

African Law Review



VOLUME 10 • ISSUE 2 • 2021

Developing an equitable legal profession

**Momentous MOU
between the BLA-LEC
and University of Venda**

**Reinforcing the
Indigenous People's
Rights to heal in the
wake of Covid-19
Pandemic**

Black Excellence
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Developing an equitable legal profession

It goes without saying that continued legal education is an important part of ensuring that legal practitioners practise at their optimum best and serve society with integrity while ensuring access to justice and upholding the rule of law. In line with the objectives of the Black Lawyers Association - Legal Education Center (BLA-LEC), this issue of the *African Law Review* focusses on the theme “Developing an equitable legal profession”.

Continued legal education goes a long way in ensuring that the image of legal practitioners is viewed in a positive light because for far too long legal practitioners have been viewed in a somewhat negative light by society. Through its legal education programmes, one of the issues that the BLA-LEC has tried to tackle is access to the profession by black legal practitioners, particularly in areas of law that were not accessible to them.

In line with this issue’s theme, the BLA-LEC has signed a Memorandum of Understanding (MOU) with the University

of Venda. Reporting on this momentous occasion, on page 7 of this issue, the Chairperson of the BLA-LEC, Adv. Mc Caps Motimele SC states: “In terms of the MOU with the University of Venda, the BLA-LEC will make available the appropriate and necessary Trial Advocacy Training to all final year law students registered at the University of Venda. This will help mould the reputation of University of Venda law faculty as one of the leading faculties in the country, which provides high calibre graduates who will become leaders in the profession. The relationship with the University of Venda is a strategic

“Throughout history the BLA-LEC has answered the call to ensure that black legal practitioners have an equal footing as their counterparts through continued legal education.”

initiative, and we are excited that the University of Venda is the first higher education institution, to sign the collaboration agreement of this nature with the BLA-LEC.”

As part of its developing an equitable legal profession objective, Adv. Motimele SC notes that: “The BLA-LEC recognises the need for the institutions of higher learning, to produce law graduates that are adequately trained and ready to enter and thrive in the legal profession for the benefit of the profession, the universities and the country in general.

The BLA-LEC, is dedicated to providing the legal community and allied professionals with the most up-to-date and relevant information. Our objectives are to: Build the capacity of lawyers and expose them to areas of law where the market penetration of black practitioners is minimal or non-existent; provide continuing legal education and services to the black community at large, and increase the number of black lawyers.”

The BLA-LEC has been alive to the fact that the number of black lawyers in South Africa had to be increased even during the Apartheid regime. Entry into the profession has included acquiring articles of clerkship or pupillage for candidate legal practitioners, which was an almost impossible task for black practitioners. This also added another barrier for black legal practitioners to enter the profession. That is why at around 1981, the Black Lawyers Association (BLA) approached black lawyers in the United States and NGOs in which the lawyers were involved in to ask for funding to increase the number of black lawyers. On page 12 of this issue, in “History of the BLA 7th series: Candidate Attorneys in the BLA”, Phineas Mojapelo (Former Deputy Judge President, South Gauteng High Court), writes that:

“The discussions that followed led to a candidate attorneys’ subsidy scheme where the Lawyers Committee would subsidise the salary of candidate attorneys in certain cases. The subsidy scheme contributed greatly to increase in the number of candidate attorneys under employment. Through the scheme, the BLA was able to urge its members who qualified each to take the maximum number of black candidate attorneys with the understanding that the salaries would be subsidised through the Legal Education Centre through funds made available by Lawyers Committee for Human Rights.”

Former Deputy Judge President of the South Gauteng High Court Mojapelo notes that the minutes of a meeting of the BLA in 1985 recorded that:

“It was decided that those who can take articled clerks should try and maximise their quota by applying for subsidy if necessary, from the Centre. It was felt that with the subsidy and the number of still unplaced would-be articled clerks, no attorney who qualifies to be a principal should have less than three articled clerks. Obviously, preference would be given to principals who need articled clerks but cannot afford them.

Regarding their training and education, it was felt members in practice should avail themselves to give them (candidate attorneys)

extra tuition under the auspices of the Centre. Ideally this means arranging seminars and workshops for them after hours or over the weekend and their principals should try and give them extra time to attend where necessary. These courses are to supplement or complement those offered by the Law Societies. It was further felt that this would also bring together articled clerks and principals because it would not be left to the articled clerks to pass the board (exams), but the principal will be chipping a hand also. ...”¹

The Annual Report of the BLA for the period ending October 1984 to October 1985 captures the two important developments of that year, which were:

- The factual opening of the BLA Legal Education Centre in October 1984 followed by the formal official opening in March 1985.
- The establishment of the candidate attorneys’ subsidy scheme.

Judge Mojapelo writes that in regard to the subsidy scheme, the 1984 to 1985 annual report stated:

“As in the previous years, the Secretariat and the LEC have increasingly been flooded with applications for articles of clerkship. Applications from principals who cannot afford salaries of clerks have also been received. One of the most important achievements of the BLA during 1985 is the initiation of the scheme whereby the salaries of articled clerks are subsidised through financial assistance from the Lawyers Committee for Civil Rights under Law. The scheme is supervised by the LEC and we are pleased to report that several principals have successfully applied. As a result, more and more clerks are placed in articles. All members are urged to refer to the guide prepared by the LEC and to make use of this facility. ...”²

We should aim to achieve equality to correct the skewed historical imbalance. We should at the same time strive to identify, acknowledge and celebrate quality whenever it emerges. At the same time BLA should give thought to mounting aggressive programs to ensure the production and sustaining of quality black lawyers. When the BLA succeeds at all of these fronts, it shall have dealt a blow to Apartheid. And we cannot and should not be proud as a people until we win that battle.”

Throughout history the BLA-LEC has answered the call to ensure that black legal practitioners have an equal footing as their counterparts through continued legal education. This is a commitment the BLA-LEC will continue to make to develop an equitable legal profession. ●

¹ Minutes of Meeting held on 29 May 1985 - Pages 1 and 2.

² BLA Annual Report October 1984 – October 1985 – Item 9.

Erratum

On the profile of Adv Ntsebeza SC that we recently published in this year’s first issue of the African Law Review (Volume 10, Issue 1, 2021), we had mentioned that he holds a BA degree and a BProc from the University of Transkei. The actual fact is that these two degrees are from UNISA, he only obtained the LLB degree from the University of Transkei. This mistake is deeply regretted.



University of Venda School of Law

In line with the University of Venda Strategic Plan 2021-2025, the School of Law under the Faculty of Management, Commerce and Law at the University of Venda (UNIVEN) strives to be a leader in engaged scholarship, producing law graduates that are locally relevant and globally competitive. Our graduates and alumni are punching above their weight in the judiciary, the magistracy, the prosecutorial service, the legal profession, the legal advisory services profession, the private sector, the academy and politics. In the pursuit of its vision of being at the forefront of transformative tertiary education in law and criminal justice, the School's mission is to pursue excellence in teaching, learning, research and community engagement to produce graduates imbued with knowledge, skills and applied competencies in a range of qualifications in law and criminal justice which are locally relevant and globally competitive.

With a student population of slightly under 1200, the School of Law at UNIVEN offers a wide range of undergraduate and postgraduate programmes and qualifications, namely:

- The four-year Bachelor of Laws (LLB).
- The three-year Bachelor of Arts in Criminal Justice (BA.CRM).
- The one year Bachelor of Arts Honours in Criminal Justice (BAHCRM) Programme.
- A research Master of Arts in Criminal Justice (MA.CRM).
- A coursework Master of Laws in Human Rights (LLM Human Rights).
- A research Master of Laws (LLM).
- Dr of Philosophy in Law (PhD Law).
- Doctor of Philosophy in Criminal Justice and Corrections (PhD in Criminal Justice).

For research degrees, students can specialize in criminology, corrections, victimology, forensics, policing, human rights, company and corporate

law, labour law, international trade and investment, intellectual property law, environmental law and climate change, constitutional law, law of property, customary law and criminal and procedural law.

Boasting a staff complement of about 35 academics, consisting of masters and PhD holders, attorneys and advocates, the UNIVEN School of law is well-positioned to offer solid legal education. Our final year students hone their practical legal skills at the Law Clinic, currently manned by three attorneys, three candidate attorneys and three support staff.

