

African Law Review



VOLUME 9 • ISSUE 1 • 2020

**Coexistence of
Lawlessness and
Human Rights:
the South African
Question**

**Administration
Law: Does the
President's power to
pardon or reprieve
offenders qualify as
an Administrative
action?**

Corruption and its threat to democracy

Focus on

**Deputy Chief Justice
Dikgang Moseneke**



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Corruption and its threat to democracy

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Corruption and its threat to democracy

The year 2020 saw South Africa go into a nationwide lockdown as a mechanism to mitigate the spread of the COVID-19 virus. The nationwide lockdown began on 23 March 2020 when President Cyril Ramaphosa announced that the country will be under a hard lockdown for 21 days, which eventually moved to the different stages of the COVID-19 Risk Adjusted Strategy. On 16 September 2020, during his address to the nation, President Ramaphosa announced that as from 20 September 2020, South Africa will move to Level 1 of the Risk Adjusted Strategy because the ‘levels of infection are relatively low and [because there] is sufficient capacity in our health system to manage the current need’.

The year 2020 has been a trying year, to say the least, not only for the legal profession but for the entire country. The legal profession had to grapple with the fact that the country was not functioning as ‘business as usual’ and find their feet while conducting business in uncharted territory. Legal practitioners had to ensure that they were deemed to be ‘essential workers’ so that they can carry on working during the hard lockdown period.

Unfortunately, COVID-19 is not the only pandemic South Africa had to deal with during the lockdown. The country also dealt with the pandemic of corruption. Corruption, as clearly stated in this volume’s theme, is a threat to South Africa’s hard-earned democracy. Numerous newspaper reports have documented the rife corruption that has overtaken the country and has spread like wildfire as those in power took advantage of their position and conducted corrupt deals that saw them pillaging the funds reserved for COVID-19 relief in the country. A new term was even coined to describe this type of criminal as those who were suspected of this wrongdoing were named ‘Covid-preneurs’.

The Ahmed Kathrada Foundation has begun a nationwide initiative to urge South Africans to wear orange masks on Fridays as a sign of taking a stand against corruption around personal protective equipment (PPE). The orange colour of the mask is symbolic of the orange uniforms worn in prison as the initiative hopes to put pressure on government to put those guilty of corruption in jail.

The remarkable 89.3 per cent COVID-19 recovery rate (as at 22 September 2020) in South Africa is marred by the fact that the government is investigating more than 600 companies and organisations awarded five billion rand in contracts to supply PPE for health workers and to distribute relief aid. The health sector has staged numerous lunch-hour protests at work, which climaxed with a picket outside President Ramaphosa’s office in Pretoria to highlight the shortage of PPE for frontline workers. More than 240 health workers have lost their lives to COVID-19 out of more than 27 000 infected in the front lines.

This volume’s column by the Chairperson of the BLA-LEC, Adv Mc Caps Motimele SC, on page 6, under the headline ‘A complex web of contemporary challenges confronting our democracy, key institution of governance and the role of the judiciary’ highlights the fact that:

“The state of our democratic country today evokes overwhelming emotions. We now rank among the highest corrupt and unequal nations in the world with high unemployment rate and stagnating economy.”

‘Our current reality calls for sedulous and brutal reflection as a nation. We must admit to have certainly committed a cardinal miscalculation since our triumph over Apartheid and the dawn of constitutionalism, rule of law, equality, and social justice. This mistake was to assume that the Constitution will self-actualise, and that its vision, its aspirations will be realised without active citizenry as drivers and pillars of social and institutional reforms and change. It is through our disturbing inertia that we allow pernicious interests and corrupt elements to stealthily find their way into our strategic and key institutions of governance. Through our unfortunate inaction and somewhat timid interventions, we have become complicit in the unprecedented high levels of crime, corruption, economic stagnation, unemployment and poverty.’

South Africa’s Constitution is hailed as one of the best in the world considering the dark past the country has survived, however, daily newspaper headlines paint a different picture because not all its citizens enjoy the advances made by this ‘best Constitution’. The world over, the country is also seen as a ‘democracy success story’ but how true is that? In his article, Adv Motimele SC points out:

‘The state of our democratic country today evokes overwhelming emotions. We now rank among the highest corrupt and unequal nations in the world with high unemployment rate and stagnating economy. Furthermore, significant structures in our criminal justice system are in an unfortunate state of disarray and the people’s faith in the system has waned. Many victims of crime receive no justice, many clear corruption cases are yet to receive priority attention from the NPA and the Hawks. However, the recent appointment of the NDPP through a consultative and democratic process inspires some confidence, but time will tell! Furthermore, the appointment of a young Minister of Justice and correctional services signifies a clear intent and resolve to repair and salvage a virtually broken system.’

Adv Motimele SC goes on further to dispel the myth that corruption is only conducted by politicians or those in government:

‘Our democratic institutions must help dispel the myth, that corruption is only corruption properly so called when the alleged kingpins are politicians. Corruption is rife also in the private sector and must be confronted in

similar vein with public sector corruption. We shall do well to remind corporate South Africa that price-fixing, collusion and creation of cartel networks is corruption. Fairly and in the same way, deliberate subversion of tax laws and competition law offends our constitutional norms, values and principles. In order to successfully defend our democracy, it is crucial to ensure that the constitutional independence of our judiciary is safeguarded. This is arguably the last remaining constitutional body in which ethics and universal codes of good practise continues to play a lodestar role. The South African judiciary is indeed a personification of lady justice who dispenses justice with a sword and a blindfold. Our apex court, the Constitutional Court, as the final arbiter, and other courts of lower status continues to enjoy the trust of South African people. A house of justice atop the constitution hill is indeed a national treasure on a historic ground.’

The article by Sentle Fenyane ‘Coexistence of lawlessness and human rights: the South African question’ on page 51 details the state of lawlessness in the country. The article states:

‘The Auditor General (AG) made an audit report on municipalities in July 2019 and indicated that only 12 municipalities out of the 257 audited posted a clean audit record. He reported that his team was confronted with a hostile audit reception in an environment, which was extremely threatening and scary. He subsequently asked Parliament to give his office power and authority to act appropriately on corruption and abuse that were omnipresent in municipalities which resemble an epicentre of corruption and shameless thieving. The AG reported that irregular expenditure in all municipalities amounted to R21.2b in 2018, which is comparatively lower than the R27.7b reported in 2017. He further reported that poor financial control was a common denominator in these municipalities; that there is a shameless absence of consequence management. The AG defines irregular expenditure as “expenditure other than authorised expenditure incurred in contravention of, or that is not in accordance with a requirement of applicable laws”. He stressed that funds were mismanaged and expended through sheer corruption.’

Mr Fenyane’s article lists the mismanagement of state owned companies in rand value and show that billions of rands have been wasted due to corruption:

“the worst that can happen to us is to be corrupt out of greed, but an average South African who is involved in crime is trying to survive”.

‘[The] result of corruption, which is informed by sheer thieving as perpetrators are aware that there is no political will to hold them accountable. The implications of these irregularities demonstrate, without any doubt, that the ineptitude of the executive sphere of government to execute duties vested in them reinforces maladministration and corruption. Parliament, the Provincial Legislatures and the Municipal councils do not hold their respective executives to account as provided for in the Constitution. Corruption has far reaching systemic effects. It takes away food from the table of poor people. It contributes

immensely to poverty, starvation and crime. This was corroborated by the Chief Justice Mogoeng Mogoeng on 25 July in response to questions posed to him on SAFM radio. He said “ordinary, day-to-day crime is escalating, and it is those who are poverty-stricken who commit crime most of the time”. He further lamented that “the worst that can happen to us is to be corrupt out of greed, but an average South African who is involved in crime is trying to survive”. He said when people feel the loss of dignity, they are driven to committing crime that may escalate to killing others. He urged South Africa to

outroot every form of corruption, for if we were to fail to do that, unemployment and poverty, which have taken root in our country would persist.’

Articles from other jurisdictions

This issue of the *African Law Review* also contains two articles from foreign jurisdictions one article is on the topic of ‘The Nigerian Supreme Court and the Political Question Doctrine’ (by Ekokoi Solomon and Ekereobong Essien on page 20) and another on ‘The best interest of a child in Botswana’ (by Tebogo Jobeta and Bonolo Ramadi Dinokopila on page 35). ●

Note from Editorial Team

Due to unforeseen circumstances, which include the outbreak of COVID-19, this September issue of the *African Law Review* is the first to be published in 2020 making it volume 9 in the series. Keep a look out for more published issues of the journal; we also encourage readers to take advantage of our great advertising rates, which are published on page 2.

A complex web of contemporary challenges confronting our democracy, key institution of governance and the role of the judiciary

By Adv. Mc Caps Motimele SC: BLA-LEC Chairperson

The incontrovertibly pre-eminent role of the judiciary in the fortification of our constitutional democracy and the rule of law cannot be overstated. It's role in facilitating access to substantive justice and in ensuring the triumph of constitutional dictates is commendable. Indeed, the judiciary has meaningfully preserved our democratic hygiene by decisively isolating it from the ever present and lurking impurities. The judiciary rightly commands enormous constitutional power and the scope of this power is regulated by the Constitution and the law. In simple terms, the judiciary exercises this power within clearly defined legal and constitutional parameters. In many occasions, the judiciary has rescued our democratic watercraft from sinking onto the bedrock of a constitutional crisis. This it has done, while other numerous key and strategic institutions of governance were demonstrating acute and disconcerting timidity to tackle graft , avarice, maladministration and the scourge of organised crime.

Photo: SWISS IM&H on Unsplash

Democracy is indeed an ideal system of government for any nation that narrowly escaped a looming possibility of self-annihilation. Any society that triumphed over decades of strife, gloom, colonialism, apartheid and other subtle forms of despotic practices must embrace and opt for a democratic rule. Patently, the foundational and jurisprudential basis for the concept of the rule of law, constitutionalism, human rights, separation of powers and the principle of equality can only be given a practical meaning where democracy is allowed to thrive.

South Africa is a classical case for a nation that nearly tore itself into wreckage. She, however, boldly and decisively took an applaudable turn to overcome dissension, crass racism, greed and apartheid. This we have done, by embracing democracy, rule of law and constitutionalism. It is in this vein that our democratic Constitution purposefully proclaims our resolve to reconstruct a society that embraces democratic ideals, good governance and accountability.

Despite crafting to sheer perfection, a progressive and world-acclaimed Constitution, our envisaged constitutional destination appears further afar, twenty-five years into the pilgrimage. Notwithstanding our conscious decision to establish crucial institutions to ensure good governance and to safeguard and defend our democracy, the ultimate goal appears ever distant and elusive.

Quite frankly, we have devoted negligible efforts towards ensuring that these institutions actually delivers per their constitutional mandates. This reality is actuated by apparently brazen and subtle yet concerted efforts to interfere, frustrate, infiltrate and defocus these institutions from their core constitutional obligations. Some of these institutions have been mercilessly infiltrated and viciously disarmed while others were looted to death or unjustifiably disbanded.

Our current reality calls for sedulous and brutal reflection as a nation. We must admit to have certainly committed a cardinal miscalculation since our triumph over Apartheid and the dawn of constitutionalism, rule of law, equality, and social justice. This mistake was to assume that the Constitution will self-actualise, and that its vision, its aspirations will be realised without active citizenry as drivers and pillars of social and institutional reforms and change. It is through our disturbing

inertia that we allow pernicious interests and corrupt elements to stealthily find their way into our strategic and key institutions of governance.

Through our unfortunate inaction and somewhat timid interventions, we have become complicit in the unprecedented high levels of crime, corruption, economic stagnation, unemployment and poverty.

The Bill of Rights, a cornerstone of our democracy is unequivocal, just like many of our constitutional clauses, text and provisions. It sufficiently guarantees fundamental human rights ranging from social, economic and political

rights and freedoms. However, these rights are rendered nugatory by a disheartening absence of political will, institutional failure or ineptitude to give meaning to these fundamental rights.

Our Constitution, guarantees human dignity, life, privacy, freedom and security of the person. This is a constitutional reality, which our national practical reality stubbornly refuses to objectively acknowledge. Our people continue to live in fear even in the luxury of their own homes. This is so because almost every South African has been a victim of a crime or at least know someone who has been a victim of crime. Reports of illicit financial flows abound and large proceeds of corrupt deeds reportedly exits our shores daily. This reality is such that leaves one to question the effectiveness of police intelligence services and other institutions established

primarily to tackle these challenges. The money that leaves our shores illegally is the money that can be properly channelled to address a myriad of national challenges. This reality paints a disturbing picture about our democratic South Africa.

Much as our Constitution guarantees freedom of religion, belief and opinion, this is not a right which exists in vacuum. Brazen and toxic failure to adequately regulate these freedoms culminate in unfortunate and well-documented and



Adv. Mc Caps Motimele SC: BLA-LEC Chairperson

“Quite frankly, we have devoted negligible efforts towards ensuring that these institutions actually delivers per their constitutional mandates. This reality is actuated by apparently brazen and subtle yet concerted efforts to interfere, frustrate, infiltrate and defocus these institutions from their core constitutional obligations. Some of these institutions have been mercilessly infiltrated and viciously disarmed while others were looted to death or unjustifiably disbanded.”

embarrassing incidences, which are now matters of public knowledge. I will pause at this stage to pose a rhetorical question whether this is a South Africa, which many went into exile and some even perished for?

Freedom of expression, a fundamental human right, is now resorted to by racist peddlers and brass-necked bigots who believes that it accords them a constitutional refuge. What a blatant constitutional illiteracy! Regrettably, these transgressors do not receive sufficient sanctions for apparent racial slurs and bigotry.

It is a general observation of every South African that very serious racial incidents do not receive appropriate attention, which would ultimately trigger a fittingly firm and sustained disapproving response. Our democratic institutions, state organs etc ought to help cure our nation of this malady before it graduates into something fatal. In *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* [2016] ZACC 38, the Constitutional Court made the following fitting remarks about racism in our country:

“South Africa’s special sect or brand of racism was so fantastically egregious that it had to be declared a crime against humanity by no less a body than the United Nations itself. And our country, inspired by our impressive democratic credentials, ought to have recorded remarkable progress towards the realisation of our shared constitutional vision of entrenching non-racialism. Revelations of our shameful and atrocious past, made to the Truth and Reconciliation Commission, were so shocking as to induce a strong sense of revulsion against racism in every sensible South African. But to still have some white South Africans address their African compatriots as monkeys, baboons or kaffirs and impugn their intellectual and leadership capabilities as inherently inferior by reason only of skin colour, suggests the opposite. And does in fact sound a very rude awakening call to all of us.”

The state of our democratic country today evokes overwhelming emotions. We now rank among the highest corrupt and unequal nations in the world with high unemployment rate and stagnating economy. Furthermore, significant structures in our criminal justice system are in an unfortunate state of disarray and the people’s faith in the system has waned. Many victims of crime receive no justice, many clear corruption cases are yet to receive priority attention from the NPA and the Hawks. However, the recent appointment of the NDPP through a consultative and democratic process inspires some confidence, but time will tell! Furthermore, the appointment of a young Minister of Justice and correctional services signifies a clear intent and resolve to repair and salvage a virtually broken system.

In the month of July we celebrate Nelson Mandela (Madiba), his life and legacy that has significantly altered our trajectory towards nation-building, non-racialism, reconciliation, justice, equality and equity. However, we have failed to meaningfully confront many root causes of our challenges. Greed, maladministration, graft and stubborn thirst for instant personal enrichment are normalised in our country. This is the anti-thesis of what Madiba stood for. Local government, recognised under chapter 7 of the Constitution, are crucial for the advancement of our people’s rights. They are constitutionally mandated to provide our people with accountable government. However, the provision of basic services to our people is often frustrated by greed and compounded by somewhat unethical and incompetent elements mandated to combat these deleterious practises.

Our chapter 9 institutions, which are mandated to protect our constitutional democracy have been found wanting in many occasions. This phenomenon in all material respects point to a looming constitutional crisis in our country. These are the institutions, which must discharge their constitutional duties without fear, favour or prejudice. The inclusion of this constitutional edict is not accidental, it was foreseen that certain elements may infiltrate and defocuses these institutions from their core mandate. If allegations of malice and incompetence in some of these institutions are true, and if there’s merit to allegations of political meddling in some of these institutions, we are doomed!

The fifth Parliament and some of its predecessor parliaments, have been found equally wanting by the Constitutional Court when it comes to discharging its constitutional obligations to hold the Executive accountable. This is a worrying phenomenon that may signal a need for electoral reform or a relook on how people choose their leaders.

Our democratic institutions must help dispel the myth, that corruption is only corruption properly so called when the alleged kingpins are politicians. Corruption is rife also in the private sector and must be confronted in similar vein with public sector corruption. We shall do well to remind corporate South Africa that price-fixing, collusion and creation of cartel networks is corruption. Fairly and in the same way, deliberate subversion of tax laws and competition law offends our constitutional norms, values and principles.

In order to successfully defend our democracy, it is crucial to ensure that the constitutional independence of our judiciary is safeguarded. This is arguably the last remaining constitutional body in which ethics and universal codes of good practise continues to play a lodestar role. The South African judiciary is indeed a personification of lady justice who dispenses justice with a sword and a blindfold. Our apex court, the Constitutional Court, as the final arbiter, and other courts of lower status continues to enjoy the trust of South African people. A house of justice atop the constitution hill is indeed a national treasure on a historic ground. ●

BLA-Legal Education Centre - Training Programmes

By Andisiwe Sigonyela: Acting Director-BLA-LEC



The following training programmes have been conducted from July 2019 to August 2020:

Commercial Law Programme (CLP) - 2019

PROGRAMME	DATE	AREA	NUMBER OF DELEGATES
Trust Agreements and Property Trust	20 July 2019	Rustenburg	11 legal practitioners attended
Trust Agreements and Property Trust	24 August 2019	Polokwane	37 legal practitioners attended
Risk and Compliance	07 September 2019	Cape Town	10 legal practitioners attended
Trust Agreements and Property Trust	09 November 2019	Bloemfontein	10 legal practitioners attended
Tax Disputes and Litigation Process	30 November 2019	Johannesburg	14 legal practitioners attended



Continuing Legal Education (CLE) - 2019

PROGRAMME	DATE	AREA	NUMBER OF DELEGATES
Bills of Cost	06 July 2019	Johannesburg	20 legal practitioners attended
Bills of Cost	03 August 2019	Durban	16 legal practitioners
Medical Negligence	21 September 2019	Polokwane	27 legal practitioners attended
Bills of Cost	26 October 2019	Nelspruit	18 legal practitioners attended
Bills of Cost	07 December 2019	Bloemfontein	10 legal practitioners attended

Trial Advocacy Training (Schools for Legal Practice) - 2019

PLT SCHOOL	DATE	NUMBER OF DELEGATES
Durban School for Legal Practice (day class)	01 – 03 July 2019	40 candidate legal practitioners attended
Pretoria School for Legal Practice (day class)	03 – 05 July 2019	57 candidate legal practitioners attended
Pretoria School for Legal Practice (night class)	09 – 11 July 2019	62 candidate legal practitioners attended
East London School for Legal Practice (night class)	10 – 12 July 2019	30 candidate legal practitioners attended
Durban School for Legal Practice (night class)	12 – 14 August 2019	55 candidate legal practitioners attended
Unisa Durban School for Legal Practice (night class)	12 – 16 August 2019	41 candidate legal practitioners attended
Johannesburg School for Legal Practice (day class)	13 – 15 August 2019	39 candidate legal practitioners attended
Unisa Cape Town School for Legal Practice (night class)	19 – 23 August 2019	28 candidate legal practitioners attended



PLT SCHOOL	DATE	NUMBER OF DELEGATES
Unisa Pretoria School for Legal Practice (night class)	26 – 30 August 2019	50 candidate legal practitioners attended
Unisa Mthatha School for Legal Practice (night class)	02 – 06 September 2019	10 candidate legal practitioners attended
Polokwane School for Legal Practice (night class)	09 – 11 September 2019	55 candidate legal practitioners attended
Cape Town School for Legal Practice (night class)	09 – 11 September 2019	51 candidate legal practitioners attended
Polokwane School for Legal Practice (day class)	30 Sept – 02 October 2019	83 candidate legal practitioners attended
Port Elizabeth School for Legal Practice (night class)	28 – 30 October 2019	17 candidate legal practitioners attended
Bloemfontein School for Legal Practice (night class)	04 – 06 November 2019	17 candidate legal practitioners attended
Johannesburg School for Legal Practice (night class)	04 – 06 November 2019	59 candidate legal practitioners attended
Durban School for Legal Practice (day class)	12 – 14 November 2019	40 candidate legal practitioners attended
Cape Town School for Legal Practice (day class)	03 – 05 December 2019	45 candidate legal practitioners attended



Trial Advocacy Training (University Programme)

PROGRAMME	DATE	NUMBER OF DELEGATES
University of the Western Cape	15 – 17 August 2019	28 students attended
University of Venda	29 – 31 August 2019	81 students attended
University of Zululand	12 – 14 September 2019	30 students attended

Trial Advocacy Training - Legal Practitioners

TRAINING	DATE	AREA	NUMBER OF DELEGATES
Advanced Trial Advocacy Training	23 – 28 September 2019	Durban	58 legal practitioners attended
Basic Intensive Trial Advocacy Training	14, 15 & 16 November 2019	Mafikeng	18 legal practitioners attended

Commercial Law Programme (CLP) – 2020

PROGRAMME	DATE	AREA	NUMBER OF DELEGATES
Trust Agreements and Property Trust	15 August 2020	Johannesburg	19 legal practitioners attended
Tax Disputes and Litigation Process	29 August 2020	Polokwane	12 legal practitioners attended

Continuing Legal Education (CLE) – 2020

PROGRAMME	DATE	AREA	NUMBER OF DELEGATES
Bills of Cost	25 July 2020	Mafikeng	10 legal practitioners attended
Medical Negligence	29 August 2020	Johannesburg	24 legal practitioners attended

Trial Advocacy Training (Schools for Legal Practice) - 2020

PLT SCHOOL	DATE	NUMBER OF DELEGATES
Unisa Cape Town School for Legal Practice (night class)	03 – 07 February 2020	13 candidate legal practitioners attended
Unisa Durban School for Legal Practice (night class)	03 – 07 February 2020	31 candidate legal practitioners attended
Unisa Johannesburg School for Legal Practice (night class)	03 – 07 February 2020	47 candidate legal practitioners attended
Unisa Pretoria School for Legal Practice (night class)	03 – 07 February 2020	42 candidate legal practitioners attended
Unisa Mthatha School for Legal Practice (night class)	03 – 07 February 2020	11 candidate legal practitioners attended
Johannesburg School for Legal Practice (night)	02 – 06 March 2020	55 candidate legal practitioners attended
Johannesburg School for Legal Practice (day)	09 – 13 March 2020	54 candidate legal practitioners attended
Bloemfontein School for Legal Practice (night)	29 June – 03 July 2020	16 candidate legal practitioners attended
Pretoria School for Legal Practice (night)	06 – 10 July 2020	29 candidate legal practitioners attended
Potchefstroom School for Legal Practice (night)	13 – 17 July 2020	27 candidate legal practitioners attended
Pretoria School for Legal Practice (day)	13 – 17 July 2020	27 candidate legal practitioners attended
Pretoria School for Legal Practice (night)	13 – 17 July 2020	28 candidate legal practitioners attended
Pretoria School for Legal Practice (day)	20 – 24 July 2020	26 candidate legal practitioners attended
East London School for Legal Practice (day)	20 – 24 July 2020	51 candidate legal practitioners attended
East London School for Legal Practice (night)	20 – 24 July 2020	39 candidate legal practitioners attended
Polokwane School for Legal Practice (day)	27 – 31 July 2020	53 candidate legal practitioners attended
Polokwane School for Legal Practice (night)	27 – 31 July 2020	53 candidate legal practitioners attended
Johannesburg School for Legal Practice (day)	27 – 31 July 2020	38 candidate legal practitioners attended
Port Elizabeth School for Legal Practice (night)	11 – 15 August 2020	17 candidate legal practitioners attended
Johannesburg School for Legal Practice (night)	17 – 21 August 2020	37 candidate legal practitioners attended

5th series: The History of the Black Lawyers Association

By Deputy Judge President Phineas Mojabelo, South Gauteng High Court



This is the fifth in a series of articles that seeks to trace the formation and history of the Black Lawyers Association (BLA). The writer shall welcome any comments, particularly by lawyers who were part of the process.

Relationship with statutory law society

It was in 1983 that the growth of the BLA caught the attention of the statutory law society and attracted its concern.

