lazaro (n 5) *Dissenting Opinion of Tchikaya J* para 29.

<sup>108</sup> As above.

<sup>109</sup> As above.

<sup>110</sup> See Amnesty International 'Death Penalty 2021: Facts and figures' *Amnesty International* 24 May 2022 <https://www.amnesty.org/en/latest/news/2022/05/death-penalty-2021-facts-and-figures/> (accessed on 2 March 2024). Amnesty International further records that as of 2021, 108 states had abolished the death penalty in law for all crimes, 144 states had abolished the death penalty in law or practice, while only 55 states retained the death penalty. See also BBC News 'How many countries still have the death penalty, and how many people are executed?' *BBC News* 25 January 2024 <https://www.bbc.com/news/world-45835584> (accessed on 2 March 2024). According to BBC News, in 2022, six (6) states further abolished the death penalty either fully or partially and in 2023, parliament in two (2) states voted to abolish the capital punishment.

<sup>111</sup> International Bar Association (n 100) 9. See also Amnesty International (n 110).

<sup>112</sup> Scharf (n 85) 312.

and quasi-judicial bodies' decisions that the death penalty is outlawed.

In the absence of an explicit rule of international law prohibiting the death penalty, courts play a fundamental role, as the exercise of their judicial discretion and powers of interpretation can necessitate the abolition of the death penalty. This is done by the courts preserving and upholding rights such as the right to life and dignity, as capital punishment is a direct infringement of those rights.<sup>113</sup>

International courts have excluded the death penalty even for the most egregious crimes, and international human rights jurisprudence bodies have encouraged the abolition of the death penalty.<sup>114</sup> In the landmark decision of the Human Rights Committee ('the Committee') in 2003, it was decided that Canada was obligated to ensure that the death penalty would not be executed against a deportee, and the Committee remarked as follows:

For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence will not be carried out.<sup>115</sup>

Although the decisions of the Committee are not binding, states have taken action adhering to its decisions, signifying the pivotal role that judicial and quasi-judicial bodies play in the development of a rule of customary international law.<sup>116</sup>

## 7.2 Regional customary practice

Customary rules can be general or particular, with the latter not being binding on all states, but rather on states of that particular region.<sup>117</sup> As such, this paper concurs with the argument in the dissenting opinion of Tchikaya J that the African continent has sufficient regional customary practice at its disposal to outlaw the death penalty. However, this paper takes the argument further by providing that regional customary practice signifies the existence of a rule of

113 See Lazaro (n 5) *Dissenting Opinion of Tchikaya J* paras 18, 21, 20, 22.

114 International Bar Association (n 100) 10. See also R Hood 'Capital punishment: The USA in world perspective' (2005) 3 *Center for Human Rights and Global Justice Working Paper: Extrajudicial Executions Series* at 6.

115 *Roger Judge v Canada*, Communication 829/1998, UNHR Committee (13 August 2003), UN Doc CCPR/C/78/D/829/1998 (2003) para 10.4.

116 My argument.

117 Liu (n 91). Liu also adds that particular international customary law may also be formed by states from different regions around the world on the basis of shared common interest.



customary international law abolishing the death penalty.<sup>118</sup> Similar to customary international law, regional customary law can also be established through resolutions taken by human rights bodies, treaties and judicial decisions in a region.

### **7.2.1 Resolutions by the African Commission on Human and Peoples' Rights**

There have been several resolutions taken at the regional level that have signified the African Commission on Human and Peoples' Rights' ('the Commission') commitment to the abolition of the death penalty. The Commission's Resolutions ACHPR/Res.42 (XXVI) 99; ACHPR/Res.136 (XXXXIV) 08; ACHPR/Res. 375 (LX) 2017 and ACHPR/Res. 483 (XXXI1I) 2021, have urged state parties to the Charter to ratify the Second Optional Protocol of the ICCPR abolishing the death penalty and to further place a moratorium on the death penalty.<sup>119</sup> Furthermore, resolution ACHPR/Res. 416 (LXIV) 2019 on the right to life, encouraged state parties to the Charter who have placed a moratorium on executions to take further measures for the abolition of the capital punishment in their domestic legislation.<sup>120</sup>

Most recently, at the 73rd public ordinary session from 20 October to 9 November 2022, the Commission recalled its commitment to uphold and preserve human rights in Africa, including to the protection of the rights enshrined in Articles 4 and 5 of the Charter.<sup>121</sup> Regarding its commitment to advance the right to life and dignity, the Commission encouraged those state parties to the Charter that maintain the death penalty to uphold the right to life, dignity, and the prohibition of torture in line with regional and international human rights jurisprudence; to curtail death sentences for all persons on death row; to take progressive steps towards the abolition of the death penalty; and that state parties with a moratorium on all executions to implement legislative measures promoting the total abolition of the death penalty.<sup>122</sup> The Commission further requested all state parties to include information on measures taken to abolish the death penalty domestically in their Periodic Reports and to further

118 This paper argues that regional practice also signifies the existence of a rule of international customary law, as it has been said that the unification of different regions on the basis of common interest can also establish customary international law. See Liu (n 91).

119 African Union 'Resolution on the death penalty and the prohibition of torture and cruel, inhuman or degrading punishment or treatment - ACHPR/Res.544 (LXXIII) 2022' <https://achpr.au.int/index.php/en/adopted-resolutions/544-resolution-death-penalty-and-prohibition-torture-and-cruel> (accessed on 23 May 2024).

120 African Union 'Resolution on the death penalty and the prohibition of torture and cruel, inhuman or degrading punishment or treatment - ACHPR/Res.544 (LXXIII) 2022' <https://achpr.au.int/index.php/en/adopted-resolutions/544-resolution-death-penalty-and-prohibition-torture-and-cruel> (accessed on 23 May 2024).

121 African Union (n 119).

122 As above.

support the adoption of the African Union's draft Additional Protocol to the African Charter on the abolition of the Death Penalty in Africa.<sup>123</sup>

As such, the resolutions by the Commission signify regional commitments to abolish the death penalty. These resolutions are in line with international human rights jurisprudence, signifying the existence of a rule of customary international law abolishing the death penalty.

### **7.2.2 Regional treaties**

There have been several protocols taken at an African regional level encouraging the prohibition of the death penalty. For instance, Article 4(2)(j) of the Protocol on the Rights of Women in Africa ('the Maputo Protocol') to the African Charter urged states to ensure that the death penalty is not to be applied to pregnant or breastfeeding women, where it is still applied.<sup>124</sup> While the Maputo Protocol did not necessitate the total abolition of the death penalty, it constituted progressive steps towards the total abolition of capital punishment, as several protocols were developed thereafter.<sup>125</sup>

Two regional conferences relating to the Death Penalty in Africa were convened in September 2009 and in April 2010, where it was recommended that a Protocol on the abolition of the Death Penalty in Africa must be drafted.<sup>126</sup> The adoption of that Regional Protocol by member states of the African Union was supported in the Continental Conference on the Death Penalty held in Benin in 2014.<sup>127</sup> In April 2018, the African Regional Congress against the Death Penalty was held, where the adoption of the draft Additional Protocol to the African Charter on the abolition of the death penalty gained support from member states.<sup>128</sup> As noted in a separate opinion of Tchikaya J, out of the 55 member states of the African Union, nearly 40 states are abolitionist in law or practice, which evidences a regional commitment to the abolition of the death penalty.<sup>129</sup>

Comparably in Europe, the Charter of Fundamental Rights of the European Union protects the right to human dignity in Article 1, Article 2 protects the right to life and explicitly prohibits the death penalty, Article 3 protects the right to integrity of the person and

<sup>123</sup> As above.