The School of Law maintains close ties with the bench, the magistracy, the Legal Practice Council, the BLA, NADEL, the Polokwane School of Legal Practice and the Law Society of South Africa. Locally, the School of Law at UNIVEN is a member of the South African Law Deans Association and the Society of Law Teachers of Southern Africa. Internationally, it is a member of the Global Campus on Human Rights, the BRICS Legal Forum, the International Association of Law Schools and the Association of Commonwealth Universities.

All programmes offered by the School are approved by the national Department of Higher Education and Training (DOHET), registered by the South African Qualification Authority (SAQA) and accredited by the Council on Higher Education (CHE).

Apply for 2022 and become part of the UNIVEN legacy.



Momentous MOU between the BLA-LEC and University of Venda

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



On 12 May 2021 the University of Venda and the Black Lawyers Association - Legal Education Center (BLA-LEC) signed a Memorandum of Understanding (MOU), which signaled a culmination of a lifelong relationship between the BLA-LEC and institutions of higher learning. The relationship between the BLA-LEC and universities has benefitted the legal profession immensely.

The BLA-LEC recognises the need for the institutions of higher learning, to produce law graduates that are adequately trained and ready to enter and thrive in the legal profession for the benefit of the profession, the universities and the country in general. The BLA-LEC, therefore, will make available the appropriate and necessary Trial Advocacy Training to all final year law students registered at institutions of higher learning.

This will help shape the reputation of law schools as leading faculties in the country, which produces high-calibre graduates who become leaders in the profession.

The BLA-LEC, is dedicated to providing the legal community and allied professionals with the most up-to-date and relevant information. Our objectives are to: Build the capacity of lawyers and expose them to areas of law where

the market penetration of black practitioners is minimal or non-existent; provide continuing legal education and services to the black community at large, and increase the number of black lawyers.

Our mission is to provide the legal community with continuing education and training. We achieve this through a series of educational programmes.

These programmes are inter alia:

- a) Continuing Legal Education – This programme is aimed primarily at building a capacity and enhancing the skills of lawyers.
- b) Trial Advocacy Training – This is designed to improve advocacy skills and trial techniques.
- c) Constitutional Litigation – The focus is the Bill of Rights and fundamental human rights litigation.
- d) Commercial Law Programme – This covers important areas such as purchase and sales agreements; mergers and acquisitions; dispute resolution and other significant areas of commercial law.
- e) Law Clinics – These are aimed at providing legal advice and services to indigent members of the community.

The fundamental aspect of our mission is to expose black lawyers to areas of law that were difficult to infiltrate during Apartheid. The mission of the BLA-LEC has always been to be dedicated to the improvement of the legal profession and be committed to the effective management and development of human potential in accordance with its values and to the promotion of an egalitarian and equitable social order.

During my address at the occasion of the signing of the MOU with the University of Venda I remarked that one of the many blessing that South Africa has is the University of Venda – a university that produces graduates that are locally relevant and globally competitive. In creating future leaders, we respect the university for working hard to build and develop our country.

On the University of Venda website, under the heading “Collaborate”, the university invites stakeholders to work with it, to make an impact in academia, business and society. This is why the BLA-LEC responded resoundingly, to this invitation.

In terms of the MOU with the University of Venda, the BLA-LEC will make available the appropriate and necessary Trial Advocacy Training to all final year law students registered at the University of Venda. This will help mould

the reputation of University of Venda law faculty as one of the leading faculties in the country, which provides high calibre graduates who will become leaders in the profession. The relationship with the University of Venda is a strategic initiative, and we are excited that the University of Venda is the first higher education institution, to sign the collaboration agreement of this nature with the BLA-LEC.

The BLA-LEC has been conducting the Trial Advocacy training since 1986. It is modelled on the National Institute of Trial Advocacy (NITA) model of training. It is an art of persuasion, using the language to tell a convincing and a believable story. The programme is aimed at helping lawyers acquire and develop the skills and values they need to become competent and confident litigators. It is focused on trial skills; this forms the foundation of a learn-by-doing approach, in that all exercises are conducted in a simulated courtroom session. Participants receive immediate feedback on their performances from the faculty members. The performance is videotaped to further individual review. There is also a benefit from seeing other participants performances and hearing their critique.

At the signing of the MOU event, Vice Chancellor and Principal of the University of Venda, Dr Bernard Nthambeleni noted that the BLA-LEC is the legal education arm of the Black Lawyers Association (BLA), a voluntary association that assists lawyers with all aspects of legal practice in South Africa. Dr Nthambeleni added that at its inception, the BLA looked after the welfare of black legal practitioners but has now been opened to all lawyers in of South Africa regardless of race, sex, political belief, religion or area/type of practice.

Dr Nthambeleni stated: “The University of Venda has been associated with the Black Lawyers Association, and the Black Lawyers Association - Legal Education Centre for a long time, and members of the Black Lawyers Association have been providing training to our final year LLB students in trial advocacy without any formal arrangement such as a Memorandum of Understanding.

The signing of this Memorandum of

Understanding today will put a formal seal to the association of the Black Lawyers Association-Legal Education Centre and the University of Venda. The University of Venda has always benefited and appreciated the trial advocacy training, which is very important in the practical legal training of final year law students and supplements the clinical training offered by the Law Clinic.”

Dr Nthambeleni remarked that in line with the University of Venda’s new strategic plan of positioning it as the university for relevance and impact, and further, in the context of being a student-centred university steeped in engaged scholarship, the importance of signing this MOU cannot be gainsaid. He added:

**“ Our objectives are to:
Build the capacity of
lawyers and expose them
to areas of law where the
market penetration of black
practitioners is minimal or
non-existent...”**

“It was a natural course for the BLA-LEC to have a partnership with the University of Venda because the vision of the institution is to be a university leading in engaged scholarship, while its mission is to produce graduates that are locally relevant and globally competitive.”

“One of our positioning statements encapsulated in our strategic plan is to expand our influence beyond our Province by emphasizing the university’s unique identity. In this regard, we view the signing of this Memorandum of Understanding as a right step towards the path of realizing that objective.

The association of the University of Venda with the Black Lawyers Association - Legal Education Centre is important in the context of our LLB students acquiring practical legal skills and becoming relevant to the market. We are very pleased by the reports we receive about the stature of our LLB graduates that we produce every year.”

Dr Nthambeleni said that he realises that the relationship with the BLA-LEC is an important one pedagogically because the university’s LLB students will view the law in its practical context and be exposed to methodologies that resonate with application and problem solving. “The interface between Black Lawyers Association-Legal Education Centre instructors and the University of Venda legal academics will be a welcome cross pollination of ideas. Our School of Law, our LLB students and Black Lawyers Association-Legal Education Centre will surely benefit from this symbiotic relationship,” he added.

It was a natural course for the BLA-LEC to have a partnership with the University of Venda because the vision of the institution is to be a university leading in engaged scholarship, while its mission is to produce graduates that are locally relevant and globally competitive. The website of the university states its values as follows:

- “We are driven by Quality and Excellence in all we do and passionate about learning, innovation and creativity;
- We embrace Accountability and are committed to responsible use of human, fiscal & physical resources;



Photo:Univen

- We are open and Transparent to public scrutiny;
- We are passionate about our Integrity and accept the responsibility to act ethically;
- We believe in Respect and treating all people and our stakeholders with civility and dignity;
- We believe in Diversity and recognize and respect diversity in all its manifestations;
- We accept our Social Responsibility and Community Engagement in serving and contributing to the intellectual, social and economic well – being of our communities;
- Environmental Stewardship, as an institution of higher learning, UNIVEN must lead the way in decreasing carbon footprint and instils a sense of pride in caring for the environment in our staff and students.”

The signing of the MOU between the BLA-LEC and the University of Venda shows the great strides that have been made by the two institutions to the advancement of legal education and ensuring that society receives competent legal practitioners that will serve them well. ●

BLA-Legal Education Centre - Training Programmes

By Andisiwe Sigonyela: Director-BLA-LEC



The following training programmes have been conducted from April to June 2021.