By then the BLA had debated over and over again its relationship with the statutory bodies.

G M Pitje had served

for a few years as a committee member of the statutory body and of the Johannesburg Attorneys Association. The BLA had started debating the wisdom of allowing its members to serve on those bodies given that black lawyers were destined to be ineffective in changing the statutory law societies and various local attorneys' associations from within because of their numerical strength. A decision was taken to call upon BLA members to withdraw from participation in the sterile governing structures of the statutory law societies. DSS Moshidi, then the secretary of the BLA had also been 'elected' or co-opted to the council of the statutory law society. The general meeting of the BLA decided that the two should withdraw from those bodies. As my memory serves me well, G M Pitje immediately withdrew but it took DSS Moshidi some years of debate with his own colleagues in the BLA before he ultimately withdrew from the law society and other bodies identified for non-collaboration. By the time he withdrew the BLA had grown to areas in Natal and Eastern Cape (Umtata) and the anti-collaboration stance had become even stronger within the BLA. As a loyal founding member he ultimately withdrew, though it needs to be said, following considerable pressure and debate.

Needless to state that the law society did not like the pressure being placed on these black members to withdraw from all its governing structures. There was, however, finally

within the BLA a firm and united position against participation in structures that served only sectarian white interest. The law society and similar bodies were finally identified as structures that supported apartheid. Such structures had to be isolated and boycotted until they were transformed. Black lawyers were to associate with them strictly to the extent that they were obliged by law and not beyond. Accepting nomination into their governing structures was not legally mandated. It was collaboration that only gave legitimacy to such structures without doing anything for the course of the black people who remained oppressed even within the law society.

“The law society and similar bodies were finally identified as structures that supported apartheid. Such structures had to be isolated and boycotted until they were transformed. Black lawyers were to associate with them strictly to the extent that they were obliged by law and not beyond.”

Those were the years of uncomfortable and strained relationship between the BLA as a pressure group and the statutory law society as the official (legislated) governing body of the attorneys' profession. Similar strained relationships existed with the Bar Council, though no members of BLA had as yet been invited on bar councils.



Mnr P J Erasmus, mnr en mev P M Mojapelo, Nelspruit, mnr J S Monyatsi, Johannesburg en mnr G M Pitje, Johannesburg.

Photo appeared in the 1983 January issue of *De Rebus* on page 12 of the Professional news page

The first official encounter with the statutory Law Society of the Transvaal, which was later renamed Law Society of Northern Provinces, came in 1983 when GM Pitje as president of the BLA was summoned to the 12th floor of the Standard Bank Centre (in the firm Webber Wentzel & Co), at the corner of Fox and Simmonds Streets, Johannesburg, where the offices of the then president of the law society, Ed Southey, were situated. There he was met by the ‘dagbestuur’ of the council of the law society, which consisted of the outgoing president, the serving president and the vice president. Having had the foresight that the discussions were going to be about the BLA, GM Pitje had summoned to his aid, Don Nkadimeng as vice president of BLA, DSS Moshidi as secretary of the organisation and PM Mojapelo as the vice secretary.

There the BLA leadership was told in no uncertain terms that the law society was concerned about the formation of what was seen as ‘a splinter group of black lawyers’. They were all obliged by law to remain within the statutory law society. The law society council was not going to extend any recognition to the BLA. As the statutory body,

it was there for all lawyers including the black lawyers. The leadership of the BLA was told that its formation was seen as an affront to the law society and had the effect of undermining it. The president of the BLA and his escorts were told to go back and to consider dissolving the BLA. That message was loud and clear.

GM Pitje, supported by his entourage, told the ‘dagbestuur’:

“The leadership of the BLA was told that its formation was seen as an affront to the law society and had the effect of undermining it.”

That black lawyers had found it necessary to form their own organisation as they felt that their problems were not receiving enough attention within the statutory body. As an association, the BLA was able to devote its total attention to the problems of its members, and had no intention of approaching the statutory law society for recognition. Its members realised their statutory obligation towards the law society and would

abide by it. As for the call to disband, neither the president of the BLA nor its leadership would consider or respond to such a call. The organisation had been formed by its ordinary members and the general membership in a general meeting

had the final authority. The call to disband would be taken to the general meeting, which would respond thereto in due course. The leadership of BLA took its mandate from the general membership and would only respond once the general membership had considered the matter.

The meeting on the 12th Floor of Standard Bank Centre ended on the basis that the president of the BLA would revert after the general meeting.

The next general meeting of the BLA was to be held at Welkom, Free State. The vice president of the Law Society of the Transvaal was Stan Treisman, who was to become (or had just become) its president at the end of the year, had been part of the 'dagbestuur' under the presidency of ED Southey. He heard of the meeting at Welkom and with only a notification to GM Pitje he invited himself to come and address the general meeting of the BLA.

He indeed arrived at the general meeting of the BLA, which was held in 1983. He was ready to address the whole meeting. The deputation that had been to the 12th floor, however, had to first report to the membership on their encounter with leaders of the statutory body. At the end of the report GM Pitje informed the meeting of their visitor who had invited himself. There was a short debate about whether Treisman was to be allowed to address the meeting and it was eventually decided that he be given audience and that at the end of his address he was, however, to be told in no uncertain terms of what the meeting felt about his visit and on the question of disbandment of the BLA. Without much further debate GM suggested and the meeting agreed that PMM (yours faithfully) would lead the response of the meeting after Treisman had spoken.

Once he was asked in, Treisman was not only eager to address the meeting about the subject of his visit; he also thought it within his powers to suggest how the meeting should be composed for his address. He had seen the 'spouses' of the BLA members outside and suggested that they should be invited in so that he can address the BLA members in the presence of their spouses. In hind sight, I think I understand, or I hope I do, where he was coming from. He probably saw himself as a guest speaker for the occasion, despite the self-invitation, and as a tradition of general meetings of the statutory law societies, guest speakers normally address the open session of the meeting, which is also attended by non-members. The new president of the law society also wanted the meeting of the BLA opened to the public for the purpose of his address. This is indeed a hind-sight gratuitous interpretation of his motive, which I give to him, only with the benefit of hind sight. It is not the reading of the man that the meeting had, as he suggested. Nor was it mine at the time. It is nevertheless

the best and most generous accolades I would give to his suggestion.

Given its interpretation of the attitude and spirit of their guest, the meeting did not even waste time entertaining the suggestion of their self-invited guest. In his characteristic forthrightness, the president of the BLA (GM), simply introduced the guest to the meeting and invited him to address the general meeting of the BLA, without as much as a reference to his idea of probably opening the meeting to the public. He had asked to speak to the BLA general membership, and the membership was ready to hear his message to them.

Treisman proceeded through the usual 'not-much-to-say' opening remarks of thanking GM and the meeting for the opportunity and for allowing him to address them. He was there to speak in his personal capacity and on behalf of the council of the law society, of which he was a member. The Law Society of the Transvaal was a statutory society established in terms of the law of the country, he said. It

was the only lawful body that had authority over attorneys practising in the province. It was not there for any particular group of attorneys to the exclusion of others. It was in particular not a racist or racially inclined body. It recognised its authority and responsibility over the professional conduct and affairs of all attorneys in the country. Black lawyers were welcomed in it as were white lawyers. The law society had noted with deep concern the formation and growth of the BLA, he proceeded. There was no such lawful body in terms of the laws

“The statutory law society, of which he was a council member, would not recognise the BLA even if the BLA approached it.”

governing the legal profession. There was no need, for that matter, for black lawyers to form themselves into such a body as the BLA. Each and every lawyer present there was welcome to submit his or her problems to the law society and it would give due attention thereto. There was no need and no scope for the existence of a separate body of lawyers such as the BLA. The statutory law society, of which he was a council member, would not recognise the BLA even if the BLA approached it. So, there was no need and no scope for the BLA. He had learnt that the authority for the decision whether to disband or not vested in the general meeting. So, he had come to address it so that we (the members) should understand the true position. He urged the meeting to disband the association because there was no other viable option going forward. He would answer any question that anybody at the meeting had about his message, he concluded.

There may have been a question or two, but at the time of writing, I truly cannot remember. There could not have been much significance in any that was asked nor in the answers given.

Before sitting down or concluding his message, Treisman referred to an affidavit which had been submitted to the law society as a complaint and he wanted to read it before he made some concluding remarks. He proceeded to read everything in the affidavit, including the identification of the complainant

member. Treisman deserved to be commended for his frankness or courage. Did he? Mixed feelings. It was not clear either whether he had sought and obtained the consent of the complainant who was the author, to air the complaint publicly in the manner he did.

Any way, he proceeded to read. The complainant and author was Thukwane Post Moloto, one of the members of the BLA who, if I am not mistaken, was in the meeting as well. TP Moloto had gone to the magistrate court at Lydenburg or Groblersdal where he was to represent his client in the court. He had parked his vehicle within the court premises where he had previously seen other colleagues park their vehicles. He either had not noticed that his colleagues who parked vehicles there were all white or he simply did not care. Knowing his character, I suspect the latter.

While in court he had been approached by a court official who called upon him to remove his vehicle from within the court premises where he had parked. TP did not oblige. He saw racism in the suggestion. He mentioned in the affidavit that he saw racism in the approach to him as the only attorney, who was black, to be instructed to remove his vehicle. He may have told them that he was busy then or some other reply, but he certainly did not remove the vehicle and protested, according to the affidavit read, about being discriminated against. No attempt by the court official could get him to remove the vehicle. He is not the sort of person who would give up protest that easily. According to the affidavit, he continued with whatever business he had at the court and proceeded to his vehicle only when his business for being at the court had been concluded.

When he got to his vehicle, he found that he had been parked in by two other vehicles one of which belonged to a white senior or chief magistrate. The motive had been to block him and he was effectively blocked. He may have tried to call for the owners to remove the vehicles – that part of the affidavit I do not recall; it was also not the most important part – and memory has a good tendency to offload what does not strike it as important. So, has mine in this regard. One thing certain, TP Moloto was not helped; and in return for his daring to park where he was not supposed to, they had him stay at the premises much longer than he had intended. They only released him from the parking bay detention late in the day when they wanted to.

He was aggrieved. He therefore requested the law society, as a body to which he belonged, to investigate his complaint of being discriminated against on the basis of his colour.

After reading the full body of the affidavit, Treisman commented on the language used. The standard of English in the affidavit, he said, was such that he (Treisman) was ashamed of it. It was embarrassing and he did not expect such a poor standard from a member of the profession. These

things, including the poor language, are some of the things that the law society had to see to. He urged members of the profession (his black colleagues) to really see to it that they improved their language competence and not embarrass him (Stan Treisman) by the type of poor language such as what he had just read.

I frankly cannot recall now, almost thirty years later, what precisely was wrong with TP Moloto's English. The contents are, however, still as clear in my memory as if it had been read yesterday. A clear and strong case of racism was made. For me it had the clear ring of *R v Pitje* [1960 (4) SA 709 (A)] (a reported case of racial discrimination in court, with which I presume the reader is familiar). A colleague had been treated as unequal to other white lawyers by a white magistrate. Treisman did not comment on the contents or the merits of the complaint. He had evidently brought it and had read it out for his audience only to demonstrate the language incompetence, which he urged his black colleagues to guard against in order

not to embarrass themselves and other presumably white English-speaking colleagues. That was the end in essence of the Treisman speech.

It stood to yours faithfully to lead the response, and the presiding chairperson, GM Pitje, duly called upon me to respond on behalf of the BLA. What follows is a paraphrase.

I thanked him for having taken the trouble to come to our meeting. He had invited himself to our meeting and he was

welcome. Although the BLA had not invited him he is to be congratulated for the move he had taken. He was probably the first white official ever to have come to address a BLA general meeting and I hoped that the move he had taken would promote a better understanding of how the black lawyers saw themselves vis-a-vis the law society and other colleagues. He should take this understanding with him as he went back home and share it with other white lawyers and officials who did not have the same exposure. It was only through talking to each other that we could reach some level of mutual understanding: The BLA had been formed by the black lawyers, who are adults and not children, I said. They had particular problems to address and they knew what they were doing when they formed the BLA. As a self-invited visitor to the BLA he had chosen to tell the BLA what he thought about the formation of their association and had not asked them why they formed the association. For his information, the BLA had been formed to address the problems of black lawyers. They had noted that whenever the law society was to consider their problems, such problems were always reflected as a small item on the agenda, and at the end. When the meeting ran out of time, theirs was the one to be pushed to the next meeting, at which it would still not be the first or urgent item for the day. To the BLA, these problems were major and deserved to be addressed on a full basis and members were confident that they would deal

“As far as the issue of non-recognition of the BLA was concerned, the BLA had not approached the law society for recognition and did not intend to do so.”

with their own problems better than the law society could or had done. For him as a non-member simply to come to give us his view and to call upon us to disband was characteristic of paternalism of white people towards efforts of black people. He had not called upon us to form the BLA and could therefore not call upon us to disband it. The BLA would only be disbanded by its members when they considered it wise to do so and certainly not at his request or command, or that of any non-member. The reply which he should take back with him is that the BLA was not going to disband.

As far as the embarrassment he had in reading the affidavit of TP Moloto was concerned, I said, I should inform him that I too was embarrassed by his conduct. As a member of the law society, of which he was a leader, I was embarrassed that he had read an affidavit in which very serious issues of racial discrimination were raised and that he said nothing to us about those serious allegations. Racism, I said, was to the BLA a very serious issue which is rooted in our history and would also affect our relationship with the law society. I was indeed embarrassed that he, as my supposed leader, would say nothing about it after reading the document. In disclosing its purpose, I thought, the affidavit was clear, whatever the language shortcomings in it. Language, I said, was only important as a means of communication and in my view the complaint of racism was quite clear. It would, however, remain an embarrassment to me that having come that far from Pretoria he had chosen to focus on the language of the document and not the substance. I hoped that as I addressed him in response, he was not focusing on the quality of my language. I hoped that he understood the content of my response, whatever my language shortcomings. English was not my language and I would not pretend to speak it better than those to whom it was the first language. I hoped that the message I had conveyed on behalf of the BLA would reach him and his colleagues in the law society. It was precisely because of the inability of the law society to focus on the issues we regarded as vital that the BLA was formed in spite of the existence of the law society. The BLA would, for instance, consider racism as more important than the language in which the complaint about it is couched. The law society, going by his very response before us, would on the other hand see language as more important.

As far as the issue of non-recognition of the BLA was concerned, the BLA had not approached the law society for recognition and did not intend to do so. We had noted his stance or that of the law society on that point, but wanted to make it clear that the BLA did not need such recognition to continue to exist. As lawyers, we were all aware of our statutory obligation to join and have joined the law society. That, however, did not affect our resolve to continue with the BLA. The BLA would remain open to speak to the law society

and its leaders on any issue if it became necessary and would, in such event, note the response of the law society for what it is, and that would in turn determine how matters would proceed thereafter. As for application for recognition, none was in the pipe line and none would come his way from us.

In his short response, Treisman did assure me that he found nothing wrong in my English and that he had clearly understood what I had conveyed on behalf of the BLA (I hoped that he had also understood colleague TP Moloto's complaint).

One or two other members added to my response and generally confirmed. If my memory serves me well, Ephraim Makgoba is one of those who added in confirmation to what

“It was precisely because of the inability of the law society to focus on the issues we regarded as vital that the BLA was formed in spite of the existence of the law society.”

I had said. Willie Seniti may also have spoken – but that too I cannot be certain of. What I recall clearly is that whoever spoke on the side of the BLA took the same line that we had agreed to take. It was a line we had all confirmed before we listened to him and nothing which he had said was unexpected. What we had not expected is that he would read the complaint affidavit of TP Moloto and what he would say on it. My response to that part of his speech was therefore unprepared and impromptu. It had not been caucused and I took full responsibility for

it. No one differed from it. One or two members may have conveyed to me later that I had been too hard to him on that score. The bulk, however, confirmed and reaffirmed the gist of my response. The message to Treisman had been loud and clear: The BLA was not going to disband and did not seek recognition.

I learnt a month or two after that meeting, from GM Pitje, that Treisman had thereafter approached my former principal, Ed Southey, to find out more about me and wondered why they had allowed me to leave Webber Wentzel after my articles. (Whatever that meant). I had fairly good articles of clerkship at Webber Wentzel and throughout, to this day, I kept a good relationship with the firm including those people in it who only joined it after I had left. Nothing ever happened that made me regret having served articles with them or having left the firm when I did. On the very contrary I am to this day happy that I did both. I hope they too are happy with the role they played in my life (which is by no means insignificant).

After that encounter in the early 1980's, the law society has never again tried to persuade the BLA to disband. They may well have endeavoured to do so through the Law Society of South Africa (LSSA) in the period 1999 – 2002 with the collaboration of Silas Nkanunu, a Nadel president, when pressure was placed on the BLA to dissolve its Legal Education Centre (LEC). The LSSA then got its response and luckily Silas Nkanunu did not enjoy the support of Nadel either on the issue of dissolution of the BLA or the BLA-LEC. That, however, is a full chapter on its own and more may be said about it when that period is examined. ●

BLA Mandela Day

NORTHERN CAPE



NEC deployees handing over paint and school trousers



Learners expressing their appreciation to BLA after painting of the school



From Right to left: P. Tlaetsi JP, V. Morobane, G. Botha and L. Lobi



The Nigerian Supreme Court and the political Question doctrine

By Ekokoi Solomon* and Ekereobong Essien**



Abstract

This paper examines the attitude of the Supreme Court of Nigeria towards the political question doctrine. It interrogates the decisions of the court in selected landmark cases involving political questions that were brought before the court between independence in 1960 (First Republic) and the Fourth Republic which commenced in 1999. The paper identifies three core approaches espoused by the court in cases involving political questions – the deference approach, the necessity approach and the avoidance approach. This paper argues that in a constitutional democracy, it is inevitable – considering that the court is both a political and a legal institution – that the court, like in other jurisdictions such as Germany, India, South Africa and the United States, will be called upon to adjudicate cases involving political questions. As such, the paper recommends that the court openly asserts the ‘politicality’ of its decisions, whether they are predicated on the need to defer to the political branches, exigency/necessity or to avoid the political questions brought before it.

Introduction

Analyses of the engagement of courts in matters regarding political questions are bound to raise the issue of institutional dialogue. The theory of institutional dialogue has been described as the participation of both the courts and the legislature in a dialogue ‘regarding the determination of the proper balance between constitutional principles and public policies’.¹ When dialogues occur between courts and the legislature, both institutions place emphasis on different values. While courts emphasise the need to maintain fundamental procedural values, the legislature concerns itself

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¹ LB Tremblay, ‘The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures’ (2005) 3(4) *International Journal of Constitutional Law* 617.

with the promotion of certain economic and social goals.² The dialogue between courts and the legislature sometimes give rise to conflict between legality and legitimacy. In the event that the outcome of procedural values conflict with the outcome of economic and social values, the former 'can be reversed, modified, or avoided by a new law, [and] any concern about the legitimacy of judicial review is greatly diminished.'³ This is because the core substance of any new law will have to effectively address the consequence of the court's decision.⁴

In a constitutional democracy, political questions are generally conceded to be within the realm of the political branches of government (the legislature and executive). In Nigeria, the notion whether judicial self-restraint in cases involving political questions is a myth or reality, is arguably an issue for legal and scholarly discourse. The divergent views on the issue may be attributed to two opposing conceptions. The first is the notion of the inherent powers of the courts to entertain any matter brought before them for judicial determination.⁵ The second is the conception that the inherent powers of courts are only meant to complement the powers which the Constitution and statutes confer on the courts, rather than conferring a separate and distinct jurisdiction on them,⁶ as inherent powers do not extend the jurisdiction of courts but merely lubricates it.⁷

The definition of concepts is a problematic academic enterprise, as there is practically no common ground to the definition of any concept. To this extent, it is essential to adopt a pragmatic approach in defining a concept. As such, the political question doctrine is described in this paper as that notion, which assists the courts to navigate within the confines of judicial tradition, so that in certain situations it will be inappropriate or injudicious for the courts to interfere, overtly or directly, with what properly should be within the realm of the political organs of government.⁸ Accordingly, a judicial matter is considered to contain a political question 'when either the constitution has expressly vested jurisdiction over the issue [raised in a case] in the other two branches of the government or it is implicit in line with the concept of separation of powers that this should be so.'⁹ It should be noted that not all political and constitutional cases constitute political questions, even though all constitutional cases have political relevance. For, in the words of Popoola,

political question[s] must, however, be distinguished from what is often referred to as political cases. The

characterisation of a question as 'political' does not lie in any possible effect, which the decision may have on the political framework of the country. In that sense all constitutional issues have political significance or undertones.¹⁰

When judicial matters, which contain political questions produce outcomes that are inconsistent with and not desirable in promoting economic and social objectives, such decisions may be considered to be legal but lacking in legitimacy. In other words, the decision of a court may be legal, in as much as it is elucidated based on rules that are discernible, implicit or inferred from the legal instrument upon which its judicial interpretation is predicated, but at the same time such decision may not be legitimate. This is usually the case in cases involving political questions.

This paper examines the attitude of the Supreme Court of Nigeria (the court) towards the political question doctrine. It interrogates the extent to which legal and constitutional principles support or reject decisions of the court in selected cases involving political questions. The paper illustrates, through the review of some landmark decisions of the court, that in relation to the political question doctrine, the court's approach has been inconsistent and fundamentally lacking in legitimising values which are also expected of courts.¹¹ In view of the crucial role of the court in the governing process in Nigeria particularly in cases involving political questions, the decisions of the court have been shaped by –

- (i) its deference to the political branches;
- (ii) the necessity or exigency of the moment; and
- (iii) the doctrine of avoidance.

These factors are indications of the court's 'awareness of the events around [it] and the prevailing social and even political situations'¹² which determine how the court resolves cases involving political questions. This paper argues, therefore, that the court should be recognised as a participant in policy formulation because by its nature the court is not only a legal institution, but equally a political institution.¹³ To this extent, it must aim at producing practical decisions capable of being the object of reasoned agreements among the participants in the process of institutional dialogue regarding cases with political questions.¹⁴ Otherwise, such decisions should be reversed, modified or avoided by a new law.

² *ibid* 633.

³ PW Hogg and AA Bushell, 'The Charter Dialogue between Courts and Legislatures: Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All' (1997) 35(1) *Osgoode Hall Law Journal* 75, 80.

⁴ *ibid*.

⁵ Constitution of the Federal Republic of Nigeria 1999 (as amended) Cap C23 Laws of the Federation of Nigeria (LFN) 2004 [hereinafter CFRN 1999 (as amended) or the Constitution] s 6(6)(a) & (b); *Adigun v Attorney General, Oyo State* [1987] ANLR 328, 344; 2 NWLR (Part 56) 197; see also KM Mowoe, *Constitutional Law in Nigeria* (Malthouse Press Limited, 2008) 179-80.

⁶ *The Young Shall Grow Motors Ltd. v Okonkwo* [2002] 38 W.R.N 98.

⁷ *Akilu v Fawehinmi* (No 2) [1989] 2 NWLR (Part 102) 122, 197.

⁸ AC Casties, 'Justiciability: Political Question' in LA Stein (ed), *Locus Standi* (The Law Books Co Ltd., 1979) 202.

⁹ AO Popoola, 'Politics of the Nigerian Judiciary' in Proceedings of the Nigerian Association of Law Teachers Conference (1994), 56, 70.

¹⁰ *ibid*.

¹¹ Tremblay (n 1) 630-634.

¹² Popoola (n 9) 68.

¹³ *ibid* 62, 64-65.

¹⁴ Tremblay (n 1) 632.

The Supreme Court and constitutional adjudication

The court is established in section 230 of the CFRN 1999 (as amended). It is the highest court in the hierarchy of the judicature in Nigeria. All adjudications, with the exception of certain electoral cases,¹⁵ terminate at the Court.¹⁶ Apart from the general powers of the Court under section 6 of the CFRN 1999 (as amended), the court possesses both original¹⁷ and appellate¹⁸ jurisdictions. Cases go on appeal to the court either as of right¹⁹ or with leave of the Court of Appeal, which decision is to be appealed, or with leave of the court.²⁰

In terms of the original jurisdiction of the court, section 232(1) of the CFRN 1999 (as amended) empowers the court, to the exclusion of any other court, to entertain cases involving 'any dispute between the Federation and a state or between states if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends'. The court is sometimes invited to decide cases, which involve political questions that may emanate by virtue of the horizontal relations of the other two branches of government or from the vertical relations of the federal and state governments, or even from electoral/political party activities (considering the fact that politics in Nigeria are yet to develop beyond the struggle for political power).