<sup>124</sup> As above. See also Protocol to the African Charter on Human and Peoples' Rights on the Right of Women in Africa (2003).

<sup>125</sup> African Union (n 119).

<sup>126</sup> As above.

<sup>127</sup> As above.

<sup>128</sup> As above.

<sup>129</sup> Lazaro (n 34) *Dissenting Opinion of Tchikaya J* para 24. See also *Ghati Mwita v United Republic of Tanzania* (Application No. 012/2019) (2022) AfCHPR 44 (1 December 2022) *Separate Opinion of Tchikaya J* para 36.

Article 4 prohibits torture and inhumane or degrading treatment or punishment. The right enshrined in Article 2 is strongly protected by the European Union ('EU') to the extent that, as a requirement of membership, the EU requires all member states to abolish the death penalty.<sup>130</sup> Protocol 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Council of Europe in 2002, also abolishes the death penalty in Article 1. The Council of Europe and the EU vehemently oppose the death penalty, as they consider its abolition as enhancing dignity and progressive development of human rights.<sup>131</sup>

The above evidence strong regional commitments in line with international human rights jurisprudence to abolish the death penalty, also signifying the existence of a rule of customary international law abolishing the capital punishment.

### 7.2.3 Judicial decisions

As noted in the dissenting opinion of Tchikaya J, courts have an inherent power of interpretation, which allows them to exercise their judicial discretion to clarify the meaning of a rule of law.<sup>132</sup> The provisions of Article 4 of the Charter neither proscribes nor prescribes the death sentence as a method of punishment,<sup>133</sup> which leaves sufficient room for the court to provide clarity on the death penalty through its power of interpretation. In clarifying the meaning of a rule of law, courts 'need to keep pace with the evolution of international law'.<sup>134</sup> The supremacy of international law accords it applicability in all domestic procedural and substantive laws of states. These international undertakings are entered into and settled by states amongst themselves, who sequentially have to conform their domestic laws to these international commitments.<sup>135</sup> Accordingly,

130 International Bar Association (n 100) 12.

131 As above.

132 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 21.

133 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 23. States who retain the death penalty also have similar provisions in their human rights declarations/protocols. Therefore, if courts exercise their judicial discretion of interpretation, they can necessitate the abolition of the death sentence as it infringes on the right to life, dignity and not to be subject to torture or to cruel, inhumane or degrading treatment or punishment. For example, in the ASEAN Human Rights Declaration, Article 11 provides that every person has an inherent right to life which is protected by the law, and Article 14 provides that no person shall be subject to torture or to cruel, inhumane or degrading treatment or punishment. ASEAN states are strongly retentionist, with only two (2) states out of ten (10) having outlawed the death penalty. See S Petcharamesree et al 'ASEAN and the Death Penalty: Theoretical and Legal Views and a Pathway to Abolition' in S Petcharamesree et al (eds) *Unpacking the Death Penalty in ASEAN* (2023).

134 Mwita (n 129) para 7.

135 Mwita (n 129) para 39. Tchikaya J continues to state that adhering to and conforming to international commitments does not tantamount to states renouncing their sovereignty.

states must not enact domestic laws that are contrary to their international human rights obligations, such as legalising the death penalty as a method of punishment, as it is contradictory to international human rights jurisprudence. Courts can exercise their judicial powers to ensure that states fulfil their international human rights obligations, thus developing and signifying the existence of a rule of customary international law.

## 8 Concluding Remarks

This paper has argued that there is sufficient state practice evidencing a rule of customary international law abolishing the death penalty. Growing trends in international and regional human rights jurisprudence bodies towards the abolition of the death penalty all evidence the existence of a rule of customary international law on the abolition of the death penalty. These sources include resolutions by international and regional human rights bodies, international and regional treaties, judicial decisions of international and regional courts, and decisions of quasi-judicial international and regional bodies.

The broader categorisation of the abolition of the death penalty as customary international law encourages states to adopt progressive methods of punishment that are in line with human rights jurisprudence. Punishment that is cruel, inhumane, and degrading, such as the death penalty, should not be legalised by states. As enunciated by the South African Constitutional Court in *Makwanyane*, the Biblical precept of ‘an eye for an eye, and a tooth for a tooth’ has been long outgrown.<sup>136</sup> True justice is restorative and involves a balancing process, where deterrence, prevention and retribution are weighed against other methods of punishment available to the state.<sup>137</sup>

As concluded in *Makwanyane*, ‘everyone, including the most abominable of human beings, has the right to life.’<sup>138</sup> Thirty years later, the same conclusion is reiterated.

<sup>136</sup> n 53, para 29.

<sup>137</sup> *Makwanyane* (n 53) para 35.

<sup>138</sup> n 53, para 392.

# REGULATING AUTOMATED DECISION-MAKING: AN ANALYSIS OF SECTION 71 OF POPIA AND ITS IMPLICATIONS FOR PRIVACY AND DATA PROTECTION

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by Caitlin Leipsig



## Abstract

*The rapid evolution of technology and its integration into various sectors of society has necessitated comprehensive data protection legislation to safeguard individuals' privacy rights. This paper conducts a comparative analysis between the Protection of Personal Information Act (POPIA) of South Africa and the General Data Protection Regulation (GDPR) of the European Union, focusing particularly on their regulatory frameworks concerning automated decision-making and its implications for privacy and data protection. POPIA, enacted in 2013 after seven years of development, seeks to regulate the processing of personal information within South Africa, aligning with international data protection standards. However, with the emergence of automated decision-making systems powered by artificial intelligence and machine learning algorithms, concerns arise regarding privacy, transparency, and accountability. This paper explores how POPIA's principles, including accountability and data processing conditions, address these challenges, while also acknowledging potential gaps. Drawing parallels with the GDPR – recognised as the international benchmark for data protection – reveals areas where POPIA could enhance its regulatory approach. The GDPR's emphasis on transparency, explicit consent, and the right to explanation in ADM processes provides valuable insights for POPIA's refinement. Furthermore, the GDPR's provisions for regulatory strategies, codes of conduct, and remedies offer potential avenues for strengthening POPIA's enforcement mechanisms. By evaluating the foundational concepts and core values of both legislations, this paper*

*offers recommendations for aligning POPIA more closely with GDPR best practices, particularly in the context of ADM. It underscores the importance of continuous adaptation and international collaboration in addressing the evolving challenges of data protection in the digital age.*

## 1 Introduction

In November of 2019, high-profile tech entrepreneur David Hansson publicly criticised the recently released Apple credit card for being sexist – claiming that his female partner had received a lower Apple Card credit limit simply for being a woman.<sup>1</sup> Hansson questioned why his wife – who had a better credit score and other factors in her favour – was denied her application for an increase in credit limit. Steve Wozniak, original co-founder of Apple, responded to Hansson’s tweet with a similar account.<sup>2</sup> According to Wozniak, he received ten times the credit limit that his wife received despite the couple having no separate bank or credit accounts, or owning separate assets.<sup>3</sup>

Hansson was particularly critical of the fact that the credit card division representatives at Apple had no insight into how the algorithms had come to a decision and had seemingly followed the result of the algorithm blindly.<sup>4</sup> In another tweet, Hansson stated:<sup>5</sup>

Apple has handed the customer experience and their reputation as an inclusive organization over to a biased, sexist algorithm it does not understand, cannot reason with, and is unable to control. When a trillion-dollar company simply accepts the algorithmic overlord like this ...