Continuing Legal Education (CLE) - 2021

PROGRAMME	DATE	AREA	NUMBER OF DELEGATES
Bills of Cost	24 April 2021	Webinar	21 legal practitioners

Trial Advocacy Training (Schools for Legal Practice) - 2021

PLT SCHOOL	DATE	NUMBER OF TRAINEES
East London School for Legal Practice (day class)	12 – 16 April 2021	33 candidate legal practitioners
East London School for Legal Practice (night class)	19 – 23 April 2021	26 candidate legal practitioners
Johannesburg School for Legal Practice (day class)	19 – 23 April 2021	51 candidate legal practitioners
Pretoria School for Legal Practice (day class)	03 – 07 May 2021	28 candidate legal practitioners
Polokwane School for Legal Practice (day class)	03 – 07 May 2021	43 candidate legal practitioners

Polokwane School for Legal Practice (night class)	03 – 07 May 2021	35 candidate legal practitioners
Johannesburg School for Legal Practice (night class)	03 – 07 May 2021	60 candidate legal practitioners
Pretoria School for Legal Practice (night class)	10 – 14 May 2021	32 candidate legal practitioners
Port Elizabeth School for Legal Practice (night class)	10 – 14 May 2021	21 candidate legal practitioners
Potchefstroom School for Legal Practice (night class)	17 – 21 May 2021	44 candidate legal practitioners
Durban School for Legal Practice (day class)	17 – 21 May 2021	31 candidate legal practitioners
Cape Town School for Legal Practice (day class)	17 – 21 May 2021	44 candidate legal practitioners
Cape Town School for Legal Practice (night class)	17 – 21 May 2021	41 candidate legal practitioners
Durban School for Legal Practice (night class)	24 – 28 May 2021	35 candidate legal practitioners
Unisa Johannesburg School for Legal Practice (night class)	07 – 11 June 2021	43 candidate legal practitioners
Unisa Pretoria School for Legal Practice (night class)	07 – 11 June 2021	37 candidate legal practitioners
Unisa Mthatha School for Legal Practice (night class)	07 – 11 June 2021	16 candidate legal practitioners
Unisa Cape Town School for Legal Practice (night class)	21 – 25 June 2021	18 candidate legal practitioners
Unisa Durban School for Legal Practice (night)	21 – 25 June 2021	22 candidate legal practitioners

Trial Advocacy Training - Legal Practitioners

PROGRAMME	DATE	AREA	NUMBER OF DELEGATES
Advanced Trial Advocacy Training	31 May - 05 June 2021	Mbombela	27 legal practitioners



History of the BLA

7th series: Candidate Attorneys in BLA

By Phineas Mojapelo (Former Deputy Judge President, South Gauteng High Court)



At the genesis of the BLA when the first group of people met to discuss the idea of forming an organisation, there were only qualified attorneys. Those who first met for that purpose therefore did so under the name Black Attorneys Discussion Group (BADG) and recorded the minutes under that name. It is not as if the advocates were excluded. There were simply no practising black advocates in Johannesburg, Transvaal, where the BADG first met. BADG was a meeting of people who were already qualified to practise and were practising as lawyers. They came together, as records of those formative stages show, to discuss problems of practising lawyers, in particular, practising attorneys. Lawyers not in practice and those not yet fully qualified to practice were not part of the group that conceived the idea of forming the association.

The history of the BLA would not be complete without a reflection from those early stages of its relationship with candidate attorneys, who were at the time referred to as articulated clerks as well as pupil advocates. It is out of this group of young lawyers in training and on the path of qualifying as either attorneys or advocates that the BLA grew, more than out of any other group. They were future practising attorneys and advocates. The future of the BLA.

The initial BADG appreciated fully where the future practising black lawyers were to come from. Shortly after

the first meetings they therefore started discussing the problems of black candidate attorneys. Black pupils would have been included if they were there. They were none, but for Ishmael Mahomed, whose tribulations with the Bar have been documented, the practising advocates profession in Johannesburg was white. The conditions under which black candidate attorneys worked first justly came on the agenda of the BADG and then that of the BLA and remained on the agenda of the BLA for some time. Ignoring this predominantly young group of future practitioners would have been ignoring

the future of black lawyers. Hence, the founders had their sights well set on the future and what would make the association itself grow.

The fact that at the time of the formation of the BLA and for a few decades thereafter the black lawyers formed only 10% of the total number of lawyers in South Africa, despite the fact that they came from and represented approximately 80% of the population of South Africa was a matter of grave concern for the BLA from its beginnings. Within the practising group of lawyers, whether as attorneys or advocates, they were a tiny minority and were outvoted left right and centre on any matter that was of concern to them as members of the disenfranchised majority. Increasing the number of black lawyers in South Africa was therefore an unarticulated priority. It might not have solved what was then the current problems, but it was a vital key to solving all racially-based problems of the future in the profession.

The cause of black lawyers being a tiny percentage of the total number was a direct result of deliberate policies of the white minority government, created through inferior education, systematic racial exclusion and general oppression of blacks by the whites. The ratio had to be reversed if black lawyers were to be effective in the affairs of the organised legal profession. Increasing the number of black lawyers in South Africa, therefore had to be and was a priority.

The attitude of those that met to form what later became the BLA was that they as qualified lawyers had the primary responsibility to solve the problems of the practising black lawyers, and of their community and therefore pave the way for the future.

Apartheid education policy was not amenable to increasing black lawyers. It was designed to ensure that as few black people as possible qualified to practise law. In fact, the idea of Apartheid government was that blacks would never qualify in any independent profession and become self-employed. They were only trained to become servants of their white masters. If it knew how, the racist regime would have ensured that no black person ever qualified to practise law. In working against justice, the regime faced the unstoppable forces of nature. It is like suppressing the truth. The policy succeeded for a long time. Hence the first black lawyers in South Africa qualified abroad and came into the country already qualified. They had defied the system.

Therefore, the early black lawyers saw it as their national responsibility to increase their numbers. The situation was very much the same in 1977 when the BADG met for the first time.

The first hurdle on the path to qualify as a lawyer was the difficulties and systemic blockages created by government policy against black people acquiring a university qualification in law. Where many of us studied, the sense was that the white lecturers who taught law were there as agents of the minority government to ensure the failure of black students in law and other independent professions. The black students at university did not trust the bona fides of their white lecturers. And all the lecturers in law were white. A few exceptions came much later. Your oppressor was there masquerading as your lecturer. The silent strategy of students at historically black universities was to listen quietly during lectures, not to ask questions, if you can help it, and to qualify without being noticed. What an awful condition in which to learn! This is no

exaggeration. Most of the white lecturers were in fact state security agents to spot out and report on the intellectually dangerous black students. To succeed as a black student, one had to slip through the fingers of the system.

Then once one had graduated at the university, there was an even greater problem awaiting one out there. In order to go through practical training, one had to find a senior practitioner who would take one under articles of clerkship or pupillage. There was no legal

obligation on practitioners to take on a candidate attorney or pupil to grant them an opportunity to train. It was the right of the qualified attorney to take on a candidate or of a qualified advocate to take a pupil and train them. A candidate attorney could not be forced on a principal, nor a pupil on a mentor. They did it or did not do it at will. It came down to a favour that a qualified attorney or advocate mentor would grant to a law graduate. And to grant that favour the mentor had to like the mentee for that purpose. If no one in practice liked you, you would not be trained. It was that simple. The 350 years of white minority rule supported by the ideology that the white race was superior and the black inferior ensured that generally the whites did not like blacks except as their servants. And I say generally advisedly because there were exceptions, too few to make a significant difference on their own.

The chances of a black law graduate getting a willing mentor to train under were minuscule compared to their white counterpart. The huge majority in practice, 90%, were white and a great number of them was not prepared to take on black candidate attorneys or pupils. Yet another wall to penetrate. Those who were inside decided who would come in, and racial discrimination ensured the continued exclusion

“The fact that at the time of the formation of the BLA and for a few decades thereafter the black lawyers formed only 10% of the total number of lawyers in South Africa, despite the fact that they came from and represented approximately 80% of the population of South Africa was a matter of grave concern for the BLA from its beginnings.”

of academically qualified black law graduates to start practice training. An ideal Apartheid milieu to keep the blacks out for as long as possible. The Apartheid wall was everywhere for one to penetrate. Dikgang Moseneke in his book, “My Own Liberator”, speaks metaphorically of successive doors he had to kick open, one after the other, to make his way into legal practice and up through the ladders of professional development. A typical pathway of a young black person into an independent profession under Apartheid South Africa.