Flowing from the above, the issue whether the court can competently exercise its judicial powers in such a manner that limits or is capable of limiting the potency of positive law may be raised.²¹ Generally, courts cannot exercise judicial powers to defeat the intention of the legislature or write into legislation what was not intended by the legislature or to rewrite a legislation through judicial decisions. By virtue of the foregoing, the court is not required to legislate from the bench (not even in the pretext of constitutional adjudication), as to do so would amount to exceeding its judicial powers and venturing into the realm of politics.

What does constitutional adjudication entail?

Written constitutions are not self-actualising. For this reason, they require interpretation and adaptation to changing circumstances.²² In interpreting the constitution, courts must ensure that the meaning accorded to constitutional texts are true to the spirit of the constitutional order. The CFRN

1999 (as amended), like every written constitution, is open-textured and 'admit[s] of competing conservative and liberal readings'²³ of the texts, and also commits to certain basic constitutional principles.²⁴ As earlier alluded, it is the open-textured nature of Nigerian Constitutions, including the CFRN 1999 (as amended), that give rise to the divergent views in constitutional interpretation. While constitutional adjudication may be considered as an inevitable and overlapping political activity. It is, however, important to ensure that decisions that emanate from the process are not only objectively based on positive law, but capable of promoting the economic and social aspirations of society in order to produce the best interpretation possible.²⁵

It would appear that the court favours two main approaches to the interpretation of the Constitution. The first is the minimalist approach. This approach to the interpretation of the Constitution, to a large extent, is a function of Nigeria's colonial heritage.²⁶ The minimalist approach was adopted by the court, for example, in the case of *Attorney-General, Ondo v Attorney-General, Federation* (ICPC case),²⁷ wherein the court unequivocally pronounced its support for the anti-corruption policy of the federal government in spite of the unitary disposition of the Corrupt Practices and Other Related Offences Act,²⁸ which negates the principle of federalism, even as the court struck down sections 26(3) and 35 of the Act for violation of the fundamental right to liberty under the Constitution.²⁹ This approach can be said to account for the court's lacklustre attitude in the interpretation of the Fundamental Objectives and Directive Principles of State Policy provisions in the Constitution,³⁰ even as the court has held that the objective to eliminate corruption can be enforced through the enactment and enforcement of legislation.³¹ The second approach to constitutional adjudication favoured by the court is the structural or purposive approach. The purposive approach to constitutional adjudication involves the systematic analysis or inquiry into the structure and function or purpose of constitutional rules. It seeks to find guidance from the history, as well as the spirit of the constitution as a living document. This approach emphasises practicality over abstract analysis, structure over procedural considerations, efficiency

15 CFRN 1999 (as amended) s 246(3); *Abubakar v Usman* [2017] 15 NWLR (Part 1587) 36.

16 CFRN 1999 (as amended) s 235. There is, however, a proposal which was sponsored by the Judiciary, seeking to limit the jurisdiction of the Supreme Court of Nigeria in terms of appeals from the court of Appeal to entertain only cases involving the death penalty, enforcement of human rights and interpretation of the Constitution (see Policy and Legal Advocacy Centre, 'Factsheet on Bills Seeking to Further Amend the Constitution to Reflect Proposals Initiated by the Judiciary' (July 2017) Issue 3 Factsheet: Review of Relevant Information on Nigeria's Democracy 1).

17 CFRN 1999 (as amended) s 232; see also Supreme Court Act Cap. S15 LFN 2004, s 17.

18 CFRN 1999 (as amended) s 233(1); Supreme Court Act Cap. S15 LFN 2004, s 16(1).

19 CFRN 1999 (as amended) s 233(2).

20 *ibid* s 235(3).

21 *Dangana v Usman* [2012] 2 SC (Part III) 103, 130.

22 DP Kommers, 'Germany: Balancing Rights and Duties' in J Goldsworthy (ed), *Interpreting Constitutions* (Oxford University Press, 2006) 196.

23 T Roux, 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference' (2009) 2 Stell LR 278.

24 E Solomon, 'The Basic Structure Doctrine and Implied Limitations on the Exercise of Legislative Powers under the Nigerian Constitution' (2016) 9 University of Uyo Law Journal 267.

25 Solomon (n 24) 279-280.

26 HO Yusuf, 'The Judiciary and Political Change in Africa: Developing Transitional Jurisprudence in Nigeria' (October 2009) 7(4) I-CON 654, 664.

27 [2002] 6 SC (Part I) 1.

28 No. 5 of 2000, repealed by Corrupt Practices and Other Related Offences Act, (No 6 of 2003) Cap C31 LFN 2004, s 55.

29 'This led to the repeal of the Corrupt Practices and Other Related Offences Act 5 of 2000 and the enactment of the Corrupt Practices and Other Related Offences Act 6 of 2003.

30 GN Okeke and C Okeke, 'The Justiciability of the Non-Justiciable Constitutional Policy of Governance in Nigeria' (January - February 2013) vol. 7(6) Journal of Humanities and Social Science, 9-14.

31 ICPC case (n 27) 28-30.

over textuality, and the ends prevailing over the means.³² The structural or purposive approach, therefore, ensures the unity and coherence of constitutional order.³³ This approach seeks to entrench the existing constitutional order by going beyond explicit constitutional provisions to apply norms that may be implied from the constitutional texts.³⁴

The court has applied the structural or purposive approach in plethora of cases. For example, in the case of *Bronik Motors Ltd v Wema Bank Ltd*, the court held that a constitution is a living document that requires a purposive interpretation of its provisions in order to promote the objects of its provisions and intention of the framers of the Constitution.³⁵ In *Dangana v Usman*, the court held that in constitutional adjudication, a judge should not only rely on the constitutional texts but also consider the historical evolution of constitutional practice and history prior to the enactment of the Constitution.³⁶ In the case of *Rabiu v State*, the court held that it is not the duty of the 'Court to construe any of the provisions of the Constitution as to defeat the obvious ends of the Constitution',³⁷ or indeed to input other meaning into the Constitution in a manner that will defeat the principles upon which a constitutional rule was established.³⁸ Also, in *Attorney-General, Abia State & Ors. v Attorney-General, Federation (Revenue Monitoring case)*³⁹ – a case which the plaintiffs instituted to challenge the constitutionality of the Local Government Revenue Management Act, a legislation which was enacted to promote the economic and social well-being of the citizens especially in the rural areas – the court was called upon 'to respond to the dilemma presented by the need to secure a balance between a laudable policy objective with constitutional support and a fundamental black-letter constitutional principle'.⁴⁰ In its judgement, the court held that the Revenue Monitoring case was not about the need to curb corruption. Rather, as it noted, it was about the violation of a major constitutional principle, namely federalism.⁴¹

There is, however, a new approach that seems to have emerged in recent times by the court's refusal to engage in constitutional adjudication. This approach is reflective of the passive disposition of the court to the extent of avoiding the adjudication of certain constitutional questions brought before

it for judicial determination.⁴² The succeeding parts of this paper examine cases with political questions and the attitude of the court in the determination of the issues involved.

The Supreme Court and Institutional Deference

Owing to British colonial heritage of the Nigerian judiciary, the deference of courts to the political branches can hardly be said to be a direct consequence of the doctrine of separation of powers. Rather, it is a function of the doctrine of deference, which is the result of 'a principle of judicial decision making [which] includes the approach of the courts to the [low] level of scrutiny applied in the process of judicial review'.⁴³ It should be noted that while the doctrine of separation of powers 'enables courts to respect the role of the executive and legislature in formulating policy, [...] constitutional deference allows for an examination of the reasons which underpin a court's deferential approach in choosing a lower standard of review'.⁴⁴

After independence therefore, this attitude reflected in the judicial attitude of Nigerian courts and judges, and as it appeared, they accepted their subordinated position in the policy formulation process. So, in the interpretation of the Constitution and statutes, the court mostly shied away from making judicial decisions that would suggest its participation in policy formulation through the judicial process. While in some cases, the court did not openly acknowledge its deference to the political branches, in other cases, however, the court made it clear that it was unprepared to engage the political questions involved in such cases, in deference to either the legislative or executive branch. In *Akintola v Aderemi*,⁴⁵ for example, a case which arose out of a political crisis in the Western Region of Nigeria (as it then was), and which resulted in the removal of the premier by the governor, the Federal Supreme Court held that in a democracy, institutions are required to imbue a spirit of tolerance, compromise and restraint. The court acknowledged that under a parliamentary democracy, which was the system of government practiced in Nigeria at the time, if a premier who was the head of the government realised that he and his government no longer commanded the support of a majority in the House of Assembly, the premier ought to resign or call for the dissolution of the Parliament and the conduct of a fresh election. The court, however, went on to hold that '[i]f a premier were to go on, although he knew that he did not

32 J Madison, 'Federalist 40' in L Goldman (ed), Alexander Hamilton, James Madison, and John Jay: The Federalist Papers (Oxford University Press, 2008) 194; see also Solomon (n 24).

33 Kommers (n 22) 199-200.

34 C Chandrachud, 'Constitutional Falsehoods: The Fourth Judges Case and the Basic Structure Doctrine in India' in R Albert and BE Oder (eds), An Unamendable Constitution? Unamendability in Constitutional Democracies (Springer International Publishing AG, 2018); see also Solomon (n 24).

35 [1983] ANLR 272, 291-292.

36 Dangana (n 21) 152.

37 [1980] 8-11 SC 130, 149 (per Udoma JSC).

38 Attorney General, Bendel State v Attorney General, Federation & 22 Ors. [1981] ANLR 85, 130-131.

39 [2006] 7 NIR 71, 1.

40 Yusuf (n 26) 663.

41 Revenue Monitoring case (n 39) 22.

42 Attorney General, *Federation v National Assembly* [April 2015] Unreported, Suit No SC/214/2015 <<http://nationalmirroronline.net/new/fg-drags-nass-to-supreme-court/>> accessed 11 January 2018, a case which sought to stop the unconstitutional amendment of the CFRN 1999 in 2015 by the 7th National Assembly, through the Constitution of the Federal Republic of Nigeria (Fourth Alteration) Bill 2015; see also E Solomon, 'Legal and Constitutional Evaluation of the Nigerian Sovereign Wealth Fund' (2015) 5(1) Afe Babalola University: Journal of Sustainable Development Law and Policy 101, 105-6, for a brief analysis of the court's avoidance of the issue/dispute between the 36 state governments and the federal government of Nigeria, which has led to consistent legal actions over what the former claims to be the latter's unilateral operation of the Excess Crude Account (ECA) and the alleged illegal withdrawal of USD 1 billion from the ECA to fund the Nigerian Sovereign Wealth Fund.

43 K Mclean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa*, (Pretoria University Law Press, 2009) 61.

44 *ibid* 62.

45 [1962] 1 All NLR 442.

command a majority he would be departing from democratic principle of majority rule which pervades the Constitution', a situation that would demonstrate non-conformity with public opinion, as well as the ideals contemplated by the framers of the Constitution.⁴⁶

Sadly, despite this clear finding, which was based on the existing constitutional order, the court went on to declare the removal of the premier of the Western Region by the governor as null and void on the ground that the governor's acceptance that the premier no longer commanded the majority support in the Western Region House of Assembly was a matter that could only be determined on the floor of the House and not otherwise. It should be observed that the court, in this case, gave greater credence to procedural value over the substantive legitimising value of the case. Not surprisingly, the court's decision was reversed by the Privy Council which agreed with the legal analysis adopted in the dissenting judgment of Brett FJ, which was based on a strict legal position of the case. Also, in the case of *Williams v Majekodunmi*,⁴⁷ the attitude of the Federal Supreme Court was based, it would appear, on the court's deference to the legislative branch, rather than on the dictates of the law. In this case, the plaintiff challenged the validity of the state of emergency, which was declared in the Western Region of Nigeria pursuant to the Emergency Powers Act of 1961. The court was, therefore, invited to consider, among other things, whether the Federal Parliament had validly exercised its powers under the Constitution. In the view of the court, the existence of a state of public emergency in the country is a political issue and 'a matter within the bounds of Parliament and not one for this court to decide.'⁴⁸ According to the court, once that state of emergency is declared, it would seem that according to the Constitution, it is the duty of the government to look after the peace and security of the state and it will require a very strong case against it for the court to act.⁴⁹

The court therefore declined to determine the constitutionality of the exercise of the emergency powers in deference to Parliament. In a remarkable fashion, instead of inquiring into the validity of the exercise of the power of declaration of a state of emergency, the court chose to focus on the aftermath (the effect) of the declaration of the emergency. Similarly, in *Attorney-General, Eastern Nigeria v Attorney-General, Federation*,⁵⁰ the court was of the view that the margin of irregularities involved in the census figures was acceptable to a reasonable person, as it was within an acceptable margin of error. The court, however, held that it was not competent to adjudicate on the matter as census is essentially a political matter.⁵¹ Consequently, the court refused to make the declaration that was sought by the plaintiff, namely to invalidate the results of the census exercise. Also, in *Lakanmi v Attorney-General, Western Nigeria*,⁵² the court in effect, recognised a military government as a constitutional

government, by inferring that the military take-over of government in January 1966 was a voluntary hand-over of power by the executive branch of the civil government to the military. This may have been a pragmatic move on the part of the court, considering the despotic nature of military governments. It might also have been an attempt by the court to defer to the action of the executive to voluntarily effect a change of government by handing over power to the military.

In *Awolowo v Shagari*,⁵³ the court engaged the political question that arose in that case and made a decision that was legal but, nevertheless, lacking in legitimising value. In this case, the court held that the 'Federal Military Government must be deemed to know that two-thirds of 19 States will be 12^{2/3} States'.⁵⁴ How could this be? To justify its deference to the framers of the provision of the law, which came up for interpretation, the court restated the notion that judges are not expected 'to apply their opinions of sound policy so as to modify the plain meaning of statutory words'.⁵⁵ This was in spite of the court's acceptance that the issue at the core of the case was an issue of law, which centred on the interpretation of the provisions of section 34A (c)(ii) of Electoral Decree No. 73 of 1977 (as amended), a task for which the court was suitably placed to undertake, as it succinctly pointed out, 'with the minimum of direction from the legislature as to how [the court] should set about this task.'⁵⁶

Notwithstanding this sound line of reasoning, the court stopped short of proffering a legal interpretation of the provision of Decree No. 73 (as amended), which required a candidate for the office of president to score 'not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the States in the Federation', in order to be duly elected. This provision entailed that for a candidate to be elected president the person had to satisfy two requirements, namely –

- (i) the requisite votes; and
- (ii) the number of States in which the votes are received.⁵⁷

Regrettably, the court chose to rely on the fact that the election was conducted substantially in accordance with the provision of Part II of the said Decree, and therefore declared the defendant as the winner having secured more votes, even though the votes were short of the required 25 per cent of the votes by a margin of 5.06 per cent.⁵⁸

The preceding analysis illustrates the court's deference to the political branches with regard to cases with political questions. It must be re-emphasised that although these decisions were legally binding, they lacked the standard of legitimacy. In terms of legality and legitimacy, while legality addresses the question of validity, legitimacy responds to the question of acceptability, which is a function of the conscious or deliberate satisfaction of economic and social aspirations

46 *ibid.*

47 [1962] 1 All NLR 324.

48 *ibid* 330.

49 *ibid.*

50 [1964] 1 All NLR 224.

51 *ibid* 231.

52 [1971] All NLR (Part II) 201.

53 [1979] All NLR 120.

54 *ibid* 141.

55 Viscount Simon, LC quoted in *ibid* 140.

56 *ibid* 139 (per Fatayi-Williams, JSC).

57 *ibid* 181.

58 *ibid* 142-144.

of the society.⁵⁹ This means that the fact that a decision of a court is legal does not make it right. Even so, in all of the cases examined above, the legislature did not take steps to reverse, modify or avoid the decisions or their effect as soon as it had the opportunity. The situation is different under the current political dispensation (Fourth Republic), as the legislature has used appropriate legislative instruments to reverse and avoid decisions of the court in cases involving political questions.⁶⁰

The Supreme Court and the notion of necessity

The landmark cases of *Attorney-General, Federation v Attorney-General, Abia State* (Oil Resource Allocation case)⁶¹ and *Amaechi v INEC* (Amaechi case)⁶² are classical examples of cases involving political questions since the return to civil rule in May 1999. The former case bordered on intergovernmental relations arising from oil resource allocation and the latter was a case, which involved electoral/intra-party dispute.

The Oil Resource Allocation case

The Oil Resource Allocation case is an important case in the analysis of the attitude of the court towards the political question doctrine. Before restating the facts of the case, it is important to provide a brief overview of the on-shore/off-shore oil dichotomy in Nigeria. The Off-shore Oil Revenue Decree of 1971 introduced the principle of dichotomy between on-shore and offshore oil for the purpose of sharing the revenues derived from oil earnings. Thereafter, the Constitution (Financial Provision, etc) Decree No 6 of 1975 was later promulgated to abolish the principle of dichotomy introduced by the 1971 Decree.⁶³ Regrettably, despite the repeal of the on-shore and off-shore oil dichotomy law, revenues derived from off-shore oil did not return to the deserving oil-bearing states. Rather, oil revenues were credited to the distributable pool account to be shared among the states and the federal government.⁶⁴

In 1992, however, following the recommendations of the Political Bureau, which was set up in 1986,⁶⁵ the on-shore/off-shore oil dichotomy was, for the second time, repealed to allow the oil-bearing states to benefit from off-shore oil

revenues. According to the Allocation of Revenue (Federation Account, etc) (Amended) Decree 1992:

‘For the purpose of subsection 2 of this section and for the avoidance of any doubt, the distinction hitherto made between on-shore and off-shore oil mineral revenue for the purpose of revenue sharing and the administration of fund[s] for the development of oil mineral producing areas is hereby abolished [...] in the application of this provision, the dichotomy of on-shore and off-shore oil production and mineral oil and non-mineral oil revenue is hereby abolished.’⁶⁶

Facts of the case

A perusal of the statement of claim of the plaintiff (federal government) in the Oil Resource Allocation case, as contained in the law report, shows that the case was technically against the littoral states. This is because the statement of claim stated that the purpose of the action was to determine the actual amount of oil revenue accruing to the Federation Account from the states (littoral states). Consequently, the plaintiff requested the court to determine the seaward boundary of the littoral states within Nigeria for the purpose of calculating the amount of revenue accruing to the Federation Account directly from oil derived from the defendant littoral states. In relation to the issue that was raised in the Oil Resource Allocation case, the provision of the Allocation of Revenue (Federation Account, etc) (Amended) Decree 1992 stated above is very important, especially as it affects the interests of the littoral states.⁶⁷

According to the plaintiff, the southern or seaward boundary of each of the defendant littoral states is the low-water mark of the land surface of such state or the seaward limit of inland waters of each of the littoral states. The plaintiff’s contention, therefore, was that natural resources (oil in particular), located within the Continental Shelf of Nigeria are not derivable from any of the littoral state of the federation. On the other hand, the littoral states argued that their territory extended beyond the low-water mark to the territorial waters to the Continental Shelf. They maintained that the oil derived from off-shore waters are from their territories and therefore entitled to the allocation of not less than 13 per cent of the revenues, from resources derived from the continental shelf of Nigeria, as contained in the proviso to section 162(2) of the CFRN 1999.⁶⁸

Decision of the court

The court gave its judgement on 5 April 2002, holding that the boundary of the littoral defendant states is the low water mark of the seabed and not the Continental Shelf. It should be noted that at the time the plaintiff brought the suit in 2001, the Allocation of Revenue (Federation Account, etc) (Amended) Decree No 106 of 1992, which sought to end the dichotomy between on-shore and off-shore oil mineral for the purpose

59 N Udobana, ‘Constitutional Restructuring and Fiscal Federalism’ (Paper presented at the Dinner Lecture organised by Godswill Akpabio Law House in collaboration with Akwa Ibom North-West Lawyers’ Coalition, Uyo, 23 December 2017) 6.

60 The effect of the decision in the case of *Attorney-General, Federation v Attorney-General, Abia State* & 35 Ors. was reversed and/or avoided by the Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act, Cap. A27 LFN 2004, s. 1(1) which states that ‘[a]s from the commencement of this Act, the two hundred metre water depth Isobath contiguous to a State of the Federation shall be deemed to be part of that State for the purposes of computing the revenue accruing to the Federation Account from the State pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, 1999 or any other enactment.’ Also, the effect of the decision in the case of *Amaechi v INEC* was reversed and/or avoided by the Electoral Act, No. 6 of 2010, s. 141 which states that ‘[a]n election tribunal or court shall not under any circumstances declare any person a winner at an election in which such a person has not fully participated in all the stages of the said election.’ [emphases added].

61 (No 1) [2001] All N.L.R. 121; (No 2) [2002] All N.L.R. 72.

62 [2007] 1 All N.L.R. 354.

63 Decree No. 6 of 1975, first column to the Schedule.

64 AE Bassey, *The Off-shore Oil and Derivation Struggle at the Supreme Court* (Sibon Books, 2006) 23.

65 Report of Political Bureau (Federal Government Printer, March 1987) 164.

66 Decree No 106 of 1992 s. 4A (Now Cap A15 LFN 2004).

67 K Ebeku, ‘Nigerian Supreme Court and Ownership of Off-shore Oil’ (2003) 27 *Natural Resources Forum* 291-299.

68 Oil Resource Allocation case (No 2) [2002] 72, 73-74.

of sharing oil revenues, was an existing legislation within the meaning of section 315(1)(a) & (b) of the CFRN 1999 (as amended).

Critique of the court's decision

It is not the intention of this paper to critique the decision of the court just for the sake of criticism. Nevertheless, it is trite that decisions of courts may be critiqued in appropriate forums such as this, albeit respectfully. This position was recognised in the case of *Adigun v Attorney-General, Oyo State*, wherein the court noted that in view of the great power, which the court under review wields, it is necessary to exercise same with care, hence the need for 'pungent and constructive analytical criticism of every judgment of the court in the law journals and similar fora. [For] [t]he judgements of a court should not be treated with sacred sanctity, once it gets to the right critical forum',⁶⁹ as the courts are not infallible.⁷⁰

In critiquing the decision of the court in the Oil Resource Allocation case, three questions are put forward:

- (a) Was it proper for the federal government to institute the case for the determination of the seaward boundary of a littoral state for the purpose of calculating the amount of revenues accruing to the federation account from natural resources (mineral oil) derived from a state, in spite of the fact that the on-shore/off-shore oil dichotomy policy in the determination of oil revenue had been abolished by two previous Decrees – the Constitution (Financial Provision, etc) Decree No. 6 of 1975 and the Allocation of Revenue (Federation Account, etc) Decree No 106 of 1992?
- (b) Why did the federal government institute the suit for the determination of the ownership of natural resources (mineral oil) located in the off-shore seabed of Nigeria when both the Constitution and the Petroleum Act are explicit on the issue of the legal ownership of mineral and mineral oil in Nigeria?
- (c) Why did the court rely on the colonial Orders-in-Council, common law principles, as well as foreign cases to arrive at its decision on the boundary of the littoral states; whereas, the 1960 and 1963 Constitutions both contained provisions which deemed the Continental Shelf as the boundary of the Southern Regions from where the present littoral states, which are bona fide successors in title, were created?⁷¹

As to the first question, it is worthy of note that both Decree No 6 of 1975 and Decree No 106 of 1992 were laws promulgated by military governments. With the return to civil rule in May 1999, both Decrees became 'existing laws' and deemed as Acts of the National Assembly, as the matters

covered by the Decrees are within the legislative competence of the National Assembly.⁷² This is because when the CFRN 1999 came into force, both Decrees were not repealed. In *Ibidapo v Lufthansa Airlines*, the court held that a law did not cease to have effect and validity as an existing law in Nigeria simply because it was omitted in the course of the compilation of the laws of the federation. Accordingly, the court held that where there is intent 'to repeal legislation, this should be expressly so stated as the courts generally lean against implying the repeal of an existing legislation unless there exist clear proof to the contrary'.⁷³

The implication is that an omission of a law or presumption of repeal of a law is not tantamount to its repeal. As such, an omitted law or a law presumed to have been repealed when in fact it was not, would continue to have the same force of validity and applicability as if it had not been omitted or presumed to have been repealed.⁷⁴ Therefore, on the basis of clear constitutional and judicial authorities, the federal government had no basis for instituting the Oil Resource Allocation case in the first place, when there were existing pieces of legislation, which had effectively abolished the on-shore/off-shore oil dichotomy. The proper cause of action for the federal government, in the circumstance, was to present a Bill to the National Assembly to repeal both Decrees which had abolished the onshore/offshore oil dichotomy. In essence, there was no justiciable dispute between the parties as the legislature's intent had been expressly made clear in relation to the onshore and offshore oil issue.