The ‘black box’ problem that Hansson described in his tweets is a notable concern in the emerging artificial intelligence (AI) sector.<sup>6</sup> A black box is an AI system whose inputs and operations are not visible to the user or another interested party – it arrives at decisions without explaining how they were reached.<sup>7</sup> Although the United States regulators exonerated Apple and its bankroller, Goldman Sachs, of breaking fair lending laws,<sup>8</sup> the issue that was brought up remains

1 The New York Times ‘Apple Card investigated after gender discrimination complaints’ <https://www.nytimes.com/2019/11/10/business/apple-credit-card-investigation.html> (accessed 10 November 2023).

2 As above.

3 As above.

4 As above.

5 As above.

6 UM-Dearborn ‘AI’s mysterious “black box” problem, explained’ <https://umdearborn.edu/news/ais-mysterious-black-box-problem-explained> (accessed 10 November 2023).

7 TechTarget ‘WhatIs.com’ <https://www.techtarget.com/whatis/definition/black-box-AI#:~:text=Black%20box%20AI%20is%20any,to%20how%20they%20were%20reached> (accessed 10 November 2023).

8 The Verge ‘The Apple Card doesn’t actually discriminate against women, investigators say’ <https://www.theverge.com/2021/3/23/22347127/goldman-sachs-apple-card-no-gender-discrimination> (accessed 10 November 2023).

relevant, and it poses the question of how risks inherent in artificial intelligence and automated decision-making (ADM) affect people's day-to-day lives.<sup>9</sup> Many jurisdictions around the world are in the process of supplementing their existing laws to regulate artificial intelligence. These existing laws primarily occur within legislation that governs data protection – such as the European Union's renowned General Data Protection Regulation,<sup>10</sup> or South Africa's own Protection of Personal Information Act (POPIA).<sup>11</sup>

POPIA is the comprehensive data protection statute of South Africa, which seeks to regulate the processing of personal information in private and public spheres.<sup>12</sup> The Act, which took seven years to become fully implemented after being signed into power in 2013, sets out the minimum standards concerning the accessing and processing of personal information belonging to a data subject.<sup>13</sup> POPIA was created to conform with the former benchmark for data protection laws, namely the 1995 General Data Protection Directive – although this directive has since been replaced with the General Data Protection Regulation (GDPR). POPIA sets out to establish mechanisms that are in harmony with international regulations to protect the privacy of personal information.<sup>14</sup>

The right to privacy is fundamental, especially in today's society, with new, emerging technologies that threaten an individual's rights and freedoms in this regard. Privacy is recognised as a personality interest by the South African common law,<sup>15</sup> and the South African Constitution additionally recognises it in section 14.<sup>16</sup> Privacy is defined as:<sup>17</sup>

the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated to others.

Since the 1970s, it has been put forward that an individual should be able to decide for themselves whether their personal information can be collected and used by others.<sup>18</sup> However, as technologies have advanced and individuals' internet usage has increased, personal

9 Automated decision making is defined in section 71(1) of the Protection of Personal Information Act 4 of 2013 as a decision that results in legal consequences for a data subject or which substantially affects them, which is based solely on the basis of the automated processing of personal information intended to create a profile of that person.

10 General Data Protection Regulation of 2016 (Regulation (EU) 2016/679).

11 Protection of Personal Information Act 4 of 2013.

12 As above.

13 Chapter 3 POPIA.

14 Roos 'Data privacy law' in van der Merwe (ed) *Information and Communications Technology Law* (2021) 515.

15 Roos (n 14) 470.

16 The Constitution of the Republic of South Africa, 1996.

17 Roos (n 14) 395.

18 Roos (n 14) 358.

information has become readily available online for use by various entities.<sup>19</sup> Personal data is now a valuable economic commodity for companies like Apple, Google, Facebook and others, who have built business models based on collecting and processing people's personal data to create economic income.<sup>20</sup>

'Big Data' is the term used to describe the practice of collecting, analysing, packaging and selling data by enterprises to ascertain the habits, personalities, and market behaviours of data subjects.<sup>21</sup> This practice involves combining large volumes of diversely sourced data and then analysing it through automated, self-learning algorithms to make or inform decisions.<sup>22</sup> The predictive potential of Big Data holds much value for companies. Initially, this monitoring of human behaviour was to increase companies' digital advertising income.<sup>23</sup> However, the practice has evolved into companies using the data to control exceedingly high market capitalisation values – higher than any other company in recorded history.<sup>24</sup>

The initial optimism of this potential has fallen away to reveal evidence of manipulation and privacy risks for data subjects.<sup>25</sup> It is evident that the processing of one's personal information poses a real threat to that individual's privacy,<sup>26</sup> and Krzystofek writes that the projection of behaviours and characteristics of persons which are modelled on uncertain information – obtained from places such as social networking services, processed through 'oversimplified algorithms defined by various institutions' – could lead to the discrimination and stigmatisation of data subjects.<sup>27</sup>

The rapid advancements in technology have led to the widespread use of automated decision-making systems across various industries. These systems, powered by artificial intelligence and machine learning algorithms, can analyse vast amounts of data, and make decisions without human intervention. While automation brings efficiency and convenience, it also raises privacy and data protection concerns. This article aims to explore the regulatory framework of automated decision-making under Section 71 of the Protection of Personal Information Act (POPIA) and analyse its implications for privacy and data protection.

19 Snail ka Mtuze & Papadopoulos 'Privacy and data protection' in Papadopoulos & Snail ka Mtuze *Cyberlaw@SA* (2022) 308.

20 Roos (n 14) 388.

21 Roos (n 14) 391.

22 Snail ka Mtuze & Papadopoulos (n 19) 308.

23 As above.

24 As above.

25 As above.

26 Roos (n 14) 394.

27 Krzystofek *General Data Protection Regulation (EU) 2016/679 – Post Reform Personal Data Protection in the European Union* (2019) 175.



The discussion that follows will explore the use of algorithms and AI in automated decision-making and the profiling of data subjects in specific sectors. These concepts will determine whether POPIA sufficiently allows data subjects to exercise their right not to be subject to ADM under specific conditions. Section 2 will delve into the critical elements of POPIA, defining relevant terms and examining its effectiveness. Section 3 will discuss the respective European law that governs data protection, looking at its principles and the differences between this law and the South African legislation. Section 4 will conclude the research.

### 1.1 Data processing and AI in Africa

Technology is not neutral, and developments such as artificial intelligence contain inherent biases that have the potential to magnify discrimination in the systems where they are implemented.<sup>28</sup> This potential is only intensified in developing regions.<sup>29</sup> The use of artificial intelligence in data processing, specifically in the Financial Services Industry, will be looked at in order to understand the context of data subjects within developing countries. It will focus on what AI and skewed data mean for the privacy and protection of data subjects in Africa. Various sources are discussed and analysed for a balanced view of the challenges addressed.