The Black Attorneys Discussion Group came together to discuss their problems in a legal profession controlled and dominated by the white minority race. Those who ran the country also dominated and ran the legal profession to the exclusion of the majority blacks. The governance of the legal profession was therefore an Apartheid structure despite its pretention and protestation to the contrary. The governance of the legal profession therefore in due course became a legitimate target for transformation. The BADG knew that to succeed in its eventual mission it had to turn the tables upside down.

They, therefore in addition to their own problems as qualified lawyers, also time and again focused on conditions of black candidate attorneys and made it their business to assist as many law graduates as possible to enter the profession. They could not depend on the white Apartheid masters to do it. Despite their relative poverty, black attorneys had to take as many candidate attorneys as possible. They also knocked on the doors of the few exceptions amongst the white lawyers to assist in taking on black law graduates for training.

The only thing the BADG did not do from the word go was to include the black candidate attorneys in their midst or to consult them until the candidate attorneys themselves, having taken note of the regular meetings of the BADG approached the group.

The first time ever that the voice of black lawyers in training was heard within the BADG was in 1978 when one Sam Mathole Motshekga attended the meeting of the BADG as an observer. He requested to be heard and was given audience at the meeting, which was held at Burgers Park Hotel, Pretoria, on Sunday 5 November 1978. In the list of those in attendance, behind his name, it was indicated in brackets that he was there as an observer. Reserving all other days of the week to serve their clients and to earn a living, the BADG only met on Sundays starting at 10 o'clock. It continued on that basis for a number of years after its formation. Mr SM Motshekga had studied for his law degree through correspondence with Unisa while working as an administration clerk at the University of the North (now University of Limpopo). He was serving articles of clerkship in a white law firm in Pretoria when he attended and was allowed at the BADG meeting. He was slightly older than the average newly graduated law student and already had some work experience. He had the requisite confidence to address those senior to him within the profession

and raise the issue. Given the fact that he was serving articles in the white law firm, where he was in the minority, he would have felt the need to reach out for other black lawyers.

The discussion group had by then been meeting fairly

regularly for almost a year. It was early days when the group met virtually every month. The eleven members of the BADG in attendance were Godfrey M Pitje (chairperson), Dimpheletse JSS Moshidi (secretary), JN Madikizela, George SS Maluleke, Willie L Seriti, Tholi JF Vilakazi, Ramarumo E Monama, Ratha R Mokgoathheng, Zacharia Garrine, Dabula Z Tantsi and Benedict P Matswiki. They were all full members and admitted attorneys. Mathole Sam Motshekga, the only ‘observer’ had come to the meeting to raise the issue. A Sunday morning would have

been convenient for him too to attend. That is the day on which it was decided that the BADG be formally constituted. The name BLA was not yet there. The BADG did not have a constitution. The idea of formalising and constituting a separate group of black lawyers outside the statutory law society and Bar councils still had to be investigated.

He was given a platform and asked to address BADG. He represented a group, which he described as the Transvaal Black Articled Clerks Association. It was not clear how and when the group was formed. The name suggested that it was a mirror image of BADG and the future BLA at a junior level. Did they get together in response to meetings of the BADG and were they inspired by the BADG? Or had they come together spontaneously as a result of peculiar problems they faced as black lawyers in training? It is interesting that one did not hear much about the particular Transvaal Articled Clerk Association after that presentation. This this is not to suggest that it did not have a life thereafter. The issue he raised attached itself to the agenda of the BLA until some resolution was found. From those early days the BLA was from time to time engaged in some sort of discussion with or about the black candidate attorneys. On occasions the candidates were represented by one or other of their number.

Mr Motshekga was present in that particular meeting of the Discussion Group when the group resolved in principle that it would be formally constituted and appointed a committee amongst its members to investigate the implications and contents of formalisation. He would therefore have had a clear sense that the group he addressed was not about to disappear; and that it had a future far beyond the particular meeting.

What happened with his short presentation is captured in item 5 of the minutes of the meeting of the day, which was chaired by GM Pitje with DJSS Moshidi taking minutes as the secretary. The item has a subheading, “The Transvaal Black Articled Clerk Association”. It reads:

“Mr Motshekga was present and explained the aims and objects of this association. This association’s membership includes

 **The idea of formalising and constituting a separate group of black lawyers outside the statutory law society and Bar councils still had to be investigated.”**

Africans, Indians and Coloureds. Mr Motshekga was excused while the matter was discussed. Mr Motshekga was (thereafter) called back and advised that our meeting was not yet in a position to establish formal relationship with his body.”¹

He was not successful with the object of his presentation. His was, however, not an outright failure. The key word in the response were “not yet”. A clear indication of a level of willingness to engage further at some future date. A stage had been set and success would in future play itself out on that stage. The suggestion was that the BADG might not be opposed to some kind of relationship with a body of candidate attorneys at some point in future.

The focus was, however, at that stage on other issues and the BADG was unable to consider his request.

An important door had been opened, much as the Transvaal Black Articled Clerks Association was not allowed any formal relationship with the group.

One of the inherent yet unarticulated tensions, as candidate attorneys were seeking formal relationship with the association of qualified attorneys, is the employer employee relationship. The candidate attorneys were mostly employed by the same qualified attorneys they were seeking relationship with through their respective associations. The employees were seeking a seat at the table of their employers and trainers. Article clerkship has never been a highly remunerative position and therefore has for a number of years become one in which candidate attorneys were under-remunerated. The BADG, and subsequently BLA, was conscious of the inherent tension. Black law firms in particular themselves did not have highly remunerative work. Nevertheless, at the association level they realised the importance of candidates been paid at least a living wage. They had a common path for the future the employers. Together with the statutory law society, the BADG was seeking to provide guidelines for its members.

Although the issue of the BADG forming any structured relationship with candidate attorneys was only raised again nearly three years later, in the intervening period the group continued to receive and entertain reports from its members concerning problems affecting black candidate attorneys. This was the source of its future growth that could not be ignored. Both its members and prospective attorneys who knew about the structure were aware of the commitment of BADG to the issues concerning candidate attorneys and frequently brought them to its attention. For example, at the general meeting of 22 July 1979 at Milner Park Hotel, Johannesburg, the BADG discussed a report by one of its senior members, Mr Tantsi, which he encountered when trying to register Mr Moffatts as his candidate attorney. In the end the meeting decided that Mr Tantsi should resubmit the application for

registration of the articles of clerkship to the Transvaal Law Society. The “meeting further directed that Advocate Browde (Senior Counsel) should be briefed on the legal issues involved”.² Jules Browde, a member of the Johannesburg Society of Advocates, was known to be sympathetic to the plight of black lawyers under Apartheid laws and was thus readily recommended.

The same meeting received and considered a letter from a candidate attorney, Mr Jimmy Makgalo, who approached the group concerning his application for articles of clerkship. In his case, the “meeting decided that his application should

be left to the individual firm(s) to consider”.³ The records consulted do not reveal the nature of the problems involved. The point made here, however, is that even prior to adoption of the constitution of the BLA, its predecessor, the BADG concerned itself with problems of black candidate attorneys and looked for solutions. It did so as a service to the candidates and as part of its commitment to correct the historical imbalance by increasing the number of black lawyers in the profession. At times the problems involved the sensitive employer – employee

relationship where the organisation would step in but where there was no need that justified its intervention the problem would be simply referred to the employer.