The second question concerns the determination of the legal ownership of mineral oil in Nigeria. The provisions of the CFRN 1999 (as amended) and the Petroleum Act clearly vest the legal ownership, management and control of oil in all land covered by water or under the territorial waters or that forms part of the continental shelf or that forms part of the Exclusive Economic Zone in Nigeria.⁷⁵ These provisions effectively establish the principle of eminent domain in Nigeria. Eminent domain is a legal principle, which recognises the power of a government to take property from a smaller and weaker entity and transfer same to a much larger and politically stronger entity for the purpose of economic and social development.⁷⁶ The effort of federal government to seek the determination of the legal ownership of oil in the off-shore seabed may, therefore, be considered as a frivolous exercise and an abuse of court process.⁷⁷ For there appears to have been no basis for the action, as there was no dispute between the parties for which the court could have exercised its original jurisdiction.⁷⁸ It is therefore submitted that the case was hypothetical in nature,⁷⁹

⁶⁹ *Adigun* (n 5) 328, 344; 2 NWLR 214-215 (per Eso JSC).

⁷⁰ *Adegoke Motors v Adesanya* [1989] 3 NWLR (Part 109) 250, 274-275.

⁷¹ According to an *Amicae Curie* in the Oil Resource Allocation case, '[t]he seaward boundary of a littoral state is a matter that has been settled by international law, especially the Geneva Convention on the Territorial Sea 1958, and the Third United Nations Convention on the Law of the Sea, and [therefore] not a matter for determination by municipal courts.' See E Osieke, 'Case between the Federal Government and 36 States on the Issue of Derivation-Suit No. SC.28/2001' (*Amicae Curie Comments*) 4.

⁷² CFRN 1999 (as amended) s. 315(1)(a).

⁷³ [1997-98] All NLR 88, 123 (per Iguh JSC).

⁷⁴ Revised Edition (Laws of the Federation of Nigeria) Act 2007, s. 2.

⁷⁵ CFRN 1999 (as amended) s. 44(3); Petroleum Act Cap P10 LFN 2004, s. 1(1).

⁷⁶ Cato Institute, Eminent Domain: Its Uses and Abuses (12 May 2002) <<http://www.cato.org/events/020514pf.html>> accessed 17 December 2017.

⁷⁷ *Pavex International Company Ltd v IBBWA* [1994] 5 NWLR (Pt. 346) 685, 699, wherein Uwaifo JCA noted that '[a]n abuse of process of the Court may occur, when a party improperly uses the judicial process to the harassment, irritation and annoyance of his Opponent'.

⁷⁸ Oil Resource Allocation case (n 61) 184 (dissenting opinion per Karibi-Whyte JSC).

⁷⁹ *Saliu v State* [1984] 10 SC. 104, 113; *Awoshima v State* [2011] 6-7 SC (Part III) 1, 38.

and akin to asking the court for its advisory legal opinion – a practice that is not recognised under Nigerian law.⁸⁰ An exception will only arise if the case related to the interpretation or application of the Constitution,⁸¹ or involved ‘questions of law rather than disputed facts’.⁸² Accordingly, the suit ought to have been commenced by originating summons and not by a writ of summons, which was the process used by the plaintiff in commencing the suit.

The third question pertains to how the court arrived at its decision. In determining what constitutes the seaward boundary of a littoral state in Nigeria, for the purpose of revenue allocation from natural resources derived from a state in order to give effect to the proviso in section 162(2) of the CFRN 1999, the Court relied on the Nigeria Protectorate Order in Council 1913 (which came into force on 1 January 1914), the Nigeria Protectorate Order in Council 1922, the Lagos Local Government (Delimitation of Town and Division into Wards) Order in Council 1950, Nigeria (Constitution) Order in Council 1951, and Laws of Nigeria 126 of 1954 (the Northern Region, Western Region and Eastern Region (Definition of Boundaries) Proclamation 1954). None of these colonial laws referred to and relied on by the court effectively defined the seaward boundary of the former Western and Eastern Regions of Nigeria (the littoral states). At best, the provisions of these instruments are ambiguous and irrelevant to the case.⁸³

To compound the dilemma in which the court found itself, the Territorial Waters Act (TWA),⁸⁴ the Sea Fisheries Act (SFA),⁸⁵ the Exclusive Economic Zone Act (EEZA)⁸⁶ and the CFRN 1999, offered no assistance on the issue of the seaward boundary of the littoral states,⁸⁷ save for the fact that they demonstrate that the federal government has the authority to legislate in respect of the Territorial Waters.⁸⁸ With no legislative provision to rely on to determine the seaward boundary of the littoral states, why did the court ignore the provisions of sections 134(6) and 140(6) of the 1960 and 1963 Constitutions respectively – both of which expressly deemed the Continental Shelf to be part of Southern Nigeria for the purpose of revenue allocation?

It would have been logical if the court had ascertained or attempted to ascertain whether the definition of the seaward boundary of the littoral states had been repealed by implication of the enactment of subsequent Constitutions, including the CFRN 1999. This is because under the 1960 and 1963 Constitutions, the seaward boundary of a littoral state was expressly deemed to be the Continental Shelf, but in subsequent Constitutions there was/is no provision on the issue regarding the seaward boundary of the littoral states.

In terms of common law, the court felt comfortable relying on its principles, but did not avert its mind to the admonition of the House of Lords in the English case of *Garnett v Bradley*, wherein it was held that:

there is one rule, a rule of common sense [...] namely that when new enactment is couched in a general affirmative language and the previous law, whether a law or of custom or not, can well stand with it for the language used is all affirmative words, there is nothing to say that the old law shall be repealed. [...] however] when the new affirmative words are [...] such as by necessity to import a contradiction, that is to say, where one can see that it must have been intended that the two should be in conflict, the two could not stand together, the second repeals the first.⁸⁹

It is submitted that the principle in the above case applies to the legal and constitutional ‘chicken and egg’ dilemma in which the court found itself in the Oil Resource Allocation case. With due respect to the court, it is further submitted that the court ought to have applied this rule of common sense, as the true test of the rule is in ‘a just application of its conformity to’⁹⁰ the constitutional reality, rather than succumb to the need to satisfy the political necessity to restate the federal government’s dominant position in the fiscal relations with the states, using the federal paramount doctrine, which has been applied in the United States (US), with the aid of comparative constitutional law analysis.⁹¹

The implication of the principle in *Garnett v Bradley*, with regard to the Oil Resource Allocation case, is that in so far as

- (i) the definition of the seaward boundary of Southern Nigeria (as it then was) under the 1960 and 1963 Constitutions has not been expressly or implicitly repealed by the CFRN 1999 (as amended); and
- (ii) there is no provision in the CFRN 1999 (as amended) on the boundary of the littoral states, which conflicts with the definition of the seaward boundary of the former Southern Region of Nigeria in the 1960 and 1963 Constitutions, the provisions in the latter Constitutions should remain valid and ought to be applicable for the purpose of calculating the amount of revenue accruing to the Federation Account directly from oil derived from off-shore in favour of the littoral states.⁹²

Again, in this case, the court made a decision based on the political necessity to reinforce the position of the federal government.

The *Amaechi* case

Another case which appears to have been decided on the basis of political necessity is the *Amaechi* case, which involved an electoral/intra-party dispute. The facts in this case are that Rotimi Amaechi contested in the primary election of

80 Osieke (n 71) 3.

81 C Ezeh, I Bozimo and I Mbaeri, *Fundamental Exceptions in Nigerian Law and Practice*, (Snaap Press Ltd., 2017) 9.

82 F Nwadiaro, *Civil Procedure in Nigeria* (2nd edn, University of Lagos Press, 2000) 237.

83 E Egede, ‘Who Owns the Nigerian Offshore Seabed: Federal or States? An Examination of *Attorney General of Federation v Attorney General of Abia State & 35 Ors. Case*’ (2005) 49(1) *Journal of African Law* 75,79.

84 Cap. T5 LFN 2004.

85 Cap. S4 LFN 2004.

86 Cap. E17 LFN 2004.

87 Oil Resource Allocation case (n 61) 159-160.

88 *ibid* 168.

89 [1878] 3 App. Cas. 944, 966 (per Lord Blackburn).

90 Hamilton, ‘The Federalist 83’ (n 32) 406.

91 B Silverman, ‘The Legitimacy of Comparative Constitutional Law: A Modal Evaluation’ (2016) 24(2) *J* 315-345; 353-354.

92 Egede (n 83) 86.

the Peoples Democratic Party (PDP) for nomination as the governorship candidate, in which he scored the highest votes. The PDP (third respondent) thereafter substituted him for Celestine Omehia (second respondent) who did not participate in the nomination process. Consequently, Amaechi instituted a suit at the Federal High Court, Abuja against the Independent National Electoral Commission (INEC) (first respondent), Omehia and the PDP. Amaechi lost at both the court of first instance and the Court of Appeal, hence his further appeal to the court. In its decision, the court set aside the substitution of Amaechi on the ground that it was an illegal action by the PDP, as no 'cogent and verifiable reasons' were given as required by section 34(2) of the Electoral Act 2006.⁹³ According to section 147(1) of the Electoral Act 2006, where 'a candidate who was returned as elected was not validly elected on any ground, the tribunal or the court shall nullify the election' and a fresh election ordered. The emphasis is on the phrase 'any ground'. Based on the court's findings that there were no cogent and verifiable reasons for the valid substitution of Amaechi, it was expected that the court would order a fresh election with the participation of Amaechi as the legitimate candidate of the PDP. Surprisingly, the court held that by '[t]he combined effect of section 147 and paragraph 27 [...] this court has no jurisdiction to nullify an election and order a fresh one'.⁹⁴

The *Amaechi* case was, no doubt, a pre-election matter, which emanated from a primary election process for the nomination of a candidate to represent the PDP in the election for the office of governor. For this reason, it may be argued, as the court seemed to have done, that a primary election is different from the actual election for which section 147(1) of the Electoral Act appears to have made reference to.⁹⁵ Interestingly, the same Electoral Act 2006 provided for how political parties were required to nominate candidates they wished to sponsor at elections.⁹⁶ This implies that certain provisions of the Electoral Act may, in special cases, be applied to both pre-election and election matters. This argument confronts any attempt to distinguish the possible outcomes of pre-election and election cases with some legal difficulties. This may seem to be a second order argument, but it is not by any means a frivolous one.

So, when the court ordered Omehia to vacate the office of governor of Rivers State and in its consequential orders directed that Amaechi be sworn in as the governor on the ground that he was deemed to have won the election, the decision understandably attracted serious criticisms by lawyers and non-lawyers alike.⁹⁷ In justifying the apparent meddling in an issue involving a political question, the court noted that since:

the name of Amaechi was not substituted as provided by law, the consequence is that he was the candidate of the PDP for whom the party campaigned in the April 2007 elections not Omehia and since PDP was declared to have won the said elections, Amaechi must be deemed the candidate that won the election for the PDP.⁹⁸

A justification such as the one given above was obviously problematic. It reinforced the view that hard cases make bad law – one that was certain to leave 'a sour taste in the mouth'.⁹⁹ This is irrespective of the direction in which the decision would have gone. Thus, to arrive at its decision, the court chose to amplify the constitutional issue of the fundamental right of Amaechi,¹⁰⁰ which, according to the court, deserved to be determined conclusively and with finality in his favour.¹⁰¹

Also important is the fact that the court saw the need to send a strong signal to the political class that '[t]he vicious acts of the *dramatis personae* in this case that have led to this unfortunate and time-wasting court case must not be allowed to repeat themselves. [As] [n]o decent and polished characters can be credited with such vicious acts'.¹⁰² Notably, therefore, the decision of the court appear to have been a response that was necessitated by a growing and widespread impunity in the PDP, as was evident in other identical cases that had previously been brought for adjudication by the court.¹⁰³

The Supreme Court and avoidance of constitutional adjudication

When courts avoid constitutional questions brought for their determination, the reason for their action is usually the claim that such issues are within the realm of the political branches. This approach entails the avoidance of constitutional adjudication because of what the courts perceive as political claims. This is an approach that is founded on the notion of constitutional avoidance.¹⁰⁴ The basis of which is the need to prevent the courts from becoming entangled in controversies in the exercise of the power of judicial review over constitutional issues involving political questions. In this vein, some scholars encourage courts to return constitutional problems involving political questions to the political realm for resolution.¹⁰⁵ It may equally be argued that by avoiding constitutional problems with political questions and electing to remain passive in constitutional adjudication, courts might be abdicating their role of judicial review. It should, however, be noted that the practice of constitutional avoidance, in its original conceptualisation, was only intended to be applied to minor constitutional problems.¹⁰⁶

The court under review has avoided major constitutional issues/problems with political questions, which came up for

93 Electoral Act 2006, Cap. E6 Laws of the Federation of Nigeria 2004.

94 *Amaechi* case (n 62) 404, para (a) (per Oguntade JSC).

95 *ibid* 402-404.

96 Electoral Act 2006, s. 32(1)&(2).

97 F Falana, 'The Rule of Law or the Rule of the Law: Epoch Decisions of the Supreme Court of Nigeria under Review' (Being a paper presented at the Annual General Conference of the Nigerian Bar Association, International Conference Centre, Abuja, 27 August 2008) 8.

98 *Amaechi* case (n 62) 408 (per Oguntade JSC).

99 *ibid* 517, para (i) (per Aderemi JSC).

100 *ibid* 395, paras (h-i).

101 *ibid* 399, paras (g-i); 517 paras (d-f).

102 *ibid* 521, paras (f-g) (per Aderemi JSC).

103 *Ugwu v Ararume* [2007] 12 NWLR (Part 1048) 367; *Attorney-General, Federation v Abubakar* [2007] 20 WRN 1.

104 LA Kloppenberg, 'Avoiding Constitutional Questions', (1994) 35(5) Boston College Law Review 1003.

105 AM Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, 1986).

106 Kloppenberg (n 104) 1016-1017.

determination in two important cases. The first case in which the court avoided the constitutional adjudicate of political question was *Attorney General, Federation v National Assembly* (Constitution Amendment case).¹⁰⁷ This case was instituted as a result of the fourth alteration to the Constitution by the National Assembly pursuant to the provisions of section 9(1) & (2) of the CFRN 1999 (as amended). The said alteration or amendment sought to, among other things –

- (i) alter the constitutional practice of presidential assent to Bills passed by the National Assembly in relation to the alteration or amendment of the Constitution;¹⁰⁸
- (ii) alter the extent of presidential power in relation to assent of ordinary Bills;¹⁰⁹ and
- (iii) alter executive power of the president to appoint persons to certain public offices established under the CFRN 1999 (as amended).¹¹⁰

The court avoided to adjudicate on this case, which was commenced by the attorney-general of the federation against the National Assembly over the disputed sections of the Fourth Alteration Bill 2015. Rather than adjudicate the case, the court returned the case to the legislative and executive branches for political resolution of the issues raised.¹¹¹

The second instance in which the court avoided the adjudication of a constitutional problem with a political question was when the court avoided the determination of cases, which were instituted by the 36 state governments against the federal government in 2008 and 2011, over the latter's unilateral operation of the Excess Crude Account (ECA) and the alleged illegal withdrawal of USD 1 billion from the ECA to fund the Nigerian Sovereign Wealth Fund respectively, contrary to the provision of section 162(3) of the CFRN 1999 (as amended). In spite of the legal controversy surrounding the federal government's operation of the ECA (an important constitutional issue), the court has not deemed it necessary to provide a judicial determination of the case up until the time of writing this paper.¹¹²

Constitutional Courts and Political Questions: Some Comparative Reflections

There appears to be a consensus on the notion that courts are guardians of any genuine democratic enterprise.¹¹³ The only

point of divergence, it would seem, is the extent of the court's guardianship in a constitutional democracy, considering that legislative and constitutional provisions, which empower the courts in this regard range 'from the relatively specific to the extremely open-textured.'¹¹⁴ This creates room for contending approaches on how courts in a constitutional democracy should deal with political questions, a situation which, according to Ely, is responsible for the disputation between the interpretivist and non-interpretivist approaches.¹¹⁵ The former entails that courts deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the constitution, and the latter entails that courts should go beyond the provisions of the constitution to make judicial pronouncements on norms that cannot be discovered within the confines of the legal document under review.¹¹⁶ This leaves constitutional theorists in a quagmire, as the former approach is characterised by analyses that are incapable of keeping faith with the spirit of the constitution, while the latter approach simply ends up constituting constitutional courts as legislative bodies or councils.¹¹⁷

As earlier noted, in a constitutional democracy, the normative political view is that elected officials are solely responsibility for policy formulation. Yet, the crucial role of the courts in the policy-making process is undeniable – this is with particular reference to apex courts, irrespective of the nomenclature with which they are described.¹¹⁸ This has resulted in what has been described as counter-majoritarianism. In Germany, for example, where there exists a purely political mechanism in the selection of the justices of the Federal Constitutional Court,¹¹⁹ there is acceptance that the German Basic Law (Constitution) is the interpretation given by the Federal Constitutional Court.¹²⁰ In this regard, '[m]ost scholars and legal professionals accept the court as a legitimate participant in the larger community decision-making process, [for which] Germans realise that the court walks a tight rope between law and politics, and the justices themselves are acutely aware of their political influence.'¹²¹ This experience explains why a former President of the German Federal Constitutional Court noted that:

Intellectual honesty compels us to state that there is no usable catalogue of criteria that could serve as signpost in the ridge-walking between law and politics. The two fields of action partly overlap, and cannot unambiguously be separated from each other. As the constitutional review body, the court has a share in politics.¹²²

¹⁰⁷ [April 2015] Unreported, Suit No. SC/214/2015.

¹⁰⁸ Constitution of the Federal Republic of Nigeria (Fourth Alteration) Bill 2015, s. 4, which sought to amend section 9 of the CFRN 1999 (as amended) by adding a new subsection 3A to section 9.

¹⁰⁹ *ibid* s. 14, which sought to amend section 58 of the CFRN 1999 (as amended) by adding a new subsection 5A to section 58.

¹¹⁰ *ibid* s. 23, which sought to amend the CFRN 1999 (as amended) by adding new sections 84A - 84F.

¹¹¹ The court merely observed that it is the president, and not the attorney-general, that ought to have been the plaintiff in the suit. This is because it was the president who exercised his constitutional power not to assent to the Bill. See Solomon (n 24) 267-268.

¹¹² The federal government's decision, in April 2018, to withdraw another USD 1 billion for the purchase of military hard wares sparked off another round of controversy as to the constitutionality of maintaining the ECA. In fact, this issue has further raised the question of how funds in the ECA should be appropriated. See O Ogunmade and D Oyedele, 'After Senate Rumble, Presidency Says Buhari Yet to Authorise \$1bn Withdrawal from ECA' *This Day* (Lagos, 10 April 2018) 1, 6.

¹¹³ JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980) 73.

¹¹⁴ *ibid* 13.

¹¹⁵ *ibid* 1.

¹¹⁶ *ibid*.

¹¹⁷ *ibid* 73.

¹¹⁸ M Bckenforde et al, *Judicial Review Systems in West Africa: A Comparative Analysis* (International Institute for Democracy and Electoral Assistance and Hanns Siedel Foundation, 2016) 20-21.

¹¹⁹ Kommers (n 22) 173.

¹²⁰ Smend cited in *ibid* 212.

¹²¹ Kommers (n 22) 212-213.

¹²² J Limbach, 'The Law-Making Power of the Legislature and the Judicial Review' in B. Markesinis (ed), *Law Making, Law Finding and Law Shaping: The Diverse Influences*, (Oxford University Press, 1997) 174.



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The above practice is also applicable in India where the Supreme Court is acknowledged as a political institution,¹²³ as it is noted for its engagement in ‘astute political craftsmanship.’¹²⁴ The same might be said of the South African Constitutional Court, which origin is rooted in post-apartheid politics, with the mode of selection of its justices similar to the practice in Germany.¹²⁵ The US Supreme Court has equally been described as a judicial institution with a mixture of political and policy-making functions.¹²⁶

In Nigeria, by virtue of the structure of the Constitution (with the separation of governmental powers as one of its core principles), it would appear that the court is not empowered to attribute finality to a legitimate action or inaction of the political branches, as the mechanism for constituting the court makes it incapable of proffering enduring answers to political questions, just as the court lacks the experience and facility to engage in the function of legislating. Yet, it is practically impossible for the court to be completely insulated from policy formulation, partly owing to its role as guardian of the Constitution.¹²⁷

Concluding Remarks

From the analysis thus far, it has been shown that the Nigerian Supreme Court, from time to time, exercises considerable power and control over policy formulation in the course of

defining the legal rights and obligations of parties before it. In some cases, the court exercises restraint and in other cases it ignores the age-long norm that courts should not legislate from the bench. By not exercising judicial self-restraint on matters which involved political questions, the court has joined its counterparts in jurisdictions such as Germany, India, South Africa and the US. This means that the court walks a very thin line between law and politics, and by entering into the unfamiliar terrain of politics, the court is more likely to overstep the bounds of its judicial powers.

There is a general tendency for the court to arm itself with the arguments that the cases brought before it involve questions of law and facts,¹²⁸ and that there is a distinction between the process of adjudication, which is a non-political activity, and the effects of its decisions, which may sometimes be regarded as political.¹²⁹ It is, however, important to note that while adjudication is about finding the law, politics is, by contrast, an activity which involves making the law.¹³⁰ For, although ‘constitutional adjudication [is] an inevitable political practice everywhere it occurs, there is one thing and one thing only that conscientious judges should do, and that is to openly declare the politicality of their decision-making practices.’¹³¹ In Nigeria, this has become imperative in view of the notion that under the existing constitutional order the court is deliberately meant and made to be a super court to the extent of its decisions.¹³² ●

123 SP Sathe, ‘India: From Positivism to Structuralism’ in J Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2006) 215, 261-263.

124 Chandrachud (n 33) 152.

125 H Klug, ‘South Africa: From Constitutional Promise to Social Transformation’ in J Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2006) 266, 282-285.

126 R McCloskey, *The American Supreme Court* (University of Chicago Press, 1960) 20.

127 A Nnamani, ‘The Judiciary in the 1990s: Expectation and Challenges’ (1990) 1(3) *Justice: A Journal of Contemporary Legal Problems* 27.

128 *Oil Resource Allocation case* (No.1) [2001] 147.

129 Kommers (n 22) 213.

130 Limbach (n 122) 161.

131 Roux (n 23) 279.

132 *Adigun* (n 5) 344.

Cyberbullying and sexting in the South African context – a new phenomenon

By Charlotte Schultz*

In recent years, the way children communicate with one another has changed significantly. This can be attributed to children being exposed to new-age technologies, various social networking sites, unlimited internet access, chat rooms, and a choice of mobile communications.¹ Children grow up spending a great deal of time in the virtual world, where there is no personal contact with others, only messages and images.² This virtual world makes it easier for them to lose their inhibitions and act in ways and express things they would not ordinarily do or say in personal face-to-face interactions.³

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¹ Badenhorst, Legal responses to cyber bullying and sexting in South Africa, Centre for justice and crime prevention, issue paper no.10 (2011) page 1.

² *Ibid.*

³ *Ibid.*

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Since information is so readily available to everyone via mobile devices, children and youth will immediately consult these devices for information or to socialise with their peers.⁴ Children and youth are creating and representing the digital culture of contemporary youth. Hence digital culture has also become a prominent element in how children and youth form their identity.⁵

Cyberbullying and sexting are two relatively new phenomena. They have emerged along with children's often unlimited and unmonitored access and use of electronic communications technology.⁶ This paper describes cyberbullying and sexting, discusses their impact and the current legal responses to cyberbullying and sexting in South Africa.

Defining cyberbullying and sexting

The increase in cyber technology has provided a new platform, which youth can bully each other. However, the phenomenon of bullying is not a new thing. It is important to firstly understand the dynamics of traditional bullying.