### 1.2 Artificial intelligence and accountability

Artificial intelligence (AI) is a broad term for a computer or software system which has the capability of being programmed to 'think' like a human in order to analyse information or data, search for patterns, or make decisions.<sup>30</sup> AI is being progressively more utilised as an emerging technology in various sectors, and among its core features are algorithmically controlled automated decision-making systems.<sup>31</sup> As discussed above, ADM systems are increasingly used in decision-making processes in both the public and private spheres.<sup>32</sup> These systems, while having the ability to make decisions concerning outcomes relating to matters such as health and finance, have the potential to have a significant negative impact on organisations,

28 Ahmed 'A gender perspective on the use of Artificial Intelligence in the African FinTech Ecosystem: Case studies from South Africa, Kenya, Nigeria, and Ghana' 2021 *Paper presented at International Telecommunications Society (ITS) 23rd Biennial Conference 2*.

29 Ahmed (n 28) 2.

30 ALT Advisory, A.I.MPACT, September 2022, accessible at [ai.altadvisory.africa](https://ai.altadvisory.africa) (accessed 10 November 2023).

31 Gwagwa, Kraemer-Mbula, Rizk, Rutenberg & de Beer 'Artificial Intelligence (AI) deployments in Africa: Benefits, challenges and policy dimensions' 2020 *The African Journal of Information and Communication (AJIC)* 3.

32 Gwagwa et al (n 31) 3.

individuals and society as a whole if left unchecked.<sup>33</sup> The lack of transparency and accountability in AI systems can exacerbate these potential negative impacts.<sup>34</sup> As the use of AI technologies increases, there is a growing necessity to ensure there is regulation that is sufficient in affording the right to equality and protection against discrimination for any persons who stand to be marginalised by such digital change.<sup>35</sup>

In discussing ADM and AI, a closer look must be had at the algorithms involved in these processes and the potential that skewed data and biases have to negatively impact the equality of automated decision-making.

### 1.3 AI risks and challenges

The use of artificial intelligence in data processing comes with certain risks that have the potential to limit the rights of data subjects not to be discriminated against. Automated decision-making presents a challenge in the form of biased or non-representative data.<sup>36</sup> Data training must occur in order to teach an algorithm to perform an assigned task and then continuously improve the success rate of this task.<sup>37</sup> AI based on biased or non-representative data can entrench existing social or economic inequality by recreating the gaps in representation and the biases of the data sets that are used to train the AI.<sup>38</sup>

A lack of transparency and accountability can further intensify this already negative consequence.<sup>39</sup> POPIA sets out a condition of accountability for responsible parties, and in following this provision, there must be a focus on algorithmic accountability.<sup>40</sup> This concept entails an emphasis on the design and implementation of automated systems that use algorithms in an accountable manner so as to lessen the potential harm or negative impacts that ADM can have on data subjects.<sup>41</sup> However, due to the adaptive and complex nature of algorithmic systems, it is difficult to determine precisely how accountability can be established for an algorithm, as most data

33 As above.

34 As above.

35 ALT Advisory, A.I.MPACT, September 2022, accessible at [ai.altadvisory.africa](http://ai.altadvisory.africa) (accessed 10 November 2023).

36 Gwagwa et al (n 31) 3.

37 Ndoro, Johnston & Seymour 'Artificial Intelligence uses, benefits and challenges: A study in the Western Cape of South Africa Financial Services Industry' 2020 *SACAIR 2020 Proceedings: AI in information systems, AI for development and social good* 63.

38 Ndoro et al (n 37) 63.

39 As above.

40 Brand 'Algorithmic decision-making and the law' 2020 *JeDEM* 121.

41 Brand (n 40) 121.

subjects cannot understand the black box of codes and computer processes.<sup>42</sup>

The risks of artificial intelligence are also heightened in developing countries, especially those in Africa.<sup>43</sup> Algorithms are trained in developed Global North countries, and the result is that the training data reflects realities significantly different from those in Africa.<sup>44</sup> The absence of African research and development for AI leads to a lack of contextual application, so certain communities are excluded.<sup>45</sup> This process also affects women, and multiple levels of inequality then become an issue for women in developing countries.<sup>46</sup> The skewed algorithms amplify and echo already-existing inequalities. An example of this data bias is evident in ADM in the Financial Services Industry (FSI). Common sectors of the FSI are credit institutions, mortgage bankers and brokers, holdings and trusts, and the securities and insurance sectors.<sup>47</sup> In Africa, 60% of the 400 million people who lack access to digital financial services are women.<sup>48</sup> 35 million women in Sub-Saharan Africa are excluded from financial services, and the lack of female ownership of a bank account then leads to the data invisibility of African women.<sup>49</sup> With such a large amount of women being absent from data collection in this industry, their personal information cannot be used to train algorithms, and this consequently results in their exclusion from the FSI – among other industries, like housing, social subsidies and other safety nets.<sup>50</sup>

The use of AI algorithms in decision-making thus comes with the risk of perpetuating inequality because if the AI is established in biased or non-representative data, the AI system will reproduce the biases and gaps in the data with which it was trained.<sup>51</sup> Data subjects have the right to equality and, consequently – especially in the context of the dangers of profiling – should be afforded the right to be protected against automated decision-making that has the intention to profile.

## 2 What is POPIA?

POPIA's aim is to ensure that the processing of all personal information by a responsible party obeys the conditions set out for

42 As above.

43 Gwagwa et al (n 31) 3.

44 Gwagwa et al (n 31) 7.

45 Gwagwa et al (n 31) 4.

46 Gwagwa et al (n 31) 7.

47 Ndoro et al (n 37) 61.

48 Gwagwa et al (n 31) 8.

49 As above.

50 As above.

51 Gwagwa et al (n 31) 4.

lawful processing.<sup>52</sup> The Act is intended to promote the constitutional right to privacy,<sup>53</sup> while protecting the flow of information and access to information.<sup>53</sup> POPIA sets out rules and governs practices for the processing of information, grants individual rights concerning information, and creates an independent regulatory body – the Information Regulator – to enforce these rules and procedures.<sup>54</sup>

## 2.1 Scope of application

POPIA applies to all processing of personal information which is recorded by a responsible party domiciled in South Africa or one who makes use of automated or non-automated means in South Africa – except if these means are merely used to forward information through South Africa.<sup>55</sup> A ‘responsible party’ is a private or public body or any other body which, alone or with others, determines the purpose of and means for processing of personal information.<sup>56</sup> A ‘data subject’ is a person to whom the personal information relates.<sup>57</sup>

‘Processing’ means any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including:<sup>58</sup>

- (a) the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use;
- (b) dissemination by means of transmission, distribution or making available in any other form; or
- (c) merging, linking, as well as restriction, degradation, erasure or destruction of information.

‘Personal information’ under POPIA encompasses information which relates to gender, race, marital status, sex and health; information on a financial, medical, educational or criminal history of a person; identifying numbers or symbols, addresses, biometric data, and more.<sup>59</sup> It is information that relates to an individual that he or she does not want to be disclosed to third parties.<sup>60</sup>

POPIA applies to the processing of personal information that is:<sup>61</sup>

52 Burns & Burger-Smidt *Protection of personal information: Law and practice* (2021) 37.

53 Werksmans Attorneys ‘Unlocking the why, the how & the who of POPIA’ <https://www.werksmans.com/wp-content/uploads/2018/11/popia.pdf> (accessed 10 November 2023).

54 As above.

55 Burns & Burger-Smidt (n 52) 78.

56 S 1 POPIA.

57 Burns & Burger-Smidt (n 52) 43.

58 S1 POPIA.

59 Burns & Burger-Smidt (n 52) 55.

60 As above.

61 S 3(1) POPIA.

- (a) entered in a record by or for a responsible party by making use of automated or non-automated means: Provided that when the recorded personal information is processed by non-automated means, it forms part of a filing system or is intended to form part thereof; and
- (b) where the responsible party is—
  - (i) domiciled in the Republic; or
  - (ii) not domiciled in the Republic, but makes use of automated or non-automated means in the Republic, unless those means are used only to forward personal information through the Republic.