Two and half years after Mr Motshekga’s unsuccessful presentation to the BADG, the thorny issue of reasonableness of salaries paid to candidate attorneys by principals landed on the agenda of the general meeting of the BLA on 12 April 1981. At that general meeting held at Holiday Inn, Jan Smuts, the BLA, by then already a properly constituted body, wrestled with the question of remuneration for candidate attorneys. The minutes reflect that an anonymous letter relating to salaries of candidate attorneys had been addressed to the Secretary of the BLA and was read out at the meeting. This led to a discussion on the reasonableness or otherwise of the salaries of candidate attorneys in black law firms. The author was clearly a candidate attorney and the BLA understood and did not quibble about the anonymity. It took the issue head on. Although it was accepted that candidate attorneys were there for training and not for the money, it was important that the stipend they received from the employers was reasonable to sustain them through the stage. If salaries were to become a real stumbling block, the BLA would never succeed in its program of increasing their number in the profession. The meeting went into a discussion of what was reasonable having regard to the position of both the mentor and the mentee. It transpired that the same issue was being raised in the white run law societies and attorneys’ associations.

“The BLA was, however, alive to the fact that the law firms owned by black attorneys were making far much less money in practice than their white counterparts.”

1 Item 5 of Minutes of BADG Meeting of 5 November 1978.

2 Item 4 (f) of Minutes of BADG Meeting of 22 July 1979.

3 Item 4 (g) (i) of Minutes of BADG Meeting of 22 July 1979 under Correspondence.

Thus, “Mr Vilakazi made reference to a circular sent out to Pretoria attorneys by the Pretoria Attorneys Association containing recommended salaries of various categories of articulated clerks”. The various categories, which overlapped, were candidate attorneys without a university law degree, those with only one university degree – often B Proc or B Iuris, those with LLB as the second degree, those with the right of appearance and those without. In that range the recommended salaries ranged from R250.00 to R300.00. These were the minimums laid down and endorsed by the statutory law societies in 1981.

Having considered these, the BLA endorsed it as the guideline for its own members. The BLA was, however, alive to the fact that the law firms owned by black attorneys were making far much less money in practice than their white counterparts. They did not have corporate clients and their overall clientele came from the same poor oppressed communities that BLA members came from. Their practices were mainly in family law, criminal law, child maintenance and small-scale damages claims. Large claims and corporate matters were the preserve of large white law firms. The project of increasing the number of black lawyers in practice through the small number of poor black attorneys was not going to move much faster without further intervention.

Luckily around the same time contact was made with black lawyers in the United States of America (USA) and NGOs in which the lawyers were involved. The black USA lawyers and their NGOs were prepared to assist. Contact was made in New York with Mr Millard Arnold, who had initially come to South Africa as an exchange student and also with Ms Gay McDougall of Lawyers Committee for Civil Rights Under Law who were interested in the activities of the black lawyers in South Africa. They appreciated the motivation of BLA to increase the number of black lawyers and the funding problems that it (BLA) faced. They were keen to fund a scheme that would assist in producing a greater number of black lawyers. A number of BLA members who had recently toured the USA, including Mr Tantsi and RE Monama had made contacts and spoke of this willingness. GM Pitje was given a mandate in his pending visit to the USA “to negotiate with various international bodies”. BLA members were, however, cautious that the scheme should not interfere unduly with the private employer – employee relationship that traditionally existed between attorneys and their candidate attorneys. A committee was established comprising initially of GM Pitje, GS Maluleke, RE Monama and ED Moseneke to investigate and report on these possible international links and how the relationship could be structured and report to the general meeting.

The committee having done initial exploratory work, the

question of a support scheme for candidate attorneys was next taken further in a Welkom general meeting of the BLA on Sunday 10 April 1983. The question then developed side by side with the issue of funding of appropriate litigation. That meeting advanced the issue much further. The issues were discussed against the background of a recent visit to Botswana by JN Madikizela, then vice-Chairperson of BLA, with other BLA members, who had met there with Miss Gay McDougall of Lawyers Committee. Item 11 of the minutes of that day is worth reproducing.

“The discussions that followed led to a candidate attorneys’ subsidy scheme where the Lawyers Committee would subsidise the salary of candidate attorneys in certain cases.”

“The vice chairman, Mr Madikizela, reported on the visit to Botswana by members of the black Lawyers Association and discussions held with Miss Gay McDougall of Lawyers Committee for Civil Rights Under Law. The discussions covered proposed financing of litigation matters and the placement of Articled Clerks. The association is requested to suggest a reasonable figure as a salary for Articled Clerks for the possible adoption of a clerk by an American company. The meeting was encouraged not to hesitate to ask

for financial assistance in civil rights matters as well as to charge reasonable fees for professional services rendered in such matters. The feeling here was that members charged rather low fees. The chairman supplemented the oral report by the vice chairman and urged members to reply to the questionnaire circulated by the Lawyers Committee for Civil Rights Under Law. The Association suggested that the financing of an Articled Clerk should be a direct contract between principal and clerk. The following figures were suggested as reasonable for salary of Articled Clerks:

B Proc -	R300.00 per month;
LLB -	R400.00 per month (with right of appearance);
B Proc -	R400.00 per month (with right of appearance);
Matric -	R250.00 per month – five year contract.” ⁴

As will be noticed, though not highly remunerative, the bottom and top levels suggested were not below those suggested by the white controlled Pretoria Attorneys Association.

The discussions that followed led to a candidate attorneys’ subsidy scheme where the Lawyers Committee would subsidise the salary of candidate attorneys in certain cases. The subsidy scheme contributed greatly to increase in the number of candidate attorneys under employment. Through the scheme, the BLA was able to urge its members who qualified each to take the maximum number of black candidate attorneys with the understanding that the salaries would be subsidised through the Legal Education Centre through funds made available by Lawyers Committee for Civil Rights Under Law.

The candidate attorney salary subsidy scheme was a huge injection in the arm of the BLA in its programme of ensuring that as many of its members as possible took the

4 Item 11, Minutes of BLA General Meeting of 10 April 1983.

maximum number of candidate attorneys permissible under the Attorneys Act. As the Act stood then, each attorney, who had practised for own account for three years or more, could take a maximum of three candidate attorneys under contract at any time. With the scheme in place there was no longer any excuse for qualifying black attorneys not to take candidate attorneys. With the salary guidance, the uncertainty was also removed, though it has to be emphasised that the figures put forward above were mere guidelines.

In the meantime, another problem that affected candidate attorneys that came up related directly to the Bantustan homelands that had become independent. The Apartheid South Africa took the issue of independence so seriously that in the absence of “pre-independence agreements” on recognition of law degrees obtained in “independent homelands,” such degrees were not recognised in South

Africa. As a result, contracts of Articles of Clerkship between candidates with degrees from homeland universities could not be registered in South Africa, that is, outside the particular homeland. The statutory law societies also did not recognise those degrees and thus declined to register the contracts.⁵ The statutory law societies within South Africa thus happily and unquestionably helped the Apartheid government to implement its homeland policies. These problems affected only black candidate attorneys. White candidate attorneys were somehow insulated from this Apartheid “legal problem” when it came to registration of articles of clerkship. It was a black problem, and the law society of the time did not see racism here. If they did, they did not find it offensive to their sense of justice. Nevertheless, those law societies would have wanted one to believe that they were not Apartheid structures and did not support it.

The problem came to the BLA, which considered it at the general meeting held at the Boulevard hotel, Pretoria on 14 August 1983. The minutes reflect deliberations on the issue as follows:

“University problems: this concerned degrees obtained from so-called independent countries. No pre-independence agreements on recognition of such degrees [had been concluded]. Articles of clerkship cannot be registered as these degrees are not recognised by our (SA) Law Society.”⁶

The issue was considered further later in the meeting and item 8 of the minutes reflect the action taken:

“Problem of Articled Clerks: The meeting decided that a committee be set up to deal with this problem of prospective articled clerks who qualified in so-called independent homelands. The committee be empowered to brief counsel on pro amico basis and select one case as a test case. In this regard, the meeting resolved that Mr (Dennis) Mosupye be appointed to compile a

memorandum and brief the firm of attorneys Seriti Moseneke & Mavundla, Pretoria.”

In this way the problem was dealt with the legally and particular problems became matters between the prospective candidate attorney, the prospective principal and the designated law firm were to handle the matter through the courts.

The focus in search of counsel was deliberately for one who is committed to the cause of the association to a point of being prepared to act *pro-amico*, that is without charging

fees. A commitment below that bar would not qualify for the brief. The issue was clearly more political than legal. On a happy note, by the time of that meeting, Mr Jimmy Makgalo, whose problem had been raised earlier by Mr Tansi, had been admitted as an attorney and his name appeared as the second in the list of those who attended the Boulevard August 1983 meeting.