Bullying occurs when a child, preteen or teen is tormented, threatened, harassed, humiliated or otherwise targeted by another child, preteen or teen using hostile or demeaning behavior. The behavior can be habitual and usually involves an imbalance of social or physical power.⁷ Traditional forms of bullying include direct, face-to-face behavior, which may include physical acts such as hitting, kicking as well as verbal acts such as taunting, teasing and name calling.⁸ However, it can also be indirect behavior such as rumor spreading and social exclusion. Bullying can sometimes consist of a group taking advantage of, or isolating one person in particular, outnumbering him or her. Targets of bullying are often considered strange or different to their peers, isolating them even more and making it harder for them to deal with the isolation.⁹

There is no single definition of cyberbullying. Cyberbullying has been defined by Belsey as bullying which involves the use of information and communications technologies, such as e-mail, cellphone and text messages, instant messaging and defamatory online personal polling websites. These are used to support deliberate, repeated and hostile behavior by an individual or group that is intended to harm others.¹⁰

Williams¹¹ has further defined cyberbullying as the use of speech that is defamatory, constituting bullying, harassment of discrimination and the disclosure of personal information that contains offensive, vulgar or derogatory comments. Even though one clear definition of cyberbullying does not exist, the key elements found between the different definitions are consistent with traditional bullying. These are the repeated

nature of the act of intentional harassment or aggression, carried out by groups or individuals against a victim who cannot easily defend themselves.¹²

Although cyberbullying shares certain characteristic with traditional bullying, there are also some major differences, with the key ones being anonymity,¹³ disinhibition,¹⁴ accessibility,¹⁵ and punitive fear.¹⁶ Burton and Mutongwizo¹⁷ have identified six types of cyberbullying which are –

- 1) harassment;
- 2) denigration, which involves sending or posting malicious gossip or rumors about a person to damage their reputation or friendships, including posting or sending digitally altered photographs or someone to others, particularly pictures that portray the victim in a sexualised or harmful way;
- 3) impersonation or identity theft, which occurs when someone breaks into someone else's emails or social networking accounts and poses as that person, sending messages or other information or pictures online in a bid to damage the victim's reputation and friendships or to get the victim into trouble or danger;
- 4) outing, which involves sharing someone's secrets or embarrassing information or images online with people who the information was never intended to be shared;
- 5) cyber stalking, which involves threats of harm of intimidation through repeated online harassment and threats;
- 6) 'happy slappy', which involves incidents where people walk up to someone and slap them, while another captures the violence using a mobile phone camera.

Sexting between children has consequences as some of these photos or messages of children (whether taking and/or sending nudes) may be regarded as child pornography. Sexting can be defined as 'sending, receiving or forwarding sexually explicit messages, photographs or images via cellphone, computer

“Bullying occurs when a child, preteen or teen is tormented, threatened, harassed, humiliated or otherwise targeted by another child, preteen or teen using hostile or demeaning behavior. The behavior can be habitual and usually involves an imbalance of social or physical power.”

4 A. Apostolides "Cyberbullying and Youth Spirituality" HTS Theological studies, 73(3), (2017) page 1.

5 *Ibid.*

6 Badenhorst (2011) page 1.

7 Edmonton Police Service, "Bullying and Cyberbullying" (2018) 1.

8 CJCP's work in Online Child Safety ([www.cjcp.org.za/online-safety-and-social-media!.](http://www.cjcp.org.za/online-safety-and-social-media!)html).

9 *Ibid.*

10 DM Smit, "Cyberbullying in South African and American Schools: A legal comparative study" (2015) 35 *South African Journal of Education*, page 2.

11 *Ibid.*

12 CJCP's work in Online Child Safety ([www.cjcp.org.za/online-safety-and-social-media!.](http://www.cjcp.org.za/online-safety-and-social-media!)html).

13 Cyberbullies are often unknown to their victims.

14 The perpetrators of online bullying are often less inhibited since they can avoid face-to-face contact.

15 Cyberbullying and its effects follow the victims wherever they go.

16 The additional disincentive to report cyber-violence due to victim's fear of losing control over their electronic media.

17 *Ibid.*

or other digital devices.¹⁸ Another definition of sexting focuses on the involvement of children in sexting. It emphasises that the sexually explicit texts, nude or partially nude images of minors are sent to other minors and that these images may, in some instances, be classified as child pornography.¹⁹

Sexting may be used as a tool to cyber-bully another person. Sometimes after a breakup, adolescents may post the nude pictures they have received from an ex-boyfriend or ex-girlfriend on the internet as revenge. In these cases, sexting crosses over into cyberbullying.²⁰ Sexually explicit images of minors, even if they are sent by the minors themselves, or whether the images are saved on their phones, may be considered as child pornography. This is a contravention of legislation prohibiting the possession, distribution, creation or production of child pornography.²¹ As this is illegal, the child or adolescent may be prosecuted.

The impact of cyberbullying and sexting

At an individual level, it has been shown that cyberbullying leads to low self-esteem, academic problems, delinquent behavior and suicidal thoughts and suicide in learners.²² Cyberbullying has been described as being more pernicious than traditional bullying. It allows for the gradual amplification of cruel and sadistic behavior, which may cause an extreme emotional response, such as a victim taking their own life.²³ However, the impact of cyberbullying is not limited to the individual effects suffered by victims, but also shows a ripple effect on learners collectively, creating a general feeling of being unsafe at school.²⁴ Cyberbullying can undermine the school climate and interfere with school functioning.²⁵ School systems, school learners and the education sector are equally effected – both directly and indirectly.²⁶ The impact of cyberbullying on the education sphere extends from the individual learner, to the learner collective, through to the school and education system as a whole and requires an urgent response.²⁷

The psychological impact of cyberbullying is often more traumatizing than the physical bullying given the extreme public nature of the bullying.²⁸ Additionally, online exposure means that the world can witness the victim's humiliation.²⁹ Cyberbullying may result in victims suffering from anxiety



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and depression and may cause suicide in extreme cases. Victims of cyberbullying may be reluctant to report the bullying, fearing that their mobile phones may be confiscated, or their internet access suspended.³⁰

Current legal responses to cyberbullying and sexting in South Africa

Currently, limited research is being conducted on cyberbullying and sexting in South Africa. Cyberbullying is therefore not prohibited by legislation, which seems to be a deficiency in our legal system.³¹ Responses to both cyberbullying and sexting in South Africa are fragmented and rely on various pieces of legislation, common law definitions of criminal offences and civil law remedies in cases.³² Generally, the undesirable acts contravene the relevant provisions of existing criminal law legislation, fit common law or statutory crime definitions, or meet the requirements for civil law remedies.³³ However, none of them are preventative measures. As cyberbullying is but another form of bullying, which in turn has been established as a form of harassment by the Harassment Act, Act 17 of 2011.³⁴ Learners who fall victim to cyberbullies may, in future, explore this as a potential avenue for redress, albeit a protection order only, which falls within the realm of an interdict and is not a real punishment or a preventative measure.³⁵

South Africa does not have any legislation dealing specifically with the sending or sharing of nude or semi-

18 Badenhorst (2011) page 2,3.

19 *Ibid.*

20 *Ibid.*

21 *Ibid.*

22 *Ibid.*

23 A. Belnap "Tinker at a breaking point: Why the specter of cyberbullying cannot excuse impermissible public-school regulation of off-campus student speech" Brigham Young University Law Review (2011) (2), page 501-533.

24 DM Smit (2015) page 3.

25 *Ibid.*

26 HS Welker, "Principal perspectives on social networking and the disruptive effects of cyberbullying" (2010) PhD Dissertation, Walden university, available at www.waldenu.edu. Accessed May 2019.

27 Smit (2015) page 4.

28 Badenhorst (2011) page.

29 *Ibid.*

30 *Ibid.*

31 Smit (2015) page 5.

32 Badenhorst (2011) page 7.

33 *Ibid.*

34 See 33 above.

35 *Ibid.*

nude photos or videos and/or sexually suggestive messages of children via mobile phone texting or instant messaging between children.³⁶ Children have the constitutional right to privacy, which includes the privacy of their communication. They also have the right to freedom of expression, which includes freedom of press and other media and the freedom to receive important information and ideas.³⁷ Any response to sexting among children must take these constitutional rights into consideration. Therefore, any legal response to this phenomenon will fail, if applicable, within the ambit of child pornography, which is prohibited in terms of the Films and Publications Amendment Act, 2009 (Act 3 of 2009) and the Criminal Law (Sexual Offences and Related matters) Amendment Act 2007 (Act 32 of 2007).

Conclusion

While cyberbullying may be described as a new way of committing an old crime, sexting however, is a relatively new phenomenon.³⁸ Since sexting between children is a complex aspect, more attention should be given to regulation/monitoring. Children may not really understand and appreciate the risks and possible consequences of sending nude or semi-nude photos or videos and/or sexually suggestive messages via mobile phone texting or instant messaging to other children, and this makes it more difficult to prevent.³⁹

There is a definite link between sexting, cyberbullying and harassment that is often overlooked. Cyberbullying and sexting do occur in South Africa, but the extent of the phenomena is unclear.⁴⁰ There are various civil and criminal remedies available in South African law. Further attempts are currently in progress by the legislature to increase the protection of victims of harassment, which includes cyberbullying.⁴¹

Although there are criminal law and/or civil law responses,⁴² which are essential to protect the rights and well-being of victims in some instances of cyberbullying and sexting, the prevention of cyberbullying and sexting does not lie within the justice system. These responses may be inappropriate and, in some instances, too severe in relation to the acts committed by the children. The unintended legal consequences, where children face possible prosecution on child pornography-related charges, are a concern.⁴³ From the above discussion, it is evident that cyberbullying and sexting is accelerating. Majority of the youth are aware that technology can be used for purposes of bullying and to be bullied. The most common device which is used to send out sexual, aggressive and malicious content about one person to another person is a cellphone.⁴⁴ The children and the youth that are abused through their cellphones exhibit feelings of

depression, anger, irritability, hopelessness and anxiety.⁴⁵ Cyberbullying has serious consequences for both the bullied and the bully. The cyber victim is degraded, embarrassed and humiliated, emotionally and sometimes publicly. Thus, the victim's ability to form positive, healthy and good social relationships may be hindered as a result thereof. The prevention of cyberbullying and sexting, and ways to effectively address these phenomena, require multidisciplinary approaches and interventions.⁴⁶ ●

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- Protection from Harassment Act 17 of 2011

³⁶ *Ibid.*

³⁷ Badenhorst (2011) page 3.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² These include but are not limited to: *Crimen injuria*, assault, criminal defamation, extortion, order to keep peace and an interdict and defamation claim.

⁴³ *Ibid.*

⁴⁴ Apostolides (2017) page 4.

⁴⁵ *Ibid.*

⁴⁶ Badenhorst (2011) page 4.



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The best interests of the child principle in Botswana

By Tebogo Jobeta* and Bonolo Ramadi Dinokopila**

Abstract

The objective of this article is to interrogate and assess the development and application of the principle of the best interests of the child in Botswana. After a brief discussion of the principle at the international and regional levels, this article will then assess how the courts in Botswana have applied this principle in various aspects of private law. These areas include, among others, custody, maintenance, adoption and unwed fathers' rights of access. The article will show, through a discussion of decided cases, that the best interests of the child principle has permeated all aspects of child law even prior to the country's enactment of the Children's Act of 2009 and subsequent accession to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

Introduction

The use and relevance of the principle of the best interests of the child appears to have gained momentum over the past years. This is despite that it is a concept which is not

susceptible to an easy definition and as such its import depends on the context. It is not only broad but is of such significance that it radiates through all aspects where the child is involved.

The objective of this article is to interrogate the best interests of the child principle, and to make an assessment as to how the best interests of the child principle has been applied in Botswana. It is our opinion that the best interests of the child principle has had, over the years, a positive impact on the promotion and protection of the rights of the child in Botswana. This is despite that this principle was previously accorded limited to no application especially under customary law.¹ That is, the rights of the child were not necessarily at the centre of the decision-making process or determination of disputes concerning or involving children. Focus was always on what the parents wanted and what they thought was an

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¹ Section 6 of the Customary Law Application Act of 1969 provides that in cases relating to the custody of children the welfare of the child shall be the paramount consideration irrespective of which law or principle is applied. See also Rectification of Laws (No. 5) Order 2000 Statutory Instrument No 74 of 2000.

appropriate decision as regards the child. This approach was totally inadequate as it did not, unfortunately, advance the rights of the child. Further, its precursor, the welfare principle, was largely applied when making decisions on matters relating to child custody.² Over the years, the best interests of the child principle was expanded to cover other aspects of life, including but not limited to adoption, custody and divorce. It has become increasingly clear that the High Court of Botswana is designated, by common law, as the upper guardian of all minor children³ and it is, as such, duty bound to have regard to what is in the best interests of the child in reaching its decisions.⁴ Viewed through the lens of child rights, the best interests of the child principle adopts, substantively, the form of a right, which accrues to each and every child regardless of his/her status. It can safely be concluded that the principle is a condition precedent for the enjoyment of other rights, which include protection and survival rights of the children. The child is considered to be the bearer of enforceable rights and duties.

This introduction is followed by a general discussion of the principle of the best interests of the child. The following section will then provide an understanding of who is a child in Botswana. This will be followed by a discussion of the best interests of the child principle in Botswana. The decisions of the courts will then be analysed so as to ascertain how the courts have grappled with the principle of the best interests of the child in matters of adoption, custody, parental rights of access, inheritance and divorce. This will be followed by a discussion of the challenges and prospects in the application of the principle in Botswana. The paper then draws some conclusions.

The principle of the best interests of the child

The best interests of the child principle can perhaps be traced back to the 1924 Geneva Declaration of the Rights of the Child. According to the said Declaration, mankind owed the child 'the very best that it has to give'.⁵ The principle was also included in the 1959 Declaration on the Rights and Welfare of the Child. It was later adopted and given due prominence in the subsequent 1989 UN Convention on the Rights of the Child (UNCRC) and the 1979 Convention on the Elimination

of All Forms of Discrimination against Women.⁶ Its scope has since been expanded to govern a broad spectrum of stakeholders including the government and other non-state actors.⁷ It permeates both legal and administrative decisions affecting the child.⁸ This is because the CRC⁹ provides that the best interests of the child shall be a paramount consideration in all decisions concerning the child.¹⁰ The use of imperative language in the Convention, lends support to the position that this principle should be given precedence and due prominence

in any decision concerning a child. This does not mean that other considerations are of no relevance and should not be considered.

The idea that decisions concerning a child must be made regard being had to the best interests of that child is not, therefore, something that was novel at the time of adoption of the UNCRC. Van Bueren points out that the UNCRC does not create the principle 'but rather transformed it through clearly placing it in a more holistic context'.¹¹ Expansive literature reveals that the principle dates back to the 20th century when civilised nations recognised that the child needed more protection.¹² An early understanding that decisions

must take account of the welfare of the child has thus metamorphosed into today's requirement that all decisions must be in the best interests of the child. It is now beyond doubt that the principle is central to the commitment made by states to the promotion and protection of the rights of children.¹³ Accordingly, it is expected that countries must promote the best interests of the child and to allow the child to express his or her views on matters that affect his or her

“Viewed through the lens of child rights, the best interests of the child principle adopts, substantively, the form of a right, which accrues to each and every child regardless of his/her status.”

2 S Morolong "Implementing the Convention on the Rights of the Child: Developments in Botswana" (2006) *International Survey of Family Law* at 67.

3 *Moremi v Mesothlo* [1997] BLR 7 (HC).

4 *January v Gamble* MAHLB 000-464-07 [2007] BW HC 407.

5 Preamble, Geneva Declaration of the Rights of the Child (1924) available at <http://www.un-documents.net/gdrc1924.htm> (accessed 27 January 2019).

6 Article 16(1)(f); J Zermatten "The Best Interests of the Child Principle: Literal Analysis and Function" (2010) 18 *International Journal of Children's Rights* at 484.

7 Article 3(1) of the CRC.

8 Article 6; General Comment No.14 CRC/C/GC/14 (2013).

9 As above. This is also echoed under section 5 of the children's Act of 2009.

10 M Maripe "The Recognition and Enforcement of Children's Rights in the Domestic Law: An assessment of the Child Protection Laws on Botswana in light of the prevailing international trends" (2001) 9 *International Journal of Children's Rights* at 339 at 3

11 G Van Bueren "Committee on the Rights of the Child" in Malcom Langford (ed.) *Social Right Jurisprudence: Emerging trends in International Comparative Law* (2008) 575.

12 See generally JH McLaughlin "The fundamental truth about the best interests" (2009) 54 *Saint Louis University Law Journal* 119; R Walton "The Best Interests of the Child" (1976) 6 *The British Journal of Social Work* 307.

13 D Archard & M Skivenes "Balancing a child's best interests and a child's views" (2009) 17 *International Journal of Children's Rights* at 1.

interests. A considerable body of literature has been dedicated to understanding the nature, content and function of this principle¹⁴ and it is not necessary to discuss such in detail.

The UNCRC provides that:

‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’¹⁵

It has been rightly pointed out that the above is the very basis upon which the principle rests.¹⁶ This conclusion is brought about by the fact that since the inclusion of the principle in the UNCRC, international and regional human rights instruments have also made provision for this principle.¹⁷ In particular, the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD),¹⁸ the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption,¹⁹ the African Charter on the Rights and Welfare of the Child (ACRWC)²⁰ and the European Convention on the Exercise of Children’s Rights (ECECR).²¹ This principle, in its varying sense and as captured by the various international and regional human rights instruments, simply entails that the best interests of the child shall be considered as paramount in any decision-making processes that concern the child’s interests.²²

Zermatten, in espousing the content and nature of this principle makes two critical points.²³ The first one is that the principle, as captured under article 3 of the UNCRC, does not place any duties on member states and simply translates into the requirement that during the decision-making processes on matters relating to the interest of the child, the principle should be given precedence.²⁴ The second point made is that the principle is a ‘rule of procedure,’²⁵ is the ‘foundation for a substantive right’ and it is an ‘interpretative legal principle’.²⁶ As a rule of procedure, Zermatten posits, the principle requires that in the decision-making process involving matters affecting the child, the decision-maker must consider as a matter of priority the impact of their decision on the interest of the child/children.²⁷ A description of the principle as ‘the foundation for a substantive right’ means that there is a guarantee by member states that the interests of the child/children would

be given priority.²⁸ Zermatten also puts forward the principle as an ‘interpretative principle’ which means that the principle is ‘developed to limit unchecked power over children by adults’.²⁹ The understanding of the principle of the best interest in this way makes it easy for one to understand the normative content of this principle from a more practical perspective. This nuanced exposition of the principle should be deemed as complimentary to that which is provided by the Committee on the Rights of the Child.³⁰ Zermatten’s understanding of this principle is used in this paper to help ascertain whether Botswana gives or has given effect to the dictates of this principle and if so, to what extent.

It is perhaps necessary to acknowledge that the exact nature and content of the principle remains problematic across jurisdictions.³¹ Barriers to a near exact description of the principle are perhaps due to the fact that what is actually in the best interests of the child is inherently difficult to ascertain.³² Consequently, even if one understands the principle as an interpretative legal principle, it becomes challenging to apply the principle to everyday life, thus limiting the development and understanding of the nature and content of the principle in the process. That notwithstanding, the principle continues to act as the basis for the protection of children in several aspects of children’s rights. Issues of inter-country adoptions,³³ custody of minor children upon the divorce of their parents,³⁴ punishment of children in conflict with the law,³⁵ the rights of children generally³⁶ and immigration issues³⁷ continue to be decided on the basis of what is in the best interests of the child. Thus, it has been rightly pointed out that:

²⁸ As above.

²⁹ As above.

³⁰ General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (Article 3, paragraph 1), UN Doc. CRC/C/CG/14, 29 May 2013.

³¹ See generally Freeman (n 16 above) 27 highlighting that the concept of the best interests of the child is indeterminate.

³² The difficulties surrounding a move towards a common understanding of the principle of the best interests of the child are captured by Abdullahi An-na’im “Cultural transformation and normative Consensus on the best interest of the child” (1994) 8 *International Journal of Law and the Family* 62 & Sonia Harris-Short “International human rights law, imperialist, inept and ineffective? Cultural relativism and the UN Convention on the Rights of the Child” (2003) 25 *Human Rights Quarterly* 131; Glenn Cohen “Beyond best interests” (2012) 96 *Minnesota Law Review* at 1187.

³³ N Cantwell *The best interest of the child in inter country adoption* (2014) available at https://www.unicef-irc.org/publications/pdf/unicef%20best%20interest%20document_web_re-supply.pdf (accessed 27 January 2019).

³⁴ See generally Koen Lenarts “The Best Interests of The Child Always Come First: The Brussels II Bis Regulation and The European Court of Justice” (2013) 20 *Jurisprudence* at 1302.

³⁵ See generally Lahny R. Silva “The best interest is the child: a historical philosophy for modern issues” (2014) 28 *BYU Journal of Public Law* at 415.

³⁶ See generally R Lee Strasburger, Jr “The Best interests of the child: The cultural defense as justification for child abuse” (2013) 25 *Pace International Law Review* at 161.

³⁷ See generally *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4. See a detailed discussion of this decision by Jane Fortin “Are Children’s Best Interests Really Best? *ZH (Tanzania)*(FC) v *Secretary of State for the Home Department*” (2011) 74(6) *MLR* 932–961

¹⁴ McLaughlin (n 12 above) 113; Y Dausab “The best interests of the child” in O C Ruppel (ed) *Children rights in Namibia* (2009) 145; Hodgkin R & P Newell “Best interest of the child in United Nations Children’s Fund” (Eds) *Implementation handbook for the Convention on the Rights of the Child* (2007).

¹⁵ UNCRC, article 3(1).

¹⁶ M Freeman “Article 3: The Best Interests of the Child” (2007); Zermatten (n 6 above) 484.

¹⁷ As above.

¹⁸ Art. 23(2).

¹⁹ Art 4(b).

²⁰ Art 4.

²¹ Art 2(1).

²² Zermatten (n 6 above) 484.

²³ As above.

²⁴ As above, 485.

²⁵ As above.

²⁶ As above.

²⁷ As above.

“Although there is no standard definition of “best interests of the child,” the term generally refers to the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child as well as who is best suited to take care of a child.”³⁸

True to the above understanding of the principle of the best interests of the child, cases across several jurisdictions have been decided on the basis of this principle. Some national jurisdictions also have statutory provisions relating to the best interests of the child. In particular, African countries have embraced the principle of the best interests of the child. The principle has also been applied at both international and regional levels largely by the various human rights’ protective bodies. The European Court of Human Rights has consistently applied the best interests of the child in the various decisions placed before it for determination. In the case of *Hokannen v Finland*³⁹ the Court indicated that in the application of the best interests of the child, emphasis should be placed on the child’s freedom of expression and the child’s wishes.⁴⁰ The Inter American Court of Human Rights has also categorically stated that the best interests of the child shall be of paramount consideration in the resolution of disputes concerning children.⁴¹ The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) has also applied the principle of the best interests of the child in some of



“ In particular, African countries have embraced the principle of the best interests of the child.”

its decisions.⁴² In the case concerning the Nubian children, the Committee indicated that in the decision concerning children, the best interests of the child are of paramount importance. It thus held that in denying the children the right to be registered, the Kenyan Government acted contrary to the best interests of the child. It thus held that the Kenyan Government’s practice that left children of Nubian descent without acquiring nationality for a very long time failed to promote children’s best interests and was in violation of the African Children’s Charter.⁴³ The decisions taken by the Kenyan Government were also impugned on the basis that they did not comply with the relevant international law practices as regards the best interests of the child. To that extent, and affirming the application of the principle of the best interests of the child, the Committee held that the Kenyan Government should take measures that are aimed towards ensuring that the children were registered as citizens.⁴⁴

The Committee has also held that incidents where children overstayed with military

intelligence agencies before being handed over to child protection agencies were not in compliance with the principle of the best interests of the child.⁴⁵ These were children who were at one point recruited as child soldiers by the Lord Resistance Army (LRA) and were then supposed to be repatriated back to Uganda so as to return to civilian life.⁴⁶ The Committee noted that they were supposed to have been placed under the care of appropriate civilian care.⁴⁷ However, they ended up staying for up to two months with the UPDF or the military intelligence before being handed over to child protection agencies.⁴⁸ The Committee has further held that the

38 Child Welfare Information Gateway “Determining the best interests of the child” (2012) available at https://www.childwelfare.gov/pubpdfs/best_interest.pdf (accessed 28 February 2015).

39 [1993] 19 EHRR 139.

40 As above. See general, van Bueren (n 11 above) 496; see also *Bianchi v. Switzerland* application no. (7548/04) where the court indicated that the passive attitude between the child’s parents had caused a complete break-off between them was not in the best interest of the child. The court thus held that the behavior was contrary to the right to the respect of the family.

41 Inter-American Court of Human Rights Advisory Opinion, OC-21/14: Rights and Guarantees of Children in the context of migration and/or in need of international protection.

42 *Institute for Human Rights and Development in Africa (IHRDA) & Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v The government of Kenya*. (DECISION: No 002/Com/002/2009) para. 57; available at <https://www.opensocietyfoundations.org/litigation/children-nubian-descent-kenya-v-kenya> (accessed 27 January 2019).