‘Automated means’ is any equipment capable of operating automatically in response to given instructions for the purpose of processing information, such as an algorithm.<sup>62</sup> Profiling and the use of Big Data to convey personal information are linked closely with automated decision-making. The use of automated procedures could result in decisions with legal consequences or ones which could affect data subjects to a substantial degree.<sup>63</sup> As seen above, processing can be automated or non-automated.

Sections 6(1)(a)-(e) set down exclusions to the scope of application. POPIA does not apply to the processing of personal information:<sup>64</sup>

- (a) in the course of a purely personal or household activity;
- (b) that has been de-identified to the extent that it cannot be re-identified again;
- (c) by or on behalf of a public body:
  - (i) which involves national security, including activities that are aimed at assisting in the identification of the financing of terrorist and related activities, 134 defence or public safety; or
  - (ii) the purpose of which is the prevention, detection, including assistance in the identification of the proceeds of unlawful activities, and the combating of money laundering activities, investigation or proof of offences, the prosecution of offenders or the execution of sentences or security measures, to the extent that adequate safeguards have been established in legislation for the protection of such personal information;
- (d) by the Cabinet and its committees or the Executive Council of a province; or
- (e) relating to the judicial functions of a court referred to in section 166 of the Constitution.

Further statutory exclusions are seen in section 7, which provides an exemption for journalistic, literary or artistic purposes.<sup>65</sup>

62 S 3(1) POPIA.

63 Burns & Burger-Smidt (n 52) 396.

64 S 6(1)(a)-(e) POPIA.

65 S 7 POPIA.

## 2.2 General principles of processing personal information under POPIA

Chapter 3 of POPIA contains eight conditions for the processing of personal information. These conditions must be observed by responsible parties when personal data is processed. These principles apply to all processing, except where the Act excludes this.<sup>66</sup> Processing is any form of operation, by automated means or not, that concerns the personal information of data subjects.<sup>67</sup> If the processing is automated, it must comply with the eight conditions set out in POPIA.

Below, an overview of the conditions for data processing will explain what is set out in each section.

## 2.3 The conditions of POPIA explained

Section 8 of POPIA states that:<sup>68</sup>

The responsible party must ensure that the conditions set out in this Chapter, and all the measures that give effect to such conditions, are complied with at the time of the determination of the purpose and means of the processing and during the processing itself.

Essentially, this first principle requires that the responsible party ensures that the conditions set out in Chapter 3 of POPIA are complied with – at all stages and times.<sup>69</sup>

This compliance must be adhered to from the beginning stage of determining the purpose of the processing to processing the data, and finally, to storing the data.<sup>70</sup> The accountability extends further – the responsible party is also liable for the integrity, safety and security of the personal information in their possession or under their control.<sup>71</sup> Importantly, this condition sets out that *all* conditions of Chapter 3 must be complied with throughout the various stages of data processing, each time processing is completed by a responsible party.<sup>72</sup> It is not enough for only some, or even most, of the principles to be complied with.

The second condition places emphasis on the fact that, in order for processing to be lawful, there should be a limit to the reasons why personal information is processed, as well as the type of personal information processed and the subjects from whom this information

66 Burns & Burger-Smidt (n 52) 183-184.

67 Burns & Burger-Smidt (n 52) 396.

68 S 8 POPIA.

69 Burns & Burger-Smidt (n 52) 189.

70 As above.

71 Burns & Burger-Smidt (n 52) 190.

72 As above.

is collected.<sup>73</sup> A limitation on processing is achieved by requiring compliance with the lawfulness and reasonableness of processing; minimality; consent, justification, and objections; and the direct collection of data from the data subject.<sup>74</sup>

Responsible parties must consider why information is required and what type or how much information is necessary for the processing's purpose.<sup>75</sup> According to this condition, only the minimum but adequate amount of information that is relevant may be processed, any information that is seen as excessive or irrelevant could be viewed as unlawful processing.<sup>76</sup>

The third condition relates to purpose specification. Section 13 calls for personal information to be collected only for a specific, explicit, and lawful purpose that is related to the function of the responsible party, and the responsible party must take steps to ensure that the data subject in question has knowledge of the purpose of the data collection.<sup>77</sup>

Section 14 provides that the records of a data subject's personal information must not be kept any longer than is necessary for achieving the original purpose for the collection of this information – unless retention of this information is required by law; the responsible party has a reasonable requirement for accessing the information and this access is lawful and related to its functions or activities; the retention is necessary as a result of a contract between the involved parties; or the data subject has consented to retention of the information.<sup>78</sup>

Next is the fourth condition, which limits further processing of information. This condition states that the responsible party must not stray from the original intention of the processing and may not add additional or alternate purposes for the processing unless such new purpose can be accommodated within the sphere of the initial purpose.<sup>79</sup> This condition therefore ensures the processing of data remains compatible with the original purpose of the collection.<sup>80</sup>

The fifth condition of POPIA sets out an obligation on the responsible party to take reasonable steps to ensure that the personal information held is complete, accurate, updated, and not misleading.<sup>81</sup> A responsible party is therefore, required to verify

73 Snail ka Mtuze & Papadopoulos (n 19) 356.

74 S 9-12 POPIA.

75 S 9-12 POPIA.

76 S 9-12 POPIA.

77 S 13 POPIA.

78 S 14(1)(a)-(d) POPIA.

79 S 15 POPIA.

80 Snail ka Mtuze & Papadopoulos (n 19) 360.

81 S 16 POPIA.

information, use reliable sources and keep information in a way so that it is not ambiguous.<sup>82</sup>

Sections 17 and 18 make up the sixth condition of openness. There are two legs to this condition – namely, maintaining the quality of the personal information and the documentation of the processing, and notification to the data subject during the collection of personal information.<sup>83</sup> Data subjects have a right to know what personal information of theirs is collected or processed by a responsible party, and how this processing is carried out.<sup>84</sup> Accordingly, the legislature has incorporated the values of openness and transparency into POPIA. It is clear that this condition is an incredibly important one, as the knowledge of processing allows the data subject to ensure that their rights are free from infringement.

A data subject must be informed when their personal data is collected.<sup>85</sup> If the personal information is collected directly from the data subject, then they must be informed of the required information before it is collected.<sup>86</sup> In any other case, a data subject must be made aware of the required information before it is collected or as soon as reasonably practicable after collection.<sup>87</sup>

The seventh condition spans sections 19 to 22 of POPIA and governs security safeguards regarding integrity and confidentiality of personal information, as well as operator-processed information and notification of any security compromises.<sup>88</sup> This condition aims to prevent data breaches by ensuring adequate security safeguards are put in place.<sup>89</sup>

The final condition for the lawful processing of data deals with the lawful access of personal information by the data subject, correction of personal information, and method of access.<sup>90</sup> This condition aims to allow data subjects a measure of control and influence over their personal information.<sup>91</sup>

82 *Snail ka Mtuze & Papadopoulos* (n 19) 361.

83 *Burns & Burger-Smidt* (n 52) 262.

84 *Burns & Burger-Smidt* (n 52) 263.

85 *Snail ka Mtuze & Papadopoulos* (n 19) 361.