A related problem, which sprang up was the number of

academically qualified law students who were struggling to find opportunities to be taken under articles of clerkship. An example of this featured in the general meeting of 23 October 1983 at Pietersburg (now Polokwane) when under the item “General” towards the end of the meeting, as the minutes reflect, “Mr Nkademeng raised the plight of a prospective articled clerk who was well qualified but could not be placed in articles.”⁷

With the scheme in place, the BLA could confidently refer the students to attorneys willing to participate. Part of the problem here, and in fact the core of it, is that there were many qualified white attorneys who were not prepared to take on black candidate attorneys. They were in the majority and a few of them were willing to assist. Generally, the majority was not willing to open the door for the minority to enter the profession. Though that reason would in practice not be given by the unwilling attorney to the prospective candidate, the facts spoke for themselves. Most white firms would have no black candidate attorney, and those that did, did so more as a token. For instance, even big “progressive” white law firms would for instance employ 15 candidate attorneys, only one of whom would be black. The system was designed and operated to exclude qualified black law graduates from entering the profession and thereby keep the number of black attorneys low all the time. Plain racism within the profession. The statutory law society was unwilling or unable to do anything about the situation. It was a case of: “Black man you’re on your own” and the subsidy scheme funded by the USA based Lawyers Committee for Civil Rights Under Law made a big difference. The funders of the scheme should be counted amongst those who played a significant role to help us defeat Apartheid within the legal profession.

“Part of the problem here, and in fact the core of it, is that there were many qualified white attorneys who were not prepared to take on black candidate attorneys. They were in the majority and a few of them were willing to assist.”

5 Item 4 (v) of Minutes of the BLA general meeting held at Boulevard Hotel, Pretoria, on 14 August 1983.

6 Item 4 (v) of Minutes of BLA meeting of 23 October 1983.

7 Item 19 (ii) of same Minutes of 23 October 1983.

With the above problems now sorted out, the candidate attorneys turned their energy towards seeking full membership of the BLA. They wanted nothing less and came much better prepared than the ground-breaking earlier approach by Mr Motshekga. They put their case loud and clear to the association and were ready to respond to whatever question was put to them. This time they did not even pretend to be from any formalised association of candidate attorneys. The debate that ensued was interesting and we reproduce it for the reader, also for the sake of historical authenticity. The debate took place at the general meeting held at Ngwane Valley Inn Hotel, Nelspruit, on 29 April 1984. It was recorded as a free-standing agenda item 8 and here it is:

“Black Articled Clerks:

The secretary read out to the letter dated 28 April 1984 addressed to Black Lawyers Association by the Black Articled Clerks requesting a hearing from BLA. The meeting invited delegates of the Articled Clerks into the meeting. Mr A Motimele, accompanied by Messrs Makhanya, Peta and Ngwenya, was the spokesman for the clerks. Briefly the articled clerks seek full membership to the BLA in that clerks are not only involved in legal profession but also in the struggle in general. The articled clerks are dissatisfied about their exclusion from BLA membership in terms of clause five (5) of the BLA constitution. The Black articled clerks further feel that they should be part of the Black Lawyers Education Centre as the articled clerks are the only source from which future lawyers are drawn. The discussion then took the following pattern of questions and answers:

Mr Kunene: Is there still a Black Articled Clerks Association and if not why was it dissolved?

Answer: The Association still exists but lacks full cooperation of members and has certain problems.

Question: Why don't you form your own organisation first and let us meet on common problems?

Answer: You are right Mr Kunene. The question was raised in your meeting and you decided to exclude us.

Mr Ngoepe: Did you apply your minds to the various obligations attendant to full membership of BLA? How many clerks do you represent? What about the articled clerk that never qualifies? Have you applied your mind to section 5 (a) (ii) of the BLA constitution?

Answer: Yes, we did. We want to be full members of BLA and not half members or associate members. We have applied our minds to the obligations of being BLA members.

Mr Phosa: Who do you represent and who gave you a mandate?

Answer: We formed an ad hoc committee to make these representations to BLA. The articled clerks did meet and we represent about 150 clerks.

“ The board exams in the country were totally in the hands of white attorneys. There was a feeling that Mr Kasutu was being deliberately failed to frustrate his plan to open his own law firm in Namibia.”

The delegation of the Black Articled Clerks was excused from the meeting and the matter was discussed whether or not to admit articled clerks to the BLA. The issue was put to vote. Fourteen (14) members voted against admission of clerks to the BLA and eight (8) for admission. The rest of the members abstained. The meeting instructed the secretary to convey its decision to the articled clerks.”⁸

Even with hindsight, one marvels at the level of preparedness of the candidate attorneys who appeared before the full meeting of the BLA to argue their point. Two (2) of the four (4) delegates were at the time employed and still under training as candidate attorneys in the office of the writer.

They are Bongani Stephan Ngwenya and Parkendorf Lukas Kenneth Peta. The lead presenter himself, Mc Caps Motimele had earlier on done a stint as a vacation clerk with us and was at the time doing his formal articles of clerkship with GSS Maluleke in Kempton Park. It is no wonder that some of them progressed to hold responsible positions in the community after the liberation. They fought a gallant fight and lost the battle but not the war. There was a significant shift in the attitude of fully qualified lawyers within the BLA. Much better than in the 1978 presentation to the BADG. And this should not take away from the presentation and bravery of the then candidate attorney Mathole Motshekga who appeared alone to present the

position of candidate attorneys.

At the same meeting (April 1984), the plight of a candidate attorney from across the border in Namibia, then still South West Africa, was raised. Mr Ephraim Katutu Kasutu from Namibia had served articles of clerkship with a law firm in Johannesburg. His problem was raised in the meeting by DJSS Moshidi. He had served articles in South Africa with a view to going back home to run a practice in Windhoek, Namibia. He had written the board exams in South Africa several times but failed. The board exams in the country were totally in the hands of white attorneys. There was a feeling that Mr Kasutu was being deliberately failed to frustrate his plan to open his own law firm in Namibia. This is the spirit in which the meeting considered the problem. The one suggestion was that the BLA should seek to have a representative on the examination board so as to monitor and protect the rights of black candidates. A contrary concern was that the BLA should avoid serving on boards of bodies, which supported Apartheid. In the end it was decided that legal action be instituted in the High Court to challenge the authenticity and apparent bias in marking his exam scripts. The discriminatory examination system had to be exposed. The legal challenge needed to be considered carefully. The perception of bias

⁸ BLA Secretary for these Minutes was DJSS Moshidi.

“The introduction of the subsidy scheme coupled with the call on BLA members to take more candidate attorneys in the same period was the cherry on top of the cake.”

was shared by the Council of Churches in Namibia, which was prepared to pay the legal costs of the intended legal challenge. A related problem was the running of a law firm, which Mr Katutu had set up in Windhoek in contemplation to carry his career forward. In terms of the South African law, which applied in Namibia he could not run such a law firm before he passed the board exams and had been admitted as an attorney. He therefore invited members of the BLA who were available to go to Namibia to assist in running the law firm pending his admission. The meeting encouraged members who were interested to approach Mr Kasutu directly. The firm of attorneys, Moshidi Kunene & Makume, in which he had served articles.⁹

When the issue of candidate attorneys next came before the BLA meeting a year later at the BLA Legal Education Centre on 29 May 1985, the candidate attorneys themselves were not in attendance. The meeting was held just after close of business at 17h30. The focus this time was on both the training and education of candidate attorneys as well as the need to maximise the number of candidates taken through training. Under the topic “Articled Clerks” the minutes recorded:

“It was decided that those who can take articled clerks should try and maximise their quota by applying for subsidy if necessary, from the Centre. It was felt that with the subsidy and the number of still unplaced would-be articled clerks, no attorney who qualifies to be a principal should have less than three articled clerks. Obviously, preference would be given to principals who need articled clerks but cannot afford them.