43 As above, at para. 42.

44 As above.

45 *Michelo Hansungule & Others (On behalf of children in Northern Uganda) v The Government of Uganda*, 15-19 April, Communication No. 1 of 2005 at para. 49 available at <https://acerwc.africa/wp-content/uploads/2018/07/decision-on-uganda-comment-edited.pdf> (accessed 27 January 2019).

46 As above.

47 As above.

48 As above.

State had an obligation to ensure that both public and private entities apply the best interests of the child principle in all actions concerning children.⁴⁹

The interpretation and application of this principle by international, regional and sub-regional human rights bodies serve as a reference point for Botswana in so far as the normative content and proper application of this principle is concerned. This is appropriate because decisions of these bodies offer persuasive authority to the Botswana courts when interpreting similar provisions.⁵⁰

The definition of a child in Botswana

The definition of who is a child in Botswana has always been problematic in that there has never been a uniform legislative definition of who a child is. The definition of a child was, for the longest time, dependent on separate statutory definitions most of which were context specific. This lack of uniformity meant that a myriad of legislative enactments defined, differently, who was a child. It is perhaps due to this anomaly that when ratifying the CRC in 1995 Botswana entered a reservation to Article 1 of the Convention which defined a child as any person below the age of 18.⁵¹ The Children's Act of 2009 has since adopted the CRC's definition of a child, which thereby implies withdrawal of the country's reservation to Article 1 of the CRC. A perusal of the other Acts of Parliament touching on various aspects of child rights have maintained their previous positions of the definition of a child. The Children's Act has gone further to provide that its provisions take precedence over other statutory provisions in the event of a conflict or inconsistency.⁵² The effect of such a provision is that the

“The definition of who is a child in Botswana has always been problematic in that there has never been a uniform legislative definition of who a child is.”

definition of a child is as provided for under the Children's Act including even in cases where a particular statute provides otherwise.

The Legislature has also seen it necessary to align the definition of a child and the age of majority. This much needed change has been brought about by means of an amendment to the Interpretations Act⁵³ with the Interpretation (Amendment) Act 9 of 2010.⁵⁴ What remains to be done is to amend the other pieces of legislation so as to align them with both the Children's Act of 2009 and the Interpretation Act.

The best interests of the child principle in Botswana

A reflection on the advent of the principle of the best interest of the child in Botswana is said to have been introduced in the country through the Customary Law (Application and Ascertainment) Act of 1969.⁵⁵ The Act provided that in the resolution of disputes, the 'the welfare of children shall be the paramount consideration irrespective of which law or

principle is applied'.⁵⁶ This Act provided for the 'welfare' of the child as opposed to the 'best interests' of the child. As aforementioned, it is beyond doubt that the 'welfare of the child' is a precursor to the principle of the best interests of the child. This perhaps explains why in some instances the Botswana courts have used the two terms interchangeably.⁵⁷ In that sense, and considering the general evolution of the principle of the best interests of the child, one can argue that the principle started taking root in Botswana's domestic law as far back as in 1969.⁵⁸ A curious development occurred when the consolidation of statutes by the Common Law and Customary Law Act was enacted in 1987. The welfare principle articulated in section 6 of the Customary Law (Application and Ascertainment) Act of 1969 was omitted. This anomaly was remedied in 2000 through the Rectification of Laws (No 5) Order 2000 (17 November 2000, SI No 74 of 2000).⁵⁹ This possibly showed that there was appreciation of the position of the law elsewhere that children's interests and welfare were critical in the decision-making processes that involved them.

Existing literature indicates that the 'welfare of the child' was used mostly by the courts in adjudicating on matters relating to custody of children during divorce. Even then,

49 *The Centre for Human Rights, University of Pretoria & La recontre Africaine Pour La Defence Des Droits de l'homme (Senegal) v Government of Senegal* No 0003/Com/001/2012 at para. 35 available at http://www.chr.up.ac.za/images/researchunits/cru/news/files/2017_senegales_talibes_v_senegal_talibe_case.pdf (accessed 27 January 2019).

50 *Gomolemo Motswaledi v Botswana Democratic Party* [2009] 2 BLR 284 (CA); EK Quansah "An examination of the use of international law as an interpretative tool in human rights litigation in Ghana and Botswana" in M Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010, PULP 2010) 37.

51 It did so with a reservation that: "The Government of the Republic of Botswana enters a reservation with regard to the provisions of article 1 of the Convention and does not consider itself bound by the same in so far as such may conflict with the Laws and Statutes of Botswana." The Governments of Germany, Italy, Netherlands and Denmark registered objections against these reservations. Convention on the Rights of the Child, Ratifications and Reservations, Office of the United Nations High Commissioner for Human Rights, <http://www.ohchr.org/english/countries/ratification/11.htm>; F Viljoen *International human rights law in Africa* (2nd ed.2012, Oxford University Press) at 386.

52 Section 3 Children's Act, 2009.

53 Cap 01:04, Laws of Botswana.

54 Statutory Instrument 9 of 2010 dated 19 August 2010 did not become operational immediately as its commencement date was to be on notice. The commencement notice came through Statutory Instrument 15 of 2013, which commenced on the 1 March 2013.

55 Section 6; Morolong (n 2 above) 68.

56 As above.

57 As above.

58 As above.

59 Morolong (n 2 above) 68.

its application was limited and only assisted the courts in determining who between the parents was better placed to look after children following their divorce.⁶⁰ Thus, the application of this principle was limited in nature. This was perhaps due to the fact that it was the welfare or the nurturing and caring of children, by the interpretation of many, which was supposed to provide guidance in the application of this principle. The Children's Act of 1981 also did not explicitly incorporate or refer to the principle of the best interests of the child. It appears that the enactment did not consider the provisions of the Customary Law (Application and Ascertainment) Act of 1969 in that it did not mention the welfare principle either. This is despite that the Children's Act of 1981 was described as a 'comprehensive piece of legislation for the care and protection of children in need and the treatment of juvenile offenders'.⁶¹ The principle of the best interests of the child can be implied from some of the provisions of this Act. For example, this Act seemed to put the incarceration of a child in conflict with the law as a matter of last resort as punishment that could be imposed on children in conflict with the law thus excluded incarceration.⁶²

The Children's Act of 2009 is considered, even though it does not specifically mention same, as the domestication of the provisions of the ACERWC and the CRC. The normative content of the Children's Act of 2009 is indeed consistent with such a conclusion. For example, the principle of the best interests of the child was for the first time expressly incorporated into our law through this piece of legislation. Section 5 of the Act provides that:

'A person or the court performing the function or exercising a power under this Act shall regard the best interests of the child as paramount consideration.'

From the above provision one can deduce that the principle of the best interests of the child is not regarded as a guiding principle in the interpretation of provisions of the Children's Act but is a paramount consideration. This means that it overrides all other principles enunciated in this Act. The guiding principles are contained under section 7 of the Children's Act.⁶³ The Children's Act of 2009 has taken a step further and has defined the concept of the best interests of the child as well as setting out what the best interests of a child entails. It sets out the factors, which must be considered in determining the best interests of the child. These factors include the need to protect the child from harm,⁶⁴ capacity of the child's parents, other relative, guardian or other person to care and protect the child⁶⁵ and the likely effect on the child

of any change in the child's circumstances.⁶⁶ The wishes of the child are also factored in depending on the evolving capacities of the said child.⁶⁷ The examples given therein are not *numerous clausus* and as such it can be safely concluded that the principle would be applied with the objective of ensuring the general well-being of a child.⁶⁸ This is appropriate, considering that the principle is open to multiple interpretations depending on the context and complexities of the issues to be determined regarding a child. By not limiting the factors that are considered when defining what is in the best interests of the child, this Act has made room for other factors to be considered when determining what is in the best interests of the child.⁶⁹ This will definitely make it easier for the courts to interpret and easily develop the principle of the best of interests of the child in Botswana.

Another important aspect of this Act is the fact that its provisions take primacy over all other enactments in the country on matters pertaining to children in Botswana. Section 3 of the Children's Act, 2009 provides that:

'In the event of any conflict or inconsistency between the provisions of this Act and any other legislation, the provisions of this Act shall take precedence, except where the exercise of the rights set out in this Act has or would have the effect of harming the child's emotional, physical, psychological or moral well-being or prejudicing the exercise of the rights and freedoms of others, national security, the public interest, public safety, public order, public morality or health.'

This essentially means that the principle of the best interests of the child, which is paramount under the Children's Act of 2009, is considered as overriding provisions of any law that is not in the best interests of the child or contrary to the ethos enunciated in the Act. The primacy of the Children's Act implies that the reference point should, in matters concerning children, always be its provisions.

The interpretation, application and relevance of the principle of the best interests of the child by the courts is important to one's understanding of the application of the principle in Botswana. Below is a discussion of examples of the application of the principle in Botswana. The discussion below highlights the extent to which the courts have enhanced the promotion and protection of the best interests of the child. The development and acceptance of the best interests of the child has been incremental. While the legislature was slow to incorporate the principle into law, the courts started applying the principle a while ago.⁷⁰

60 See generally Botswana CRC Report (2003) para. 124; *Chiepe v Sago* [1982] 1 BLR 25; *Langebacher v Thipe* MC 150/1982; *Phiri v Dintsi and Dintsi* MC F29/1990.

61 B Otlhogile "Juvenile delinquency in Botswana and the 1981 Children's Act" (1985) 18/3 *The Comparative and International Law Journal of Southern Africa* 396 at 398.

62 Children's Act, 1981, section 28.

63 The section provides for the principles to be observed in the administration of the Children's Act. These include the non-discrimination clause.

64 Section 6(1) (a).

65 Section 6(1)(b).

66 Section 6(1)(f).

67 Section 6(1)(h).

68 Section 6(2) of the Children's Act provides that '[t]he provisions of subsection (1) [being factors that will be taken into account in determining the best interests of the child] shall not be construed as limiting the factors that may be taking into account in determining what is in the best interests of the child'.

69 *Makambe v Makambe* MLHGB 000719/14 (unreported judgment).

70 *Ex Patre Veen: In re Infant Otlogetswe Kgosietsile* [1978]BLR 43



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The best interests of the child principle and the Botswana courts: an analysis

The courts in Botswana have, over the years, made concerted efforts to prioritise the best interests of the child in the decisions concerning children. The application of this principle is shown in a myriad of cases involving maintenance, custody and adoption of children. What follows is a discussion of some of the key cases where the courts have applied the principle. An attempt was made to highlight the incremental development of the principle in Botswana.

Custody cases

Issues relating to custody of a child should be determined without delay.⁷¹ It is inappropriate for custody issues to drag on as it occasions disruption and bewilderment to the child because where children are concerned, there is need for security and certainty.⁷² The paramount determinant of suitability of the parent to be awarded custody is the best interests of the child. This is usually determined by involving social workers to carry out an assessment of the child's living conditions (socio-economic enquiry report). Sometimes courts are able to resolve custody issues without any assistance by social welfare officers. Where the custody is contested by both parties, the court engages the services of social welfare officer who makes recommendations to the court on what may be in the best interests of the child.⁷³ The award of custody is no

longer solely made on such factors as gender and the marital status of the parties. Section 18 of the Abolition of Marital Power Act of 2004⁷⁴ and section 28 as read with section 13 of the Children's Act have put both fathers and mothers on an equal footing by conferring equal guardianship rights in respect of the child.

Moroka J in *Ntshakisang v Ntshakisang*⁷⁵ sufficiently addressed the importance of the principle of the best interests of the child in custody matters when he pointed out as follows:

'The coming into force of the new Children's Act changed the legal landscape in the handling of children's issues which courts must acknowledge and make use of. Now the concept of the best interest [sic] of the child is no longer a matter for common law or case law acknowledgment. It is a matter of statutory reality'.⁷⁶

This case was concerned with an instance where the mother sought permission to take the minor children to Australia for eighteen months to pursue her studies.⁷⁷ Moroka, J held that the need to relocate to Australia by the custodial parent in pursuit of her studies was valid enough a ground for the court to sanction such relocation.⁷⁸ Additionally, the court pointed out that it was in the best interests of the children to permit them to relocate with their mother to Australia.

The relocation would, in the opinion of the court, present them with a new environment that would assist them in their emotional readjustment following the traumatic events in their lives.⁷⁹

The decision of the High Court in the *Ntshakisang* case confirmed that the principle of the best interests of the child is, with respect to custody issues, of paramount consideration in Botswana. Moroka J further pointed out the following:

'Children's optimum needs are sacred hence the best interest of the child must lie at the apex of the hierarchy of all competing interests. The court must identify the optimum needs of the child before anything else. The court must be alive to the hierarchy of interests' attendant to the child's development and survival. It is only through this appreciation that the court can truly make a decision that is in the best interest.

Giving primacy to the best interests of the child enjoins the court to adopt a two staged approach; (i) firstly to determine the child's peculiar needs from a psychological, emotional, spiritual and material perspective. The court must inquire into the age, gender, state of health of the child, whether there are any particular health concerns, the emotional stability of the child, the educational, spiritual

71 *Phibion v Phibion* [2001] BLR 195, Morolong (n 2 above) 69.

72 As above.

73 See *Peloewetse v Peloewetse* [2005] 2 BLR 130(HC).

74 The common law position was that the father was designated as the legal guardian of the child..

75 [2011] 2 BLR 894 (HC) at 895.

76 As above, 897.

77 As above, 896.

78 *Ntshakisang v Ntshakisang* (as above) 903.

79 It was alleged that the husband was in the habit of physically and verbally assaulting his wife in the presence of their minor children.

and cultural needs of such a child. In doing so the court is putting itself in a position to understand the critical needs of the child whose destiny it's [*sic*] about to reshape.⁸⁰

In its application of the principle of the best interests of the child, the court rightly noted that the concept was indeterminate making it possible for the courts to accommodate the 'ever-changing social values, standards and customs and way of life of people'.⁸¹

The overarching consideration in the award of custody is therefore what is deemed to be in the best interests of the child. This principle can be resorted to when overriding a piece of legislation or statutory provision, addressing problems relating to jurisdiction and other impediments, for the sake of the child.⁸² The jurisprudence of the Botswana courts has consistently shown that matters pertaining to custody are no longer based on gender considerations but are based on efficiency and quality of parenthood.⁸³ The court is also at liberty to vary the custody order on application by the other spouse if there has been a change of circumstances⁸⁴ from the time the order was granted and if such variation would be in the best interests of the child.⁸⁵ This is appropriate for the custody of a child entails both a responsibility as well as a privilege.

The court in the *Mazile* case succinctly put factors that would assist the court in arriving at a decision which is just and in the best interests of the child. These were identified as the –

- suitability of the parent;
- desirability of keeping siblings together;
- viability of the parent to provide day to day care;
- desirability of ensuring stability and security in the lives of young children;
- availability of the parent to provide for the children's emotional, psychological, cultural and environmental development; and
- suitability or otherwise of the children's existing environment, having regard to maintaining the *status quo*.⁸⁶

There is no indication from the judgement that the list is exhaustive or excludes any relevant factors from consideration by the court. From the general tenor of the judgement, it appears that the court may take into account any factors that may be relevant to the determination of what is in the best of interests of the child.

It should be noted that most of the cases discussed herein deal with the legal position prior to the enactment of the Children's Act of 2009. The Act has since laid down several factors that should be considered in interrogating what amounts to the best interests of the child.⁸⁷ These factors are more expansive than the ones elaborated in the *Mazile* case and it is submitted that they should be read together.⁸⁸

Parental access to children born out of wedlock

The right of access is an entitlement, which belongs to the child and the father is only given access in so far as it is conducive to the best interests of the child.⁸⁹ The right of access is not dependent on marital status of the parents. This implies that the right of access is not automatic and that the father has such a right only in cases where it is in the best interests of the child. The central test, when making a determination on what is in the best interests of the child, as regards parental access, was set out in the following terms by Chinhengo J:

A child has a right to have access or to be spared access and so access is granted or denied depending on where the best interests of the child lie. Access is a two-way process. In one sense it is a right granted in the interest of the non-custodian parent and in another and more decisive sense, it is a right granted in the best interest of the child.⁹⁰

The Roman Dutch Law that subordinated the best interests of the child standard to parental interest, as regards children born out wedlock, can now be safely regarded as a relic of the past.⁹¹ It has been overtaken by the principle of the best interests of the child as the applicable standard where access or custody is sought by one of the parents.⁹² The Children's Act of 2009⁹³ introduced the concept of co-parenting agreements as a way of mitigating the issue regarding access. Although the parents of a child could previously agree, informally, on the dynamics regarding the raising of their child, it has now been formally introduced reducing the levels of non-compliance with maintenance orders as well as animosity between the parties. Under the new dispensation, a co-parenting agreement has to be affirmed by the court and it is submitted that like any other court order any departure from its terms would amount to contempt.

80 *Ntshakisang v Ntshakisang* (as above) 899.

81 *Ntshakisang v Ntshakisang* (as above) 90, the court also applied the reasoning adopted in the South African case of *Godbeer v Godbeer* [2003] 3 SA 976.

82 *Morolong* (n 2 above) 68.

83 *Mazile v Mazile* (as above) 176.

84 *Cowell v Cowell* [2004] 2 BLR 235 (HC).

85 *Mosase v Mosase* [1984] BLR 253 (HC), *Rangaka v Rangaka* Misc No. 29/1996 (13 January 1997) (Unreported), *Cowell v Cowell* [2004] 2 BLR 235 (HC).

86 *Mazile v Mazile* (as above) 177.

87 Section 6 of the Children's Act of 2009

88 As aforementioned, this is based on the fact that the factors outlined are not numerous classes and as such the *expressio unius, exclusio alterius* maxim has no application. The factors outlined are but examples of what amounts to the best interests of the child which makes it more of a malleable concept to suit diverse situations. This is evident from use of the words 'any other factor which will ensure the general well-being of the child'.

89 *Modisenyane v Modisenyane* [2006] 2 BLR 65.

90 As above. This approach was followed by Moroka J in *Mokoti v Okatswa* [2011] (2) BLR 1021 (HC).

91 See generally *Baars v Scott* [1995] 4 All SA 392 (AD).

92 *Macheme v Ndlovu* [2009] 1 BLR 120 (CA).

93 Children's Act, Section 29.

“The Children’s Act of 2009 has, to a limited extent, changed the common law position in such a way that gender roles, as regards the caring and maintenance of children, have been removed as the primary consideration in respect of matters affecting children. What is now the decisive factor is the overarching consideration of the best interests of the child.”

Maintenance

Child maintenance is regular, reliable financial support that is aimed at helping a child to attain the basic necessities of life. These by and large entail provision of necessities which is connected with the right of the child to be cared for by both its parents.⁹⁴ Maintenance of children is usually dependent on whether the child is born in or out of wedlock and whether customary law or the common law is applicable.

Customary law distinguishes between the duty to support children born out of wedlock and the duty to support those who are legitimised by marriage.⁹⁵ A child born out of wedlock under customary law belongs to its mother and her kin group.⁹⁶ The legal guardian of such a child is the maternal grandfather and, in his absence, the maternal uncle. The duty of child care and protection thereof is aligned to the maternal parents of the child. This customary law position is outright discriminatory in that it provides differentiated treatment between children born in and those born out of wedlock. It does fail to have regard to the best interests of the child. The courts have held, that notwithstanding, that the maintenance of a child exist under *Tswana* customary law, although not in the form of periodic payments as in the common law.⁹⁷ The common law position with respect to child support and maintenance was highlighted in *Moremi v Mesotlho*,⁹⁸ where the court stated in no uncertain terms that children have a common law right of support from their parents. This right, according to the court, arises from a sense of natural justice and filial, parental duty and affection of

blood and this extends to children born out of wedlock.⁹⁹

The statutory position is captured by section 27 of the Children’s Act of 2009, which obliges parents to care for and maintain their children. The parent also has a duty towards a child to ensure that the basis of every decision and action he/she takes in respect of the said child is in their best interests. Every child has the right to know and be cared for by both its biological parents irrespective of their marital status. A child is also entitled to appropriate alternative care in instances they are removed, subject to their best interests, from the family environment.¹⁰⁰ A child born out of wedlock and who does not live with both of his/her biological parents has a right of access to both parents and maintenance by both parents. The child also has the right to be nurtured, supported and maintained by such absent parent in accordance with the provisions of the Children’s Act or any other Act, which deals with the care and maintenance of children.¹⁰¹

The Affiliation Proceedings Act¹⁰² makes provision for the procedure of maintenance of children born out of wedlock in the Magistrate Court and other Customary Courts, which have been designated to hear such cases. Such cases are supposed to be brought within five years from the birth of the child. The Affiliation Proceedings Act has also put in place measures that ensure that the best interests of the child are protected by making sure that they are provided and cared for. Where the parent of a child has no income from which deductions can be made, a social worker is usually directed to make a socio-enquiry assessment so as to compile a report that will be used to determine how the parent may contribute towards the upkeep of the child.¹⁰³

The Deserted Wives and Children Support Act¹⁰⁴ provides for situations where the child, whose parents are married, has been deserted by its father and is in need of support.¹⁰⁵ When approaching the court under this Act, it has to be shown that the child is in need of support,¹⁰⁶ that the child was deserted by its father¹⁰⁷ and that the father is in a position to provide the maintenance. Although the provisions of this Act do not mention the best interests of the child principle anywhere, it is submitted that by necessary implication, the underlying theme is that of the best interests of the child.

It is submitted that the right of the child to be cared for and maintained by its parents is given protection in terms of the customary law, common law and the statute.¹⁰⁸ The Children’s Act of 2009 has, to a limited extent, changed the

⁹⁴ Section 13 Children’s Act.

⁹⁵ I Schapera “*A Handbook of Tswana Law and Custom*” (2nd edition, 1970, Oxford University Press) at 171-172.

⁹⁶ As above.

⁹⁷ *Mashabane v Molosankwe* [2000] 1 BLR 185 (HC). The court reiterated that maintenance related to the provision made for the upkeep of a child born out of wedlock and a distinction was made between seduction damages and maintenance.

⁹⁸ [1997] 2 BLR 7 (HC)

⁹⁹ *Magibisela v Mogobe* [2002] 2 BLR 53 (CA). The court stated that in terms of the Roman Dutch Common Law, which is the common law applicable to Botswana, both the mother of the child and the father are obliged to support the child according to their respective means. The obligation to support the child lapses when the child reaches the age of 21, marries or becomes self-supporting.

¹⁰⁰ Children’s Act, sec 13.

¹⁰¹ Children’s Act, sec 13(2).

¹⁰² Amendment Act of 1999; See generally Morolong (n 2 above) 70.

¹⁰³ Affiliation Proceedings, sec 6(3).

¹⁰⁴ Cap 28:03 Laws of Botswana.

¹⁰⁵ Sec 3(2) Deserted Wives and Children Protection Act Cap 28:03 Laws of Botswana.

¹⁰⁶ Sec 2(2)(b) Deserted Wives and Children Protection Act

¹⁰⁷ Sec 2(2)(b)(i)

¹⁰⁸ *Montshioa v Montshioa* [1999] 2 BLR 216 (HC).

common law position in such a way that gender roles, as regards the caring and maintenance of children, have been removed as the primary consideration in respect of matters affecting children. What is now the decisive factor is the overarching consideration of the best interests of the child. The acknowledgment of the role played by fathers in the upbringing of their children is a welcome development and has strengthened filial relationships between children and their fathers, which was not the case before.¹⁰⁹

Adoption of Children

Adoption in Botswana is governed by the Adoption of Children's Act of 1952.¹¹⁰ The Act lays down the requirements to be complied with for adoption to take place in Botswana¹¹¹ as well as classes of people who are qualified to adopt.¹¹² In addition to the eligibility criteria set out in section 3 of the Act, the court has to satisfy itself that the persons seeking an adoption order are of good repute and fit and proper persons to be entrusted with the custody of a child. The court is also supposed to ascertain whether they are possessed of adequate means to maintain and educate the child.¹¹³ The totality of these factors can effectively determine whether the adoption is conducive to the best interests of the child or not.¹¹⁴ Adoption of children could either be viewed either as complete or inchoate.¹¹⁵ Complete adoption entails a scenario where the adopted child is assimilated into the family of the adoptive parents. On the other hand, incomplete adoption is where the adopted child still maintains relations and contact with the biological parents such that there is still a connection. It has been posited that the complete model is conducive to the best interests of the child as it ensures a stable environment for the child.¹¹⁶

The Botswana model, which has been described as inchoate, has traces of the integration model but it restricts or curtails certain rights of the adopted child resulting in half-hearted or partial integration of the child into the adoptive family.¹¹⁷ Section 6 of the Adoption of Children Act makes provision for the consequences of adoption. The adopted child is deemed for all intents and purposes to be the legitimate child of the adoptive parents.¹¹⁸ The effect of an adoption order when granted is to irrevocably put to an end the rights and responsibilities of the natural parents and such responsibilities

are taken over by the adoptive parents. Conversely, all the legal ties that the child had with the natural parents immediately cease except the right to inherit from natural parents. This indicates that the child is completely integrated into the adoptive parents' family.¹¹⁹ Botswana therefore should adopt approach that takes into account the best interests of the child.