86 *As above.*

87 *As above.*

88 *Burns & Burger-Smidt* (n 52) 272.

89 *Snail ka Mtuze & Papadopoulos* (n 19) 362.

90 *Burns & Burger-Smidt* (n 52) 280.

91 *As above.*



## 2.4 Automated processing and profiling

### 2.4.1 Overview

Section 71(1) of POPIA gives data subjects the right not to be subject to a decision which could result in legal consequences for that data subject or which affects them to a substantial degree, if that decision is based exclusively on the automated processing of personal information which has the intent of profiling that data subject.<sup>92</sup> The personal information protected against ADM includes a subject's performance at work, credit worthiness, reliability, location, health, personal preferences or conduct.<sup>93</sup>

Profiling is the automated processing of personal information to analyse various aspects of a person's behaviour, personality, and habits in order to make predictions about that person.<sup>94</sup> Automated decision-making can overlap with profiling. Various sources are combined to create a profile of a data subject, who is then treated in accordance with this profile.<sup>95</sup> The types of personal data that are collected for profiling incorporate many aspects of a person's day-to-day life, including categories like health and economic situation.<sup>96</sup> It can be seen that profiling has three elements: it implies an automated form of processing data; it is carried out on personal data; and its purpose is to evaluate personal aspects of a subject in order to predict behaviour and make a decision.<sup>97</sup>

### 2.4.2 Regulation of ADM and its implications for privacy and data protection

Section 71(2) is an important and tricky piece of legislation. This subsection of POPIA contains a proviso to section 71(1), namely, that ADM of a data subject that has legal consequences *will* be allowed in certain, listed instances.<sup>98</sup> Section 71(1) will not apply if the decision has been taken in connection with the conclusion or execution of a contract, or if the decision is governed by a law or code of conduct in which 'appropriate measures' are specified for protecting the legitimate interests of data subjects.<sup>99</sup>

As can be seen from the above discussion, POPIA puts a great deal of emphasis on the values of transparency and accountability.

92 S 71(1) POPIA.

93 S 71(1) POPIA.

94 Roos (n 14) 431.

95 Roos (n 14) 515.

96 Burns & Burger-Smidt (n 52) 418.

97 Burns & Burger-Smidt (n 52) 422.

98 S 71(2) POPIA.

99 S 71(2) POPIA.

However, a question arises as to how effectively the legislature has placed data subjects in a position to exercise their right not to be subject to ADM. I put forth the argument that, in order for a data subject to be able to exercise such a right, it is necessary for the data subject to first be aware that they have been subjected to ADM. To investigate this matter, it must be determined if POPIA provides an express duty of notification to data subjects when automated decision-making takes place.

#### **2.4.3 Right to notification – Section 71**

Do either of the two exceptions in section 71(2) provide for a duty of notification to data subjects in the event of automated decision-making? Both subsections specify that ‘appropriate measures’ must be taken or specified. In section 71(2)(a), POPIA states that the prohibition against ADM will not be applicable if the decision has been taken in connection with the conclusion or execution of a contract when there are ‘appropriate measures’ established to protect the data subject. Subsection three usefully sets out exactly what these appropriate measures entail. The data subject must be provided with the chance to make representations about the decision, and the responsible party must additionally provide the data subject with enough information about the underlying logic of the automated processing so that the data subject is able to make such a representation.<sup>100</sup>

After careful scrutiny of this section of the legislation, it is evident that there is no duty on the responsible party to notify the data subject of the ADM. The responsible party is, at most, required to present the opportunity for the data subject to make representations – with sufficient knowledge of the logic of the processing involved. This section does not require that the responsible party initially provide the data subject with any notification that they may be entitled to make representations. No duty of notification is found in section 71(2)(a).

Section 71(2)(b) also makes reference to ‘appropriate circumstances’, although this meaning is much broader than in the preceding subsection. In terms of this section, the prohibition against ADM will not apply if the decision is regulated by a law or a code of conduct in which ‘appropriate measures’ are specified for protecting the legitimate interests of data subjects.<sup>101</sup> There is not, however, additional guidance on what these appropriate measures constitute. This part of the Act leads to Chapter 7 of POPIA, which sets out the rules and regulations of codes of conduct pertaining to the Act.

<sup>100</sup> S 71(3) POPIA.

<sup>101</sup> S 71(2)(b) POPIA.

Section 60(4) deals with the need for a code of conduct to specify appropriate measures –

- (ii) for protecting the legitimate interests of data subjects insofar as automated decision-making, as referred to in section 71, is concerned...

At this point, the reader is referred back to section 71, and so a back-and-forth cross-reference begins, with no actual suggestion for the meaning of ‘appropriate measures’. At this time, it does not seem that any code of conduct which has been approved or published by the Information Regulator contains confirmation or suggestion of what the appropriate measures of section 71(2)(b) should mean. What is apparent, though, is the fact that there is no explicit duty of notification that requires a responsible party to inform a data subject of automated decision-making. It is clear that neither section 71(2)(a) or (b) provides for an express duty of notification concerning ADM, but perhaps such a duty can be found in another provision of the Act.

#### **2.4.4 Right to notification – Section 18**

The openness condition for lawful processing – as discussed above – encompasses the duties of notification of a responsible party. There are various required instances in which the responsible party must take ‘reasonably practicable’ steps to ensure that the data subject is aware that their personal data is being collected.<sup>102</sup> The openness condition in section 18 deals with the processing of data that occurs at an early stage in the process, namely, the collection of personal information.<sup>103</sup> So, there exists a duty to inform data subjects that their data is being collected. But what of a duty to notify these data subjects when the processing of such data results in a decision or when their personal information is processed automatically?

It seems that the section 18 duty of notification does not extend past the phase in which the data subject’s personal information is collected, or reasonably soon after that. This provision POPIA is not intended to give notification after a decision has been made, nor for an instance when personal data is automatically processed any way other than by collection. In light of this, section 18 also lacks a duty of notification regarding automated decision-making.

102 S 18 POPIA.

103 S 18 POPIA.

### 3 The European Union's General Data Protection Regulation

After analysing the way in which POPIA regulates data protection, it can be seen that section 71 of the Act is insufficient in adequately allowing data subjects to exercise their right not to be subject to automated decision-making under certain circumstances, and it can be argued that the conditions of openness and accountability are not met due to this. These conditions must be met for lawful processing to take place.

POPIA must be compared with its European counterpart, the General Data Protection Regulation (GDPR), to analyse how profiling and ADM fare among each legislation's core values. The foundational concepts of each legislation will be examined to determine if there are any best practices to be utilised by POPIA regarding automated decision-making.

The GDPR came into effect in 2018.<sup>104</sup> The GDPR establishes a baseline of standards for the handling of data for citizens of the European Union in order to protect the processing of personal data.<sup>105</sup> The GDPR has been described as 'the most consequential regulatory development in information policy in a generation',<sup>106</sup> and has become the international benchmark for data protection legislation.<sup>107</sup> It is seen as the gold standard for data protection legislation,<sup>108</sup> which makes it the ideal instrument to compare to the values and policies of POPIA.

#### 3.1 Scope of application

The GDPR aims to protect the fundamental rights of natural persons while their data is processed – without limiting the free movement of personal data within the European Union.<sup>109</sup> The Regulation applies to data processing of personal data by a controller or processor which is established in the EU, regardless of whether the processing occurs within the EU or not.<sup>110</sup> The GDPR additionally applies to the processing of personal data of data subjects who are situated in the

104 Warikandwa 'Personal data security in South Africa's financial services market: The Protection of Personal Information Act 4 of 2013 and the European Union General Data Protection Regulation compared' 2021 *PER/PELJ* 14.