Regarding their training and education, it was felt members in practice should avail themselves to give them (candidate attorneys) extra tuition under the auspices of the Centre. Ideally this means arranging seminars and workshops for them after hours or over the weekend and their principals should try and give them extra time to attend where necessary. These courses are to supplement or complement those offered by the Law Societies. It was further felt that this would also bring together articled clerks and principals because it would not be left to the articled clerks to pass the board (exams), but the principal will be chipping a hand also. Mr Modise Khoza was to approach individual lawyers and find out in what area of way but they help in this regard.”¹⁰

Feelings amongst qualified lawyers in the BLA towards the candidate attorneys becoming members were becoming softer and softer by the day.

On 30 June 1985 the general meeting of the BLA at Welkom Holiday Inn “decided that we should review the decision not to include articled clerks as members without

repealing the decision taken at Nelspruit. The view was expressed that in this regard, the BLA should clean its own house first, propose a formal notice of motion to rescind the Nelspruit resolution and also to amend the constitution accordingly concerning membership of articled clerks”.¹¹

When the BLA general meeting returned to Ngwane Valley Inn, Nelspruit, on 25 August 1985, the issue was once again raised, this time not by the candidate attorneys but by a senior qualified lawyer. There was hardly any debate: “BM Ngoepe raised the vexed question of articled clerks” admission to the BLA as members. It was noted that before the question could properly be considered an amendment of the constitution would be necessary and that before the amendment could be considered due notice of amendment in terms of the constitution had to be given.”¹² BM Ngoepe was ready to move for the constitutional changes there and then and to remove the bar to admission of candidate attorney’s as full members of BLA. The mood within the meeting was one of readiness to concede. However, the constitution required that a notice be given for a certain number of days before an amendment of the constitution could be considered. None had been given. There was effectively no more opposition to admission of candidate attorneys to full membership.

The earliest date by which the amendment could be moved would have been by the last meeting of the year in October 1985, the AGM. The writer was regrettably unable to lay a hand on the relevant minutes. Nonetheless, all indications are that the amendment went through and that the first batch of candidate attorney members of the BLA were formally introduced and welcomed in the October meeting.

The move taken by the BLA between June and October 1985 to admit candidate attorneys as full members was the end of a road that lasted for a decade. In the end, it was a wise move indeed. It ensured that the principals brought their candidate attorneys to BLA meetings. A sure way of growing the membership from amongst the captive market of candidate attorneys of BLA members, in addition to new members who would join on their own from outside. The introduction of the subsidy scheme coupled with the call on BLA members to take more candidate attorneys in the same period was the cherry on top of the cake. The combined effect was unprecedented in its impact towards transformation within the legal profession. In the Annual Report of the association for the period October 1984 to October 1985, the national chairperson, GM Pitje, and the Secretariat comprising DSS Moshidi and the writer identified the two important developments of that year within

9 Item 13 of the Minutes of BLA general meeting held at Ngwane Valley Inn, Nelspruit, on 29 April 1984.

10 Minutes of Meeting held on 29 May 1985 - Pages 1 and 2.

11 Minutes of BLA meeting held on 30 June 1985 - Page 9.

12 Minutes of BLA meeting 25 August 1985 - Item 8 (f).

the BLA. These were firstly, the factual opening of the BLA Legal Education Centre in October 1984 followed by the formal official opening in March 1985, and secondly, the establishment of the candidate attorneys' subsidy scheme. In regard to the subsidy scheme, the annual report stated:

"As in the previous years, the Secretariat and the LEC have increasingly been flooded with applications for articles of clerkship. Applications from principals who cannot afford salaries of clerks have also been received. *One of the most important achievements of the BLA during 1985* is the initiation of the scheme whereby the salaries of articulated clerks are subsidised through financial assistance from the Lawyers Committee for Civil Rights under Law. The scheme is supervised by the LEC and we are pleased to report that several principals have successfully applied. As a result, more and more clerks are placed in articles. All members are urged to refer to the guide prepared by the LEC and to make use of this facility. It is hoped that the annual report of the LEC will provide more details on this scheme."¹³

In the next general meeting held on 23 February 1986, of which minutes have been perused, the second batch of candidate attorneys were welcomed as full members of BLA. The minutes of that meeting confirm that "articled clerks who attended for the first time subsequent to the amendment of the constitution were introduced to the meeting. It was also directed that a detailed list of articulated clerks should be compiled with the assistant of principals".¹⁴ More importantly, adding impetus to the programme of drawing more membership for the BLA from candidate attorneys, in the same meeting "it was resolved that articulated clerks be exempted from paying annual bursary contribution fees and that their membership subscription fees be paid by their principals".¹⁵ In the end therefore candidate attorneys attained full membership of the BLA, which was free with the principals carrying the full financial burden. Another incentive for candidate attorneys to join.

The BLA had taken the responsibility in both hands to increase the number of black lawyers in the country from the historically indefensible 10% of the total members of the profession. One trusts that these measures have been continued by the association and its members. It will be a good exercise to assess and report on the impact. The report should be published. How many existing qualified attorneys had black principals? During our time it could only have been small. How many were the beneficiaries of the subsidy scheme? And how many of these that were subsidised went on to take on black candidate attorneys once they were qualified? It is

a research which the BLA or its Centre should conduct if not already done. Just as it is important to report on the number of black attorneys generally as a percentage of the national total since the formal demise of Apartheid. A similar report should be compiled about the advocates, the silks etcetera. It is an important transformation barometer, which should be done regularly and the results put out there for all to see. At the next level, one should see a report on the advancement and success of the black candidates, as qualified attorneys who came out of the scheme.

We should aim to achieve equality to correct the skewed historical imbalance. We should at the same time strive to

“We should aim to achieve equality to correct the skewed historical imbalance. We should at the same time strive to identify, acknowledge and celebrate quality whenever it emerges.”

identify, acknowledge and celebrate quality whenever it emerges. At the same time BLA should give thought to mounting aggressive programs to ensure the production and sustaining of quality black lawyers. When the BLA succeeds at all of these fronts, it shall have dealt a blow to Apartheid. And we cannot and should not be proud as a people until we win that battle.

The BLA bursary scheme should also report and celebrate how many black lawyers it helped to qualify as attorneys or advocates. Is that scheme continuing, as it should?

And is there another type of support that a new black lawyer needs? And is the BLA and its LEC responding to the new needs? What are the new programs, which were started after 1986 and what have they delivered? It is 40 years later – and it is fair to expect the returns on a compounded scale. We need to have run past the pole of self-pity to the goal of success. Success in turning the Apartheid agenda on its head and then, and then only, proclaiming true transformation. I reiterate that quantity with quality must be the finishing line that BLA should strive to cross.

There was a report by DSS Moshidi on behalf of the Bursary Committee in the next general meeting held at Ngwane Valley Inn, Nelspruit, on 24 August 1986. Like all other structures of the black lawyers of the time, progress was achieved amidst many hurdles. There was nothing new. Those who practised law during that time know that black lawyers and the BLA succeeded not because there were no problems but despite the problems. As a starter, the general meeting of the association, which had been convened for 29 June 1986 at Burgerpark Hotel, Pretoria had had to be called off as it had been banned in terms of the state of emergency rules and regulations.¹⁶ At the August 1986 meeting, on behalf of the bursary committee, DSS Moshidi "pointed out that there had been problems for the bursary committee to meeting due to the absence of the convener, Mr L R Ramodipa, who was in detention. He further mentioned for the record that an amount

¹³ BLA Annual Report October 1984 – October 1985 – Item 9.

¹⁴ Minutes of BLA meeting of 22 February 1986 – Item 3 titled "New Members".

¹⁵ Same Minutes as above – Item 7 (ii).

¹⁶ See Item 4 Minutes of BLA meeting 24 August 1986.

of R4 000.00 had been made available for the three main Black universities”.¹⁷ That was typical of the problems of the 1980s: execution of the mandate in the midst of the hurdles, deliberately and wantonly placed in the way by the oppressors, like random detentions of lawyers and liberation activists, often without any trial.

As already pointed out elsewhere, in the period running up to the launch of Nadel as an umbrella organisation of lawyers in May 1987, the attention and energy of the BLA was consumed in the deliberations leading up to it. In the period May 1987 to June 1988 the BLA was part of Nadel in some constitutionally obscure relationship, which culminated in its withdrawal from Nadel. In the intervening period the air of uncertainty, which hovered over the BLA and its LEC had a dampening impact on its programs.