For the longest time, the provisions of the Adoption of Children's Act excluded the participation of the unwed father in the adoption process.¹²⁰ Section 4(2)(d) of the Adoption of Children's Act specifies persons who are required to give consent to the adoption of an extra marital child. The unwed father of such a child is not one of them. The fact that unwed fathers did not have a say in the adoption of their children leads one to ask whether the provisions of such law were in the best interests of the child. In *Geoffrey Khwarae v Bontle Onalenna Keakitse & Others*¹²¹ the constitutionality of such law, in particular section 4(2) of the Adoption of Children's Act, was considered. The facts of this case are that the applicant was the biological father of a female minor who was allegedly a product of a brief relationship between her parents. The romantic relationship between her parents ended before she was born. The applicant played an active role in his daughter's life by supporting her by providing her with finances and supplies. The applicant also had access and visited the child whenever he was allowed to do so by the child's mother.

The applicant's case was that he was fearful that his daughter could be adopted by her mother's boyfriend, the 3rd Respondent, without his consent. He averred that he had no way of ascertaining whether the child was already adopted as he was irrelevant to the whole adoption process notwithstanding that he was the child's biological father. The applicant was rendered irrelevant to the adoption proceedings by the fact that section 4(2)(d)(i) of the Adoption of Children's Act did not require his consent before the adoption of his child as she was born out of wedlock.¹²² The applicant contended that the section, in so far as it did not require his consent for the adoption of his child because she was born out of wedlock, was unconstitutional. According to him, the section was in violation of his right to freedom from discrimination, freedom from inhuman and degrading treatment and the right to a fair hearing. The applicant's main argument was that the effect of denying unmarried fathers a legally protected relationship with

¹⁰⁹ *Mfundisi v Kabelo* [2003]2 BLR 129(HC) where the court granted the father of a non-marital child access to the said child notwithstanding the fact that the mother was married; *Ndlovu v Macheme* [2008]3 BLR 230(HC); *Macheme v Ndlovu* [2009]1 BLR 120 (CA).

¹¹⁰ Cap 28:01 Laws of Botswana.

¹¹¹ Adoption of Children Act (1952), Section 4(1).

¹¹² As above, sec 3.

¹¹³ As above, sec 4(2)(b).

¹¹⁴ As above, sec 4(2)(c); *Attorney-General v Harrison Thipe and Others* [1972] 2 BLR 6 (HC).

¹¹⁵ RJV Cole *et al* "Adoption of Children in Botswana in a comparative perspective: Unpacking two models of adoption" (2013) 16 *University of Botswana Law Journal* 38.

¹¹⁶ As above.

¹¹⁷ As above, 41

¹¹⁸ Adoption of Children's Act (1952), Sec 6(1).

¹¹⁹ Cole *et al* (n 116 above) 40.

¹²⁰ Adoption of Children's Act, sec 4(2)(d).

¹²¹ Case No. MAHGB – 000291-14 (Unreported).

¹²² According to Sec 4(2)(d), an order for adoption shall only be made provided consent to the adoption has been given –

- (i) by both parents of the child or, if the child is illegitimate, by the mother of the child whether or not such mother is a minor or married woman and whether or not she is assisted by her parent, guardian or husband, as the case may be;
- (ii) if both parents are dead, or in the case of an illegitimate child, if the mother is dead, by the guardian of the child;
- (iii) if one parent is dead, by the surviving parent and by any guardian of the child who may have been appointed by the deceased parent;
- (iv) if one parent has deserted the child, by the other parent; or
- (v) by a guardian specially appointed under section 5.

their children was to discriminate unfairly against them on the basis of sex or marital status.¹²³ As a result, the section was contrary to section 15(3) of the Constitution.¹²⁴

The court held that section 4(2)(d)(i) of the Adoption of Children's Act was unconstitutional to the extent that it does not require the consent of the father in the adoption of his illegitimate child in all cases.¹²⁵ The court took into account the fact that the new scheme of things under the Children's Act of 2009, called for an increased involvement of both parents in the life of the child and consequently, in adoption proceedings. Above all, Dingake J rightly pointed out that the supremacy of the principle of the best interests of the child has been clearly established in Botswana.¹²⁶ Accordingly, the court was of the view that the father's interest in the companionship and desire to take care of his child could not be ignored as it had a direct bearing on the interests of the child.¹²⁷ The court was of further opinion that the underlying purpose of section 4(2)(d)(i) of the Adoption of Children's Act – to the extent that it provided that the consent of the father is necessary where he is married and not necessary where he is not – was not shown to be reasonably necessary in an open and democratic society¹²⁸ and had, as he indicated, 'grave consequences for the best interests of the child'.¹²⁹

Dingake J's decision followed an earlier decision by the Court of Appeal in *Deborah Jan Kirsten Mey v Joshua July*.¹³⁰ This case involved an instance where the father, who was never involved in the life of his child, sought to reverse adoption that had taken place within a period in excess of three years. The Court of Appeal indicated that it was erroneous for the High Court, in making orders that sought the removal of the child from the care of her adoptive parents, to have failed to consider the best interests of the child.¹³¹ In this case, the appellant/adoptive mother had been staying with the adoptive child since the child was three months old. The father had only seen the child once since the child was born. It was clear from the circumstances of this case that at the time of the court proceedings, the child had already developed a bond with its adoptive parent.

The adoption was thus deemed as not being detrimental to the best interests of the child. This was despite that the child's father was not involved or consulted during the adoption proceedings. The reasoning of the court was that the rights

of the parents, as asserted by the respondent (father), were not absolute but were subject to the child's best interests.¹³² The Court of Appeal in this case concluded that in adoption proceedings, an unwed father should only expect to be consulted on the adoption of his child if he had been involved in the child's life.¹³³ In such a scenario, the involvement of the father in the child's welfare and upbringing would then be factors to be taken into account in deciding whether the adoption would be in the child's best interests.¹³⁴

It is important to highlight that both the *Khwarae* case and the *Kirsten* cases took into account the best interests of the child in determining whether the adoption process under scrutiny was appropriate. In both cases the supremacy of the best interests of the child was confirmed. As already indicated, the advent of the Children's Act 2009 was perhaps an affirmation of the direction that the courts had already taken in dismantling common law rules that ignored the best interests of the child. The decisions of the High Court in relation to access by unwed fathers indicated this momentous shift.¹³⁵ In all those cases, it was clear that the best interests of the child were a determining factor in deciding whether the father should have access to the child or not. This was in contrast to the previously applicable common law position that the mother of a child born out of wedlock had absolute control over the child.¹³⁶ Such control in practice usually resulted in instances where the father to a child born out of wedlock totally had no access to his child.¹³⁷

General reflections, challenges and prospects

Despite that the principle of the best interests of the child has found favour and application by the Botswana courts, there are other areas where the application of the principle is still wanting. It is with respect to these areas that there is need for concerted efforts to ensure that the principle is consistently applied in Botswana. In addition to adoption, two other areas where the application of this principle is wanting are with respect of treatment of children by immigration officials and surrogacy. The immigration laws in Botswana do not seem to adequately take into account the best interests of children born to people who are regarded as illegal immigrants.¹³⁸ These are people who have either overstayed, those who have been denied refugee status or have entered the country at ungazetted points as well as undocumented persons. When their parents are deported or sent to the Centre for Illegal Immigrants, children are dealt with in the same manner.¹³⁹ It is submitted

¹²³ para. 35.

¹²⁴ 1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.

(3) In this section, the expression 'discriminatory' means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

¹²⁵ para. 221.

¹²⁶ para. 148.

¹²⁷ para. 199.

¹²⁸ para. 200.

¹²⁹ As above.

¹³⁰ Unreported, CACGB-134-13.

¹³¹ Para. 47 & 48.

¹³² para. 48.

¹³³ para. 61.

¹³⁴ As above.

¹³⁵ *Mfundisi v Kabelo* [2003] 2 BLR 129; *Ndlovu v Macheme* [2008] 3 BLR 230 (HC) upheld by the Court of Appeal in *Macheme v Ndlovu* [2009] 1 BLR 120 (CA).

¹³⁶ EK Quansah *Introduction to Family Law in Botswana* (4th edition 2006, Pula Press) at 144.

¹³⁷ As above.

¹³⁸ The relevant pieces of legislation include the Immigration Act (2011), the Refugees (Recognition and Control) Act (1968) and the Prisons (Centres for Illegal Immigrants) Regulations Cap 21:03 (SI) 38.

¹³⁹ See generally

that the children's best interests should be taken into account as to incarcerate them with their parents is not in their best interests. This obviously calls for a different approach to and treatment of families arriving in the country with children. Such can include, but is not limited to, housing them in facilities that are designed to accommodate families.

Inheritance by children born out of wedlock has also withstood the winds of change that has been brought about by the Children's Act. The assault on the common law position that a child born out of wedlock is not entitled to inherit from its biological father so far has not been completely successful.¹⁴⁰ The common law position is that an illegitimate child should only be entitled to maintenance from his father.¹⁴¹ Albeit with some narrow exceptions, extra-marital children under customary law are also not entitled to inheritance from their deceased father's estate.¹⁴² This position fortifies an earlier position that customary law did not, adequately, take into account the best interests of the child.

It appears that the principle of the best interests of the child has not been able to influence the outcome in these cases. Recent decisions of the courts with respect to this issue appear to indicate an approach that is in favour of extending – in the future and with respect to specific instances – the right of children's born out of wedlock to inherit from their fathers by children born out of wedlock.¹⁴³

The other aspect to consider is with respect to children born as a result of surrogacy arrangements. There is no legislation in Botswana that seeks to regulate surrogacy arrangements. The absence of such legislation is not in the best interests of children born as a result of a surrogacy arrangement or similar circumstances. In *Gofhamodimo Sithole v Lekoko Baatweng*¹⁴⁴ the High Court was mainly confronted with the legal position of surrogacy in Botswana and a question relating to what happens to a frozen embryo when the parties divorce. The court applied the test that seem to concern itself with the parents as opposed to the best interests of the yet to be born child. Balancing the parties' rights does not take into account such factors as the child's interest to grow up in a family or at the very least the suitability of the woman to be a mother. The legislative approach in South Africa, requires that the persons commissioning a surrogacy pregnancy “in all respects” be suitable persons to accept parenthood of the child that is to be conceived.¹⁴⁵ The approach, where the best interests of the child are considered, in surrogacy matters have been followed

in South Africa.¹⁴⁶ This, in our opinion is a superior approach which, if applied in Botswana, would give effect to the provisions and aspirations of the Children's Act, 2009.

A reading of the provisions of the Children's Act of 2009 also indicates that the future of its substantive use will largely depend on a proper understanding and application of the Act. This is because section 3 of the Act seems to suggest that the Act only overrides the provisions of other pieces of legislation. The section should have explicitly stated that it overrides, as well, common law and customary law. This is because the legal principles applicable under these laws regulate most areas affecting children's rights. As is usually the case, such issues are highly contested and, in some instances, not in the best interests of the child. A case on point is the inheritance at common and customary law by children born out of wedlock.

Conclusion

From the foregoing it can be seen that the principle of the best interests of the child is invariably used each time an issue involving children arises. It has certainly moved beyond being an interpretative tool to a principle of paramount consideration by the courts. The principle emerged as and was applied as the welfare of the child. This incremental development of the principle by the courts has resulted in its sustainable and eventual codification. It is important to note the invaluable role played by the courts in the transformation of this principle in Botswana and the consistent application of the principle in the resolution of disputes concerning children.

It can be concluded that the advent of the Children's Act of 2009 has cemented the approach taken by the courts towards issues involving children. It is comforting to note that judicial officers are aware of the provisions of the Act and this has made difference in the adjudication of children's rights in Botswana. Education on the application of this principle and the extent of such application among judicial officers will go a long way in ensuring that the principle is effectively applied. Such education should not only be limited to judicial officers but also to social workers and social welfare officials as well. It remains to be seen how this principle will effectively promote and protect the rights of children in Botswana.

As illustrated by the previous discussion, a proper application of the Act allows for a more extensive enquiry into the various aspects of the child's life. Thus, if it is applied correctly it allows for a more extensive enquiry in the various aspects of the child's life. Once such an enquiry has been made, it is more likely that the court will arrive at a decision that will offer acceptable, if not maximum, protection to the child. This is with respect to a range of issues such as custody, maintenance and access to the child by unwed fathers. This is a best practice and an approach, which could be adopted in other jurisdictions. ●

¹⁴⁰ *Mosienyane v Lesetedi and Others* Misc F257/2005 (Unreported)

¹⁴¹ *Hendrick v Tsawe* [2008] 3 BLR 447(HC)

¹⁴² *Tape v Matoso* 2007 (1) BLR 512.

¹⁴³ See generally O Jonas and P Gunda 'Children born out of wedlock and their right to inherit from their fathers under customary law in Botswana – Baone Kealeboga & Anor v Tidimalo Mercy Kehumile & Anor' (2015) XLVIII CILSA 89; O Jonas 'Extra-marital children and their right to inherit from their fathers in Botswana: A critical appraisal' (2015) 17 *European Journal of Law Reform* 93; E Macharia-Mokobi 'Lingering inequality in inheritance Law: the child born out of wedlock in Southern African Litigation Centre (SALC) (Ed.) Botswana' in *Using the courts to protect vulnerable people: perspectives from the judiciary and legal profession in Botswana, Malawi, and Zambia* (2014) 140.

¹⁴⁴ Case No. MHLB – 000670 – 11 (HC) (Unreported judgement).

¹⁴⁵ As above.

¹⁴⁶ J Sloth-Nielsen 'Surrogacy, South African Style' *Family Law Newsletter* (September, 2013) 19, available at <http://repository.uwc.ac.za/xmlui/bitstream/handle/10566/1275/Sloth-NielsenSurrogacySouthAfricanStyle2013.pdf?sequence=1> (accessed 15 October 2015).

Does the delivery of a notice in terms of rule 51(1) of the Magistrates' Court Rules stay the execution on a judgment?

By Karabo Nedohe

Rule 51(1) of the Magistrates' Court Rules [herein after referred to as rule 51(1) notice] provides that upon a request in writing by any party within 10 days after judgment and before noting an appeal and upon payment by such party of a fee of R70, which shall be affixed to such request in the form of a revenue stamp, the judicial officer shall within 15 days hand to the clerk of the court a written judgment which shall become part of the record showing the facts he found to be proved and his reasons for judgment.

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“Requesting a written judgment or reasons for a judgment and noting an appeal are two different processes and have different procedures to carrying them out.”

The issue for determination in this matter is whether delivering a notice in terms of rule 51(1) of the Magistrates Court Rules, automatically suspends the execution on a judgment.

In the *Saambou Bank Ltd v Mzozoyana* (SECLD, case No 3215/98, 22 December 1998) the Respondent was the owner of property over which the applicant bank had registered a mortgage bond to secure a loan to the respondent. The respondent defaulted and the applicant bank obtained judgment against the respondent. On the day that the magistrate found against the respondent, the respondent filed a rule 51(1) notice, requesting the magistrate's written reasons. The respondent's attorney notified the applicant bank that they were instructed to note an appeal in due course and that the applicant bank may not proceed with the execution judgment. The applicant bank proceeded to sell the property at a sale in execution. Jansen J reasoned that it may result in an injustice or be unfair to a person affected adversely by a judgment of a magistrate if the execution on a judgment is not suspended until the magistrate has provided a written judgment. Accordingly, Jansen J concluded that the execution of a judgment in the magistrate's court is automatically suspended the moment a request in terms of rule 51(1) notice is filed.

In the recent decision of *Burgher v Burcher NO and Others* (633/11) [2011] ZAWCHC 16 (10 February 2011), Henny AJ, was not persuaded with respect that the judgment of Jansen J was correct where he says that by invoking the provision of rule 51(1), an appeal is noted and the execution of a judgment is therefore suspended. Henny AJ said that the respondent in the *Saambou Bank Ltd v Mzozoyana* (SECLD, case No 3215/98, 22 December 1998) case after having requested the written reasons of the magistrate also could have made an application in terms of section 62(3) of the Magistrates' Court Act 32 of 1944 to have stayed the execution of the order of court, while awaiting the reasons of the Magistrate. The *Burgher* case is plausible in that it clearly set out the distinction between requesting a written judgment or reasons for a judgment and noting an appeal. Requesting a written judgment or reasons for a judgment and noting an appeal are two different processes and have different procedures to carrying them out.

In the case of a request for reasons or a written judgment in terms of rule 51(1) notice, a request must be made in writing to the magistrate concerned within 10 days after the judgment. In this process, only the magistrate concerned and the party requesting the reasons are involved, there is no need to inform the opposing party about it. Any of the parties, it seems, can request such reasons. In the case of the noting of an appeal, there must be a delivery of notice in terms of the rules of court, which means that it shall be served with the clerk of the court and a copy shall be served on the opposing party.

In my view, the two processes cannot be meant to be the same especially if regard is to be had to the provisions of section 78 of the Magistrates' Court Act, which deals with the noting of judgment and which gives the magistrate the discretion whether execution of a judgment should be suspended or not. A mere delivery of the Notice in terms of rule 51(1) of the Rules of the Magistrates' Court Rules does not automatically stay the execution on a judgment. It is only a request for a written judgment from the magistrate.

In conclusion, the delivery of a notice in terms of rule 51(1) of the Magistrates' Court Rules does not stay the execution of the judgment. The notice in terms of rule 51(1) is a request by a party to the proceedings, requesting the Magistrate to provide a written judgment. What may stay the execution on a judgment is:

- a. When we note an appeal in terms of rule 51(3) of the Magistrates' Court Rules with regard to section 78 of the Magistrates' Court Act. Section 78 provides that 'where an appeal has been noted or an application to rescind, correct or vary a judgment has been made, the court may direct either that the judgment shall be carried into execution or that execution thereof shall be suspended pending the decision upon the appeal or application'.
- b. Make an application in terms of section 62(3) of the Magistrates' Court Act. Section 62(3) provides that: 'Any court may, on good cause shown, stay or set aside any warrant of execution or arrest issued by itself.' ●

Administration Law: Does the President's power to pardon or reprieve offenders qualify as an administrative action?

By Jesca Genius Machokoto¹

Photo: DOJ&CD

In order to determine whether an act constitutes an administrative action or not, the first step is to look at the definition of an administrative action in the Promotion of Administrative Justice Act 3 of 2000 (PAJA).¹ Administrative action is defined in terms of section 1 of PAJA as any decision or failure to take a decision by:

- a) 'An organ of state, when –
 - (i) exercising a power in terms of the Constitution or provincial constitution, or
 - (ii) exercising a public power or performing a public function in terms of any legislation or
- b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision which adversely affects the right of any person and which has a direct and external legal effect ...'

The definition of administrative action as noted in section 1 of PAJA is broken down into seven elements² namely –

- i) a decision;
- ii) by an organ of state;
- iii) exercising a public power or performing a public function;
- iv) in terms of any legislation or empowering provision;
- v) which adversely affects the rights of others and
- vi) which has a direct, external legal effect; and
- vii) does not fall under the listed exclusions.

In *Viking Pony Pumps (Pty) Ltd v Hidro-Tech Systems (Pty) Ltd*,³ the court held that the question whether or not a decision constitutes to an administrative action must be determined based on whether or not the facts of each case satisfy the elements of administrative action as listed above.⁴

In determining whether or not the seventh element has been complied with, section 1(i)(b) must be looked at as it lists certain exclusions to the definition of administrative action. According to s 1(i)(b)(aa) any decision relating to the executive powers and function of the president in terms of section 84(2) are excluded. However, section 84(2)(e) and (j) are left out under the exclusions. This means that not all powers of the executive falls under the exclusions. The court in *Centre for the study of Violence and Reconciliation v President of the Republic of South Africa*⁵ held that, functions of the President to pardon or reprieve offenders was an administrative action and had to comply with the constraints of procedural fairness laid down in the PAJA.⁶

The second, third and fourth element can be looked at together. The President is an organ of state in terms of section 239 of the Constitution and exercises his presidential powers in terms of sections 84 and 85 of the Constitution. Section 84 of the Constitution lists the powers of the President including the power to reprieve or pardon offenders. This means that the President is acting under an empowering Constitution. In *Marais v Democratic alliance*, a case which concerned the removal of a mayor, Hlophe J held that actions that were *ultra vires* to the party's constitution could not qualify as an

¹ LLM University of Witwatersrand. Member of the Institute of Risk Management and (Institute of Information Technology Professionals South Africa)

¹ *Zondi v MEC Traditional and Local government affairs* 2005 (3) SA 589.

² C Hoxter.

³ 2011 (1) SA 327 (CC).

⁴ Para 37.

⁵ 2009 ZAGPPHC 35

⁶ Para 7.3-7.4

administrative action because they lacked an empowering provision.⁷ The other two elements are likely to be satisfied if the President is exercising a public power or performing a public function. In the case of *Grey's Marine*⁸ and *SARFU*⁹ it was held that the question whether or not a conduct constitutes the exercise of public power depends on the nature of the power exercised and not necessarily the identity of the body exercising such power. This requirement for administrative action is likely to be satisfied where factors such as strong public interest are present.¹⁰

The first element that the conduct must amount to a decision read with element five and six are critical in determining whether or not the conduct of the President amounts to administrative action. The element of 'decision' must be viewed in terms of whether or not there was 'finality' and 'substantive effect' in order for that action to be reviewable.¹¹

In support of 'finality', the doctrine of *functus officio* provides that once a person with authority to make a decision has done so, they may not then return to that same decision to vary or revoke it. In *President of the Republic of South Africa & others v South African Rugby Football Union & others*¹² the Constitutional Court, found that the power of a President to appoint a commission of inquiry 'only takes place when the President's decision is translated into an overt act, through public notification' and that prior to this overt act, he was 'entitled to change his mind at any time'. Another aspect of the finality of the decision is that it should have been 'published, announced or otherwise conveyed'¹³ in order to be final. In the case of *Chaka Johannes Moeke* the court was persuaded on the finality requirement in that the decision was announced at a press conference on 14 December.

There is no provision in the Constitution, nor any other legislation, which provides for a unilateral revisiting of a decision by the President. Section 83 of the Constitution describes all the decisions taken by the President in terms of section 82 as executive acts. The courts may revisit a decision where it is deemed to be in the interest of public. In doing so, courts exercise their discretion with caution to avoid the uncertainty that would arise from decisions being revisited and possibly changed. In the *President of the Republic of RSA v Hugo*¹⁴ the court confirmed that the decision to pardon was an executive act.

Thus, it can be inferred that procedurally an internal appeal is a requirement to a decision that needs to be changed but this is based on the assumption that substantively the decision of the President amounts to a decision for the purposes of the PAJA in that it adversely affects rights and has a direct external legal effect. For one to reach a conclusive decision *Magaret Beukes & Isabeau South wood* suggest the use of a multi-stage process which consists of an investigative stage and a deliberative stage, which eventually leads to the final decision

being reached.¹⁵ Decisions of an investigative nature cannot under certain circumstances be classified as an administrative action and for this reason they are not subject to review.¹⁶

A conduct will amount to an administrative action if the decision adversely affects the rights of someone. In the determination of the phrase 'adversely affect rights' the determination theory should be used.¹⁷ When using this theory, consideration needs to be given to the effect on a person's right by determining what those rights are, even if the rights are not yet in existence as well as

the capacity of the action to affect those rights. The decision by the President to pardon or reprieve an offender could potentially affect the pre-existing rights protected in the Bill of Rights such as equality, human dignity and the right to life.

The requirement of direct, external legal effect is generally satisfied upon the requirement of adversely affecting rights being met.¹⁸ In this case specifically it can be seen to have been met by the fact that the allegation of the decision must have a direct impact on the person rights. The decision must have a legal effect that is direct and external. The pardoning power of the president has an external legal effect on the public at large in that a person is likely to commit the same crime when discharged before serving his or her full sentence.