105 Warikandwa (n 103) 15.

106 Roos (n 14) 412.

107 Roos 'Data Protection Principles under the GDPR and the POPI Act: A comparison' 2023 *THRHR* 4.

108 Corporate Governance Institute 'GDPR: A gold standard for Europe and beyond' <https://www.thecorporategovernanceinstitute.com/webinar/gdpr-a-gold-standard-for-europe-and-beyond/> (accessed 10 November 2023).

109 Roos (n 14) 412.

110 Art 3(1) GDPR.

EU, by a controller or processor not established in the EU, where the processing activities are related to:<sup>111</sup>

- (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or
- (b) the monitoring of their behaviour as far as their behaviour takes place within the Union.

Materially, the GDPR applies to the processing of personal data of data subjects by automated or non-automated means.<sup>112</sup> No distinction is made between processing in the private or public spheres, nor is any distinction made between the different stages of processing (such as collection, recording, storage, use, disclosure, etc.).<sup>113</sup> The GDPR only protects natural and not juristic persons.<sup>114</sup> The GDPR does not apply to processing of personal data for household or purely personal activities,<sup>115</sup> nor does it apply to processing that is done in the course of an activity that falls outside the scope of EU law – matters concerning national security or European security policies, for example.<sup>116</sup> The GDPR additionally does not apply to data processing by authorities for prevention, investigation, detection or prosecution of criminal offences.<sup>117</sup>

### 3.2 General principles of processing personal information under the GDPR

Similar to POPIA, the GDPR sets out numerous governing principles for the processing of personal information. Article 5 sets out six principles that relate to the processing of personal data:<sup>118</sup>

- (1) Personal data shall be:
  - (a) processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency');
  - (b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes ('purpose limitation');

111 Art 3(2) GDPR.

112 Roos (n 14) 413.

113 Roos (n 14) 414.

114 Art 1(1) GDPR.

115 Art 2(2)(c) GDPR.

116 Art 2(2)(d) GDPR.

117 Art 2(2)(d) GDPR.

118 Art 5 GDPR.

- (c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation');
- (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay ('accuracy');
- (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject ('storage limitation');
- (f) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures ('integrity and confidentiality').

Article 5(2) sets out the accountability principle – the data controller will be responsible for and able to demonstrate compliance with paragraph 1.

According to the first condition of the GDPR, the processing of personal data should be done lawfully, fairly and in a transparent manner. To be lawful, processing must be based on legitimate grounds, and it must comply with the law.<sup>119</sup> The controller must decide beforehand on a lawful ground for the processing, and the data subject must be notified of any change in the lawful basis for processing.<sup>120</sup>

Fairness under this condition relates to proportionality under European law, and is relevant when interests must be balanced.<sup>121</sup> The principle of transparency requires that data subjects be made aware that their personal data is to be processed.<sup>122</sup> notification must be given regarding the purposes for which the processing is occurring, the identity of the controller or processor, and the rights of the data subject, namely, the right of a data subject to obtain confirmation and communication of their personal data.<sup>123</sup>

The second condition is the purpose limitation. In line with this condition, personal data may only be collected for an explicitly

119 Art 6(1) GDPR.

120 Roos (n 14) 415.

121 As above.

122 As above.

123 As above.

defined purpose.<sup>124</sup> This specific purpose must also be legitimate.<sup>125</sup> Data may not be processed further for purposes which are incompatible with the original specified purpose for the processing.<sup>126</sup>

The third condition sets out that data of a personal nature may only be processed if it is 'adequate, relevant and limited' to what is necessary for the purposes of the processing.<sup>127</sup> This condition sets a standard regarding the quantity of the data that is processed, and the GDPR accountability principle necessitates that a data controller be capable of demonstrating which processes are employed to meet this standard.<sup>128</sup>

The GDPR's fourth condition stipulates that personal data must be accurate and kept up to date, if necessary.<sup>129</sup> If personal data is inaccurate, reasonable steps must be taken to rectify or erase the data.<sup>130</sup> Much like the previous condition, a standard is set (although here, it is one regarding the data quality), and the data controller must be able to show how this standard is adhered to.<sup>131</sup> Only reliable sources must be accepted for processing, and steps must be taken to verify information before the processing happens.<sup>132</sup>

The fifth processing condition requires that personal data be kept in a form which allows for the identification of data subjects for no longer than is necessary for the purpose of processing.<sup>133</sup> To meet this requirement, a controller is expected to set time limits for the erasing of the data or for a review of the data.<sup>134</sup>

In terms of the sixth condition, personal data must be processed in a way that ensures proper and necessary data security.<sup>135</sup> Security measures must be put in place to safeguard an appropriate level of security to prevent risks.<sup>136</sup>

In line with the seventh condition, a data controller is responsible for ensuring compliance with data privacy principles.<sup>137</sup> The controller must be capable of showing compliance with these principles and how effective this compliance is.<sup>138</sup>

124 Roos (n 14) 416.

125 As above.

126 As above.

127 Art 5(1)(c) GDPR.

128 Art 5(1)(c) GDPR.

129 Roos (n 14) 416.

130 As above.

131 Roos (n 14) 417.

132 As above.

133 As above.

134 As above.

135 Roos (n 14) 417.

136 As above.

137 Art 5(2) GDPR.

138 Art 5(2) GDPR.

### 3.3 Automated decision-making under the GDPR

Under the GDPR, a data subject has the right not to be subject to a decision based solely on automated processing – including profiling – that creates legal or other significant effects for that data subject.<sup>139</sup> Three conditions make up this right: firstly, a decision is made that is, secondly, based solely on automated processing, and, thirdly, the decision has legal effects or other significant effects for the data subject.<sup>140</sup>

The exceptions to the right against ADM in the GDPR are set out in Article 22(2). According to this, ADM is allowed if the decision is necessary for the creation or performance of a contract, if the decision is authorised by a law that lays down adequate protective measures, or if the decision is based on a data subject's explicit consent.<sup>141</sup>

### 3.4 Differences between POPIA and the GDPR

#### 3.4.1 *Regulatory strategies*

POPIA has adopted the 'command-and-control' mode of regulation that appears in the GDPR, but as will be seen, POPIA has neglected to embrace the collaborative governance features of the GDPR.<sup>142</sup> Collaborative governance regulation, as Bronstein explains, corresponds with the notion of decentred regulation – this incorporates self-regulation and co-regulation.<sup>143</sup> Command-and-control regulation, conversely, is based on the concept of law as the 'command of a sovereign backed by sanctions'.<sup>144</sup> This type of regulatory strategy has been criticised as being ineffectual and not cost-effective – a vast amount of resources must be used to deploy sanctions for this theory to be effective.<sup>145</sup> In a democratic context, this strategy is seen as largely unattainable, especially in South Africa, where efforts for large-scale compliance are usually unreachable.<sup>146</sup> Another positive for the collaborative governance theory is provided in the context of data protection. Bronstein argues that it is impractical for governments to regulate the cyber world, as government regulators will always have to deal with a lack of

139 Art 22(1) GDPR.

140 Roos (n 14) 431-432.

141 Art 22(2) GDPR.

142 Bronstein 'Prioritising command-and-control over collaborative governance: The role of the Information Regulator Under The Protection of Personal Information Act' 2021 *PER/PELJ* 6.