Conclusively, a presidential decision to pardon or reprieve offenders meets all elements of an Administrative action as per PAJA. It is an unsurprising why the legislature, in enacting PAJA excluded the power to pardon or reprieve offenders from a list of those executive actions that do cannot be scrutinized in terms of PAJA. This in my view, was a deliberate exclusion. ●

“The decision by the President to pardon or reprieve an offender could potentially affect the pre-existing rights protected in the Bill of Rights such as equality, human dignity and the right to life.”

7 2002 (2) BCLR 171 (C) para 52-55

8 Para 24

9 Para 143

10 *Marais v Democratic Alliance* 2002 (2) BCLR 171 (CC) para 51-58

11 Iain Currie *The Promotion of Administrative Justice Act: A Commentary* 2nd ed (2007) 54

12 *President of the Republic of South Africa & others v South African Rugby Football Union & others* 1999 ZACC 11, 2000(1) SA 1 (CC) para 44

13 Cora Hoexter *Administrative Law in South Africa* (2 ed) (2012) at 278

14 1997 4 SA 1(CC) para12

15 *Magaret Beukes & Isabeau South wood* 'When is a Decision a Decision?' (2009) 24 *SA Public Law* 223.

16 *Simelane NO v Seven-Eleven Corporation of SA (Pty) (Ltd)* (2002) ZASCA 141 para 17

17 According to Cora Hoexter 221.

18 *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) para 27-28

Coexistence of lawlessness and human rights: the South African question

By Sentle Fenyane



In the year 1993 The Multiparty Negotiation Process (MPNP) gathered in Kempton Park and agreed on a set of 34 binding Constitutional Principles to be used as a framework for the drafting of the Constitution of South Africa. The MPNP also agreed on the text of the Interim Constitution. Section 4 of the Interim Constitution made provision to the effect that the Constitution is the supreme law of the country and any conduct or law inconsistent with it would be deemed null and void (this was an epoch making break with the previous dispensation where Parliament was the supreme law

of the country)¹. Section 4 of the Interim Constitution found direct expression in the current Constitution of South Africa (hereinafter referred as the Constitution).² The amended text of the Constitution was adopted by the Constitutional Assembly on 11 October 1996, and was assented to by President Nelson R Mandela on 10 December 1996 at Sharpeville – it came into effect on 4 February 1997.

1 Ian Currie & Johan De Waal "The Bill of Rights Handbook". (Sixth Edition-2013). Juta- Cape Town ch 1.

2 The Constitution of the Republic of South Africa, 1996; section 2 provides that 'this Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.

“The question that remains indelibly agglutinated to our lips is whether the rights as enshrined in the Constitution can be enjoyed in an environment that is pervasively punctuated by malicious lawlessness currently experienced in South Africa?”

The adoption of the Constitution enjoins the state to be bound by the basic principles of the new order. Whereas many of these basic principles, such as constitutionalism and the separation of powers are not explicitly mentioned in the Constitution, others such as the foundational values of the Constitution are explicitly mentioned in the Constitution.³ The state is accordingly not expected to act inconsistent with these values as that would offend section 2 of the Constitution, which makes provision that ‘the Constitution is the supreme law of the country and any law or conduct inconsistent with it, is invalid’. Section 7 of the Constitution enjoins the state to, respect, protect, promote and fulfil the rights in the Bill of Rights’ as the Bill of Rights is the cornerstone upon which our democracy is anchored. Section 8 of the Bill of Rights provides, without equivocation, that the Bill of Rights applies to all inclusive of the state and its organs. The question that remains indelibly agglutinated to our lips is whether the rights as enshrined in the Constitution can be enjoyed in an environment that is pervasively punctuated by malicious lawlessness currently experienced in South Africa?

State of lawlessness in South Africa

The following statistics (from The United Nations Office on Drugs and Crime (UNODC)) bear reference:

- Between the years 1994 and 2017, 485 260 people were reported to have been killed in South Africa. In support of these figures the South African Police Services (SAPS) reported that between the years 2017 and 2018, 20 306 people were reportedly killed in South Africa (the statistics unfortunately say these people were murdered but I thought only the courts are entitled to use the term ‘murder’ after a sentence has been ordered accordingly – I, therefore, opted to use the word ‘killed’ instead)
- The ‘murder’ rate of South Africa has been approximated to be at the rate of 36 per each 100 000 people
- In the City of Cape Town, which unfortunately earned the dreaded title the ‘murder capital’ of South Africa, 2 300 people were reported to be killed between the period November 2018 to May 2019. It is needless to indicate that from 5 to 7 July 2019, 55 people were reportedly killed in Cape Town. This information is supported by information from SAPS, which indicates that 20 336 people were reported to have been killed in South Africa between April 2017 to March 2018.
- SAPS reported that currently, on average, 45 vehicles are hijacked every day in South Africa, of those 23 were hijacked in Gauteng. SAPS also reported that between the years 2017 and 2018 16 325 vehicles were reported hijacked in South Africa
- SAPS reported that, as at 12 July 2019, 3500 children, on average, were discovered to be abandoned by their irresponsible parents in South Africa per annum.
- Sexual Offences cases: Between the years 2017 and 2018, 50 108 sexual assault cases were reported and of those 39 828 comprised rape cases; between the years 2017 and 2018, 2 930 women were killed, the majority of which had been reportedly raped first. In comparison, from the years 2016 to 2017, 49 660 were reported to have been sexually assaulted, and 40 035 of which had been raped. These cases were reported by SAPS in support of the United Nations Office on Drugs and Crime (UNODC) reports.
- Robbery: Between the years 2017 and 2018, 50 730 cases of robbery were reported to have taken place and between the years 2017 and 2018 140 956 cases of robbery with aggravating circumstances were reported to have happened in South Africa.
- House robbery: Between the years 2017 and 2018, 228 094 house burglary cases were reported to have happened in South Africa. These cases were reported by SAPS in support of the UNODC reports.
- Assault: Between the years 2017 and 2018, 156 243 cases of common assault were reported to have happened in South Africa. In the same period 167 352 cases of assault cases with intent to do grievous bodily harm were reported to have happened in South Africa.

³ Section 1(a) of the Constitution makes provision that ‘human dignity, the achievement of equality and the advancement of human rights and freedoms’ are the pre-eminent foundational values of South Africa’s democracy as a sovereign country.

White collar crimes: corruption, fraud and maladministration

- The Auditor General (AG) made an audit report on municipalities in July 2019 and indicated that only **12 municipalities out of the 257** audited posted a clean audit record. He reported that his team was confronted with a hostile audit reception in an environment, which was extremely threatening and scary. He subsequently asked Parliament to give his office power and authority to act appropriately on corruption and abuse that were omnipresent in municipalities which resemble an epicentre of corruption and shameless thieving. The AG reported that irregular expenditure in all municipalities amounted to R21.2b in 2018, which is comparatively lower than the R27.7b reported in 2017. He further reported that poor financial control was a common denominator in these municipalities; that there is a shameless absence of consequence management. The AG defines irregular expenditure as ‘expenditure other than authorised expenditure incurred in contravention of, or that is not in accordance with a requirement of applicable laws’. He stressed that funds were mismanaged and expended through sheer corruption.
- Eskom had earlier received government loans to the tune of R200b as a life boat after it had mismanaged its funds from 2011. Eskom had a shortfall of R440b as of end of March 2019 and it has posted the loss of R20.7b in 2018/19, these figures were confirmed by Mr Jabu Mabuza on 30 July 2019 – Jabu Mabuza is Eskom’s Chairman and Acting CEO. The Minister of Finance, Tito Mboweni announced in the week ending on 27 July 2019 that the total bail out granted by government to Eskom was already R128b towards the latter part of 2019 – making Eskom the most wasteful state – owned enterprise in South Africa. It is rather ironic that the same Minister had earlier warned in February 2019 that ‘pouring money directly into Eskom in its current form is like pouring water into a sieve’.
- The South African Airways (SAA) received a government bail out to the tune of R35b since 1999. SAA has not posted a profit from 2011 to date. It is standing at a shortfall of R9.2b and has approached the government, with cap in hand and tail between its legs, for a life boat.

“Corruption has far reaching systemic effects. It takes away food from the table of poor people. It contributes immensely to poverty, starvation and crime.”

- SANRAL debts amount, as at June 30 2019, to R35b
- Denel’s revenue fell to R8bn in 2019. It is needless to indicate that Denel has failed, at the end of June 2019, to pay full salaries to its recorded 4 600 employees. Denel, has, with shameless effrontery, announced that it might fail again to pay its employees at the end of July 2019 or so.
- The South African Strategic Fuel Fund (SASFF) recently sold 10 million of barrels of oil for an embarrassing sum of \$28 per barrel.
- Transnet has, even as I write, R122.5b outstanding loans – R3.8b of which is guaranteed by the South African government.
- The SABC has an irregular expenditure of R3.03b from its 2018 budget of R6.6b

I have not included financial irregularities that are found in government departments, both nationally and provincially, which are very huge and discouraging. I am of the view that all these problems outlined above are a result of corruption, which is

informed by sheer thieving as perpetrators are aware that there is no political will to hold them accountable. The implications of these irregularities demonstrate, without any doubt, that the ineptitude of the executive sphere of government to execute duties vested in them reinforces maladministration and corruption.⁴ Parliament, the Provincial Legislatures and the Municipal councils do not hold their respective executives to account as provided for in the Constitution.⁵ Corruption has far reaching systemic effects. It takes away food from the table of poor people. It contributes immensely to poverty, starvation and crime. This was corroborated by the Chief Justice Mogoeng Mogoeng on 25 July in response to questions posed to him on SAFM radio. He said ‘ordinary, day-to-day crime is escalating, and it is those who are poverty-stricken who commit crime most of the time’. He further lamented that ‘the worst that can happen to us is to be corrupt out of greed, but an average South African who is involved in crime is trying to survive’. He said when people feel the loss of dignity, they are

⁴ Chapter 5 of the Constitution vests national authority of government in the President and his/her cabinet; chapter 6 vests provincial authority of government in the Premier and his/her executive; chapter 7 vests local government authority in the mayors and their committees.

⁵ Section 55, 114 and 156 of the Constitution give authority to Parliament, Provincial Legislatures and Municipal Councils to hold their executives accountable. Parliament and the Legislatures have additional powers to exercise oversight on the claims (and functions) made by their executives.

driven to committing crime that may escalate to killing others. He urged South Africa to outroot every form of corruption, for if we were to fail to do that, unemployment and poverty, which have taken root in our country would persist.

Convoluting crimes

Uncontrolled and uncoordinated immigration give rise to all manner of unintended consequences as we see unfolding in South Africa currently. No one knows exactly how many foreigners/immigrants reside in South Africa legally and illegally as our borders are literally unguarded and erratically sieve illegal immigrants into South Africa. Even foreign criminals who are wanted by Interpol reside without ado in South Africa. The physical presence of undocumented immigrants in South Africa is, in itself, a criminal offence as these individuals neither acknowledge the sovereignty of South Africa nor respect its laws.

The Minister of Justice and Constitutional Affairs, in his response to a question by the Freedom Front Plus in 2017, answered that there were 4 million foreigners in South Africa; that 12000 foreigners were in South African prisons out of a total of 158 111 prisoners; that 11 842 incarcerated foreigners cost South Africa R1.6b per annum (one prisoner costs R133 805 per annum). The 12 000 number of foreign prisoners in South Africa was confirmed in the Sowetan edition of July 17 2017.

We know that almost all townships and villages in South Africa have spaza/tuck shops and corner shops owned by Pakistanis and Somalis, in particular – which business is valued at R7.2b per annum. These Somalis and Pakistanis use price collusion to drive South Africans out of business (the only easy way to establish business venture, which was exclusively accessible to black small business people in townships and villages). Whenever concerned citizens have one problem or another, they invariably burn and loot these foreign owned shops, which do not pay any tax to the fiscal purse. And often when there are incidents associated with immigrants' stay in South Africa, life and limb are lost. Immigration problems are called xenophobia by media in South Africa only – a term never used elsewhere on immigration problems. South Africa appears to be sitting on a time bomb ready to explode anytime on this uncontrolled immigration.

Immigration is a world-wide problem. It is needless to indicate that the two main reasons for Brexit are immigration (but not called xenophobia by British media) and the economy. The USA has capped refugee admissions to 30 000 per annum (a number that is a fraction of what is currently happening in South Africa). It is reported that as at the end of May 2019, 34 million immigrants were said to be residing in the USA. The USA and Mexico have signed an accord on June 7, 2019 to curb immigration of Mexicans into the USA. The European Union (EU) is also seized up with this immigration problem.

The EU has since decided to reform its immigration policy. Currently the EU has set up immigration 'hotspots' frontline member countries to find a way to hold immigrants in certain identified spots in those countries, register them properly and make a determination to equitably distribute them to countries so identified: 4 spots and 1 spot have been identified in Greece and Italy respectively for the purpose. Britain said it would not participate and pulled out of the EU. However, immigrants' numbers increase by day.

Unemployment rate in South Africa, as in the second quarter of 2019 was estimated to be at 29% while the youth unemployment rate was estimated

in the same vein at 40%. The government has recently signed a regulation that would be used to punish, rather severely, businesses in South Africa that employ undocumented immigrants. This knee-jerk reaction by the government is a desperation attempt to address the impending explosion that is brewing beneath the surface on this untenable eventuality. Ordinary South Africans will not rest on their laurels while unskilled and undocumented immigrants are given preferential employment opportunities as opposed to citizens of the country. It is needless to indicate that immigrants are wage/salary takers (they accept any amount paid to them as if South African business has not signed a minimum wage agreement with the Unions) and cannot form labour unions. They thus erode the gains South Africans made in the labour market – a possible trigger to violence and crime.

“The right to life, as presumed in context, by the foundational values as obtained in section 1 of the Constitution, is guaranteed in the Bill of Rights. It is therefore not possible that human rights can coexist with crime simultaneously as both are mutually antagonistic.”

Conclusion

It is the considered view of the writer that the pre-eminent foundational values, namely the right to human dignity, achievement of equality and freedom as provided for in section 1 of the Constitution and elaborated in sections 9, 10 and 12 of the Constitution cannot be enjoyed by South African citizens in an environment that is polluted by crime, most of which is so heinous and uniquely cruel and dehumanising⁶. The right to human dignity, equality and freedom read together give meaning to and ensure a quintessential consummation of the right to life as opined by Judge A J Kentridge.⁷ In corroboration of views opined by Justice A J Kentridge, Former Chief Justice A Chaskalson, making direct reference to *Ex parte Bugdaycay*, said ‘the right to life is the most fundamental human right,’⁸ that death is a denial to one’s human dignity and is irreversible – it leaves the living with nothing but a memory regarding what has been.⁹

People who ordinarily reside and are largely domiciled in South Africa live in constant fear of these marauding criminals who are extremely brutal in the execution of their criminal deeds. Almost all crimes mentioned supra may likely culminate in the death of victims so targeted. I agree absolutely with views opined by these judges and avers that crime, heinous and violent as it is in our country – and as chronicled supra, denies South Africans their human rights as enshrined in the Constitution. Crime is a direct antithesis to the foundational rights to human dignity, equality and freedoms, which are couched in imperative terms in our Bill of Rights. The right to life, as presumed in context, by the foundational values as obtained in section 1 of the Constitution, is guaranteed in the Bill of Rights. It is therefore not possible that human rights can coexist with crime simultaneously as both are mutually antagonistic. The South African state has thus effectively failed to promote, defend, respect and fulfil the Bill of Rights as provided for in section 2 of our Constitution. ●

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⁶ Section 9 of the Constitution accords everyone equal rights before the law; section 10 provides that ‘everyone has inherent dignity and the right to have their dignity respected and protected’; section 11 provides that ‘everyone has a right to life’

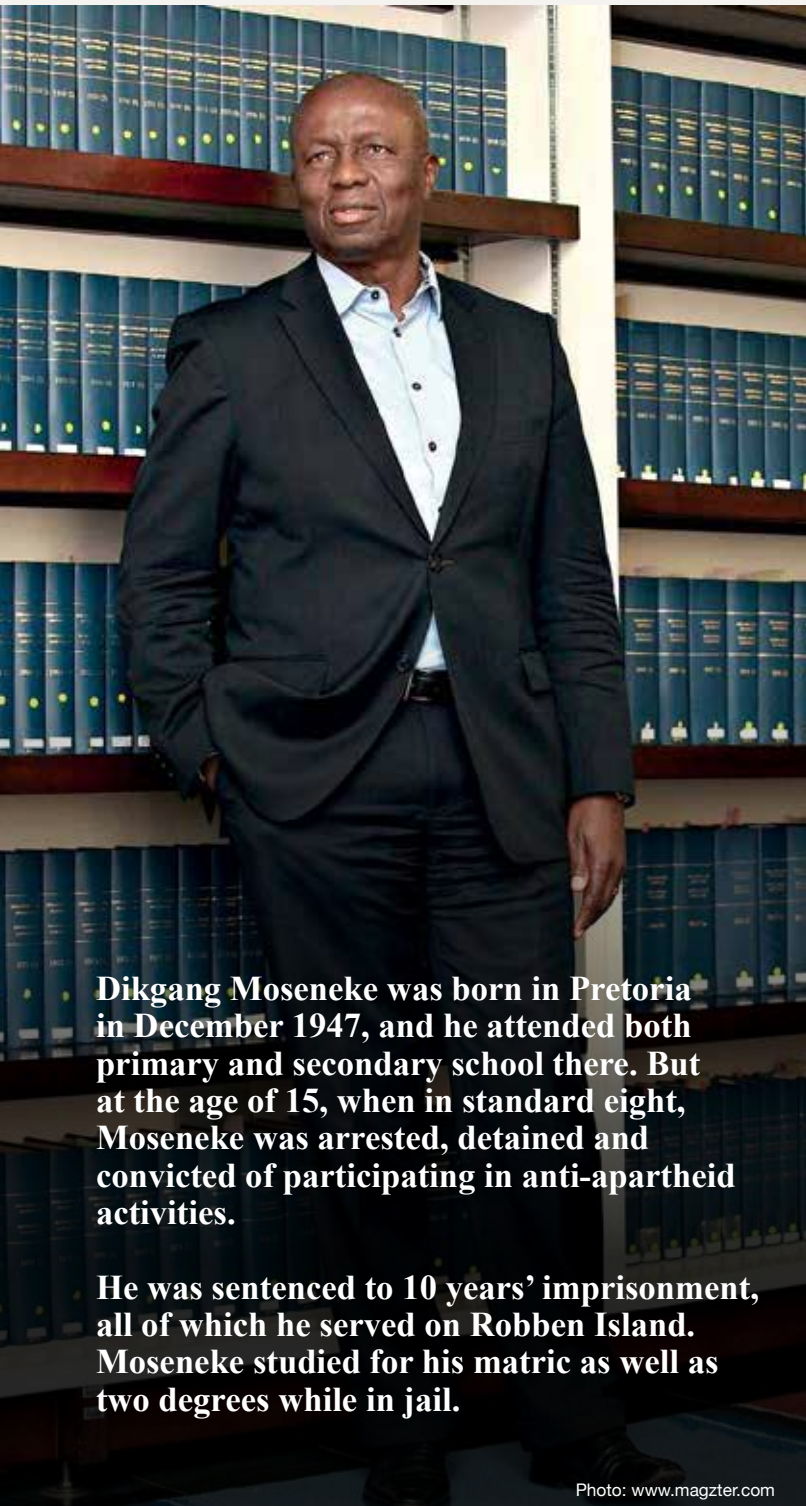
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⁸ As said in ‘Per Lord Brudge in *R v Home Secretary, Ex parte Bugdaycay* AC 514 at 531G.

⁹ *S v Makwanyane and Another* (CCT3/94) [1995] ZAACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

Deputy Chief Justice Dikgang Moseneke

By Adv. Fhumulani Mbedzi



Dikgang Moseneke was born in Pretoria in December 1947, and he attended both primary and secondary school there. But at the age of 15, when in standard eight, Moseneke was arrested, detained and convicted of participating in anti-apartheid activities.

He was sentenced to 10 years' imprisonment, all of which he served on Robben Island. Moseneke studied for his matric as well as two degrees while in jail.

Photo: www.magzter.com

Education

While Moseneke was jailed on Robben Island he obtained a BA in English and political science, as well as a B Juris degree. He later completed an LLB. All three degrees were conferred by the University of South Africa.

Professional history

Moseneke started his professional career as an attorney's clerk at Klagbruns Inc in Pretoria in 1976. In 1978 he was admitted and practised for five years as an attorney and partner at the law firm Maluleke, Seriti and Moseneke.

In 1983 he was called to the Bar and practised as an advocate in Johannesburg and Pretoria. Ten years later, in 1993, he was elevated to the status of senior counsel.

In 1993 Moseneke served on the technical committee that drafted the interim constitution of 1993. In 1994 he was appointed Deputy Chairperson of the Independent Electoral Commission, which conducted the first democratic elections in South Africa.

In September 1994, while practising as silk, Moseneke accepted an acting appointment to the Transvaal Provincial Division of the Supreme Court.

Before he was appointed Justice of the Constitutional Court, in November 2001 Moseneke was appointed a Judge of the High Court in Pretoria. On 29 November 2002, he was appointed as a judge in the Constitutional Court and in June 2005, Moseneke was appointed Deputy Chief Justice of the Republic of South Africa.

Following his retirement from the Constitutional Court bench, Justice Moseneke served as an Arbitrator, in the Arbitration between *families of mental health care users affected by the Gauteng mental marathon project (claimants)* And the Minister of Health, Government of the Gauteng Province, Premier of Gauteng, and the MEC of Health Gauteng (Respondents). The arbitration was prompted by a regrettable tragedy wherein 144 mental health care users died after they were moved from the Life Esidimeni facilities in 2015. The arbitration proceedings started on 9 October 2017 and ended on 9 February 2018.

Other activities

Between 1995 and 2001 Moseneke left the Bar to pursue a full-time corporate career in the following capacities.



Photo: www.polity.org.za

He has since resigned all these positions:

- Chairperson: Telkom South Africa Limited (Since October 1994)
- Chairperson: African Merchant Bank
- Chairperson: Metropolitan Life Ltd
- Chairperson: African Bank Investments Ltd
- Chief Executive: New Africa Investments Ltd
- Director: New Africa Publications (Pty) Ltd
- Director: Phaphama Holdings (Pty) Ltd
- Director: Urban Brew (Pty) Ltd
- Chairperson: Alisa Car Rental (Pty) Ltd (Hertz)
- Director: Life Officers' Association

Justice Dikgang Moseneke is a founder member of the Black Lawyers' Association and the National Association of Democratic Lawyers of South Africa.

In 1986 Moseneke was appointed visiting fellow and lecturer at Columbia Law School, University of Columbia, New York.

He has served in numerous community and non-governmental organisations, including as:

- chairperson of Project Literacy for more than 10 years;
- trustee of Sowetan Nation Building; and
- deputy chairperson of the Nelson Mandela Children's Fund.

Moseneke is the first chancellor of Pretoria Technikon and currently serves as chancellor of the University of the Witwatersrand.

Moseneke holds several honorary doctorates and is a recipient of numerous awards of honour, performance and excellence. These include:

- the Order of Luthuli in Gold- (For his exceptional contribution to the field of law and the administration of justice in democratic South Africa, 2018)
- the KWV Award of Excellence;

- the Black Lawyers Association Excellence Award (1993);
- Unisa School of Business Leadership Excellence Award (1997);
- Black Management Forum Empowerment Award (1998);
- Sunday Times Businessman of the Year Nominee (1998);
- International Trial Lawyer of the Year Award (from the International Academy of Trial Lawyers) (2000);
- Soweto Achiever Award (2002);
- honorary professorship in Banking Law, Unisa (2002);
- honorary professor in the Department of Mercantile Law, Unisa (2004-2006);
- Doctor of Laws (honoris causa) from the University of the North;
- Doctor of Commerce (honoris causa) from the University of Natal; and
- Doctor of Technology (honoris causa) from the Tshwane University of Technology.
- Doctor of Laws (honoris causa) from the University of South Africa.
- Doctor of Laws (honoris causa) from the City University of New York.

In the past 20 years, Moseneke has read numerous papers at law and business conferences, published several academic papers in law journals at home and abroad.

Books written:

- *My Own Liberator: A Memoir* (2016)
- *A Warrior for Justice* (2017)
- *All Rise: A Judicial Memoir* (2020)

Speeches and lectures

- A Jurisprudential Journey from Apartheid to Democratic Constitutionalism
- The courage of Principle: An address by Deputy Chief Justice Dikgang Moseneke to mark the 30th anniversary of the assassination of Ruth First
- The Hart Memorial Lecture 2012 - Georgetown University Law School
- Striking a Balance between the will of the people and the Supremacy of the Constitution
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