143 Bronstein (n 141) 6.

144 As above.

145 Bronstein (n 141) 7.

146 As above.



information and expertise.<sup>147</sup> It can be seen that, for regulation to be fully effective, there must be multiple mechanisms of accountability, and the collaborative governance strategy is designed to provide this.<sup>148</sup>

### **3.4.2 Codes of conduct**

Another difference between pieces of legislation is seen in how the GDPR and POPIA govern codes of conduct. POPIA, in its command-and-control method, provides that codes of conduct that are issued become binding on responsible parties. Codes of conduct under POPIA are comparable with subordinate legislation – the code is binding on a specific sector regardless of the views of those subject to it.<sup>149</sup> In contrast, codes of conduct set out in the GDPR are considered voluntary for data controllers.<sup>150</sup> The GDPR intends for codes of conduct to fulfil a normative function that accelerates compliance.<sup>151</sup> This strategy is designed to lead to greater adherence to the voluntary rules over time as a result of involving the private sector in its own regulation – a clear collaborative approach by the GDPR.<sup>152</sup>

### **3.4.3 Remedies for automated decision-making under POPIA and the GDPR**

Section 71 of POPIA and Article 22 of the GDPR provide remedies that allow individuals to protect their personal information from automated decision-making that involves profiling. As can be seen by the legislation, the safeguards in this section and article, respectively, are almost identical and prohibit a data subject from being exposed to automated decision-making and profiling.<sup>153</sup> POPIA provides a general remedy against ADM, but the GDPR departs from this by opting to incorporate a requirement that aims to improve, on a systemic level, the quality of ADM that, includes profiling.<sup>154</sup> With this GDPR measure, a potential best practice for POPIA and ADM can be found to improve accountability and openness and better protect data subjects from processing.

147 Bronstein (n 141) 8.

148 Bronstein (n 141) 9.

149 Bronstein (n 141) 17.

150 Bronstein (n 141) 16.

151 As above.

152 Bronstein (n 141) 17.

153 S 71 POPIA; Art 22 GDPR.

154 Bronstein (n 141) 18.

### 3.4.4 *Right to be informed*

According to the GDPR, if the processing of personal data involves automated decision-making, then the data subject must be informed of this – as well as the significance of this processing and the expected consequences of the processing.<sup>155</sup>

The right to notification of a data subject was discussed in Chapter 3, and there, it was concluded that neither section 71 nor section 18 of POPIA provides an express duty of notification regarding ADM. Comparatively, the GDPR does expressly dictate that a data controller must inform a data subject about the existence of automated decision-making. I put forth that because of POPIA's lack of a similar duty, no obligation exists for a responsible party to give notice of ADM taking place during the processing. With no such obligation to inform the data subject, this brings about the potential for violation of the data subject's right to be protected against ADM, and the Act does not meet the conditions of accountability and transparency. This is an area that POPIA falls short in, and the Act could adopt the GDPR's express duty as a best practice to better promote the rights of data subjects.

### 3.4.5 *Data Protection Impact Assessments*

A Data Protection Impact Assessment (DPIA) is a process whereby data protection risk can be identified and managed.<sup>156</sup> The process starts with the structured assessment of a data processing activity to classify any risks for data protection that exist in the activity.<sup>157</sup> It must then be determined if such risks are legally compliant, and a data controller can consequently take any necessary action to mitigate the identified risks.<sup>158</sup> According to Whitcroft, DPIAs in the EU assist in establishing compliance with data protection standards – especially in accordance with the accountability requirement.<sup>159</sup>

The Article 29 Working Party Guidelines describe a DPIA as:<sup>160</sup>

... a process for building and demonstrating compliance by systemically examining automated processing techniques to determine the measures necessary to manage the risks to the rights and freedoms of natural persons resulting from the processing of personal data.

<sup>155</sup> Art 13(2)(f) GDPR.

<sup>156</sup> Burns & Burger-Smidt (52) 432.

<sup>157</sup> As above.

<sup>158</sup> As above.

<sup>159</sup> Whitcroft 'Data protection impact assessments' in Carey *Data protection: A practical guide to UK law* (2020) 237.

<sup>160</sup> Guidelines on Data Protection Impact Assessments (DPIA) and determining whether processing is 'likely to result in a high risk' for the purposes of Regulation 2016/679.

DPIAs are significant tools for accountability, as they help data controllers comply with the GDPR requirements.<sup>161</sup> A Data Protection Impact Assessment is compulsory when there is a 'high risk' to the rights and freedoms of natural persons.<sup>162</sup> According to the duty set out in Article 35(1) of the GDPR, a data controller must assess the impact of the proposed processing on personal data protection, where such processing is likely to result in high risk to the rights and freedoms of natural persons.

Under POPIA, no reference is made to a risk assessment such as a DPIA. The section regarding assessments in the Act only refers to whether data processing complies with the provisions of POPIA.<sup>163</sup> In addition to this, there is no duty to make such an assessment prior to the processing of personal data.<sup>164</sup> It can, therefore, be seen that there is no similar concept to DPIAs in POPIA.

The use of DPIAs prior to automated data processing would introduce a best practice for POPIA. This process can provide coherence before automated decision-making even begins for a data subject, and the practice would create an additional layer of transparency and accountability for the responsible party – something that should be strived for to meet the conditions for lawful processing set out in the Act.

While both POPIA and the GDPR share aspects of regulation, strengths, and conditions for data protection, there are many best practices of the GDPR that POPIA could adopt to better protect data subjects from ADM. Regulatory strategies, codes of conduct, remedies, explicit notification, and DPIAs are all areas that could be improved POPIA.

## 4 Conclusion

The regulatory framework of POPIA sets out to protect the privacy of personal information of data subjects, and in many ways, the Act meets its objective. However, there are areas in the legislation that need to be improved for proper data protection. POPIA emphasises the importance of processing in line with the values of transparency and accountability. However, with its lack of express notification to data subjects regarding ADM, it is evident that POPIA could be more effective in allowing data subjects to exercise their right not to be subject to ADM. The data subject can only effectively exercise this right if they are aware of it in the first place. This conflicts with the aims set out in POPIA; the data subject is left without an opportunity

<sup>161</sup> Burns & Burger-Smidt (n 52) 432.

<sup>162</sup> Art 35(1) GDPR.

<sup>163</sup> Burns & Burger-Smidt (n 52) 432.

<sup>164</sup> As above.

to exercise and be protected by their right. A solution to this would be for POPIA to implement an explicit obligation of notification on responsible parties. Alternatively, the Information Regulator could publish a code of conduct for section 71(2)(b) of POPIA that specifies 'appropriate measures' for protecting the interests of data subjects concerning ADM. This way, a duty of notification for ADM could be established, and a data subject could rely on section 71 for adequate protection.

POPIA can also improve on its aims of accountability and transparency — as well as better data subject protection — by implementing the best practices found in the GDPR. Most practically, introducing Data Protection Impact Assessments would create more transparency and responsibility for a responsible party. By enforcing a risk assessment to be completed before data processing occurs, the risk of impairing the rights and freedoms of data subjects would be lessened.

POPIA does not sufficiently allow data subjects to exercise their right not to be subject to automated decision-making. The Act has done well in introducing comprehensive data protection legislation, but several areas can be amended to ensure proper protection. Until such a time that new practices are implemented, however, data subjects in South Africa are not entirely safeguarded against the dangers of automated processing, algorithms and AI.