If the programme of advancing candidate attorneys within the BLA had proceeded without internal problems, it would have been magical. Just like a vehicle, the faster one runs in any program the higher the likelihood of problems arising. It is not the absence of problems that indicate efficiency, it is the swiftness and the efficiency with which the problems are identified, confronted and tackled.

The minutes of the general meeting held at the Landrost Hotel, Johannesburg on 25 October 1987 show this:

“AK Manthe commented on the question of marketing BLA to get more members into BLA. He pointed out that the attitude of BLA members towards their clerks was one of the major factor damaging the image of BLA. He spoke passionately of some of his colleagues as clerks who even after admission as attorneys were still complaining of their previous ill-treatment by the principals who are BLA members. Clerks therefore tend to scorn the idea of belonging to the same body as the former principals. He suggested that the Association (should) urge its members to examine their attitude towards their clerks as part of a broader marketing strategy aimed at increasing BLA members. The matter was debated and thereafter a committee was appointed to market BLA with a view to increasing its members and promoting its image. The committee should also pay particular attention to the problems of articulated clerks and report on their work to the executive committee of BLA.

The members of the committee are: M Gumbi (convenor), M Mavundla, AK Manthe and AM Motimele.”¹⁸

The problem was raised and measures were immediately put in place to address them. It appears that there is no minuted report of the committee. The reader should, however, bear in mind that this was the stage during which BLA was running on

two legs, one within Nadel and the other outside. It had played a significant role in the establishment of and was part of Nadel. At the same time, it continued to operate as an autonomous organisation. However, having regard to the composition of the committee, one may safely assume that the problem was tackled head on and resolved. The fact that candidate attorneys and newly admitted attorneys continued to join the BLA in high numbers is confirmation that the problem was tackled and solved with its inherent perceptions. As a matter of fact, membership of the BLA increased at a faster rate in the aftermath of its withdrawal from Nadel.

Besides the fast spreading of the organisation to the previously far-flung areas like the Eastern Cape Western Cape and Natal, the admission of candidate attorneys as

full members opened the way to the admission of a broad array of lawyers who were not in practice. Up until then, the BLA membership was made up of attorneys and practising advocates only. After the granting of full membership to candidate attorneys, and as a logical consequence, the BLA membership was opened to lawyers in corporate sector, in academics, in the civil service, public prosecutors, magistrates and many others. It changed from being an association of legal practitioners to become truly an association of black lawyers from all spheres of life. Again, the guiding principle remained the attitude of the

prospective member as well as the acceptance of the values, mission and objectives of the BLA. The all-important safety net was the fact that membership of the BLA was never automatic. It was granted in the discretion of the national executive which in turn functioned subject to the decisions from time to time of the full body of membership expressed in a general meeting. The general meeting of the BLA is the supreme structure which can overrule the executive committee on any matter – even on the question of granting of membership.

Once candidate attorneys had been admitted as full members, some of them became active in the Membership Recruitment Drive Committee. The formation of the BLA students’ chapter was another sequel, but that indeed is another chapter that falls outside the ambit of the present task. ●

“ That was typical of the problems of the 1980s: execution of the mandate in the midst of the hurdles, deliberately and wantonly placed in the way by the oppressors, like random detentions of lawyers and liberation activists, often without any trial.”

¹⁷ Minutes of BLA meeting 24 August 1986 – Item 5.8.

¹⁸ Item 4.3 of Minutes of BLA general meeting of 25 October 1987

Agri South Africa v Minister of Minerals and Energy: **Another Search for the Meaning of Expropriation Leads a Dead-End.**

By Sfiso Benard Nxumalo

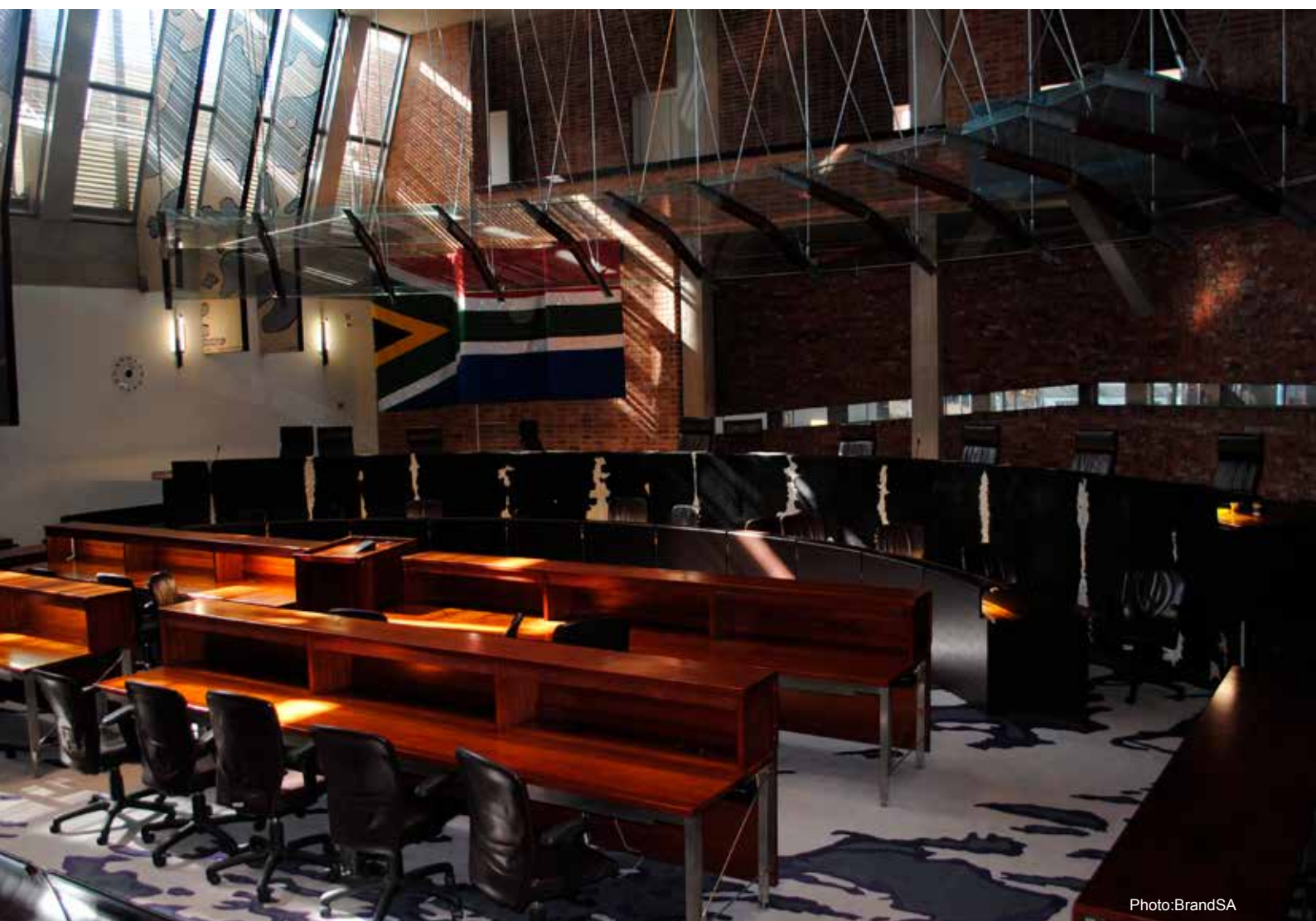


Photo:BrandSA

“Rectifying the injustices of the past by denying the expropriations of today did not further the protection of property under the property clause in South Africa.”

- PIETER BADENHORST

The trilogy of decisions delivered in the case of *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA) gave rise to a hotbed of academic debate and confusion. This paper acts as a critique of the three respective decisions. As such this paper will:

- First, briefly delve into the Supreme Court Appeal’s (SCA) decision and criticise it accordingly.
- Secondly, dissect the majority and minority judgements of the Constitutional Court respectively and criticise the decisions accordingly.
- Thirdly, this paper will attempt to offer a different and arguably more viable approach to expropriation in relation to mining and prospecting rights.

In the majority judgement by the SCA in *Agri SA*, the court essentially held that prior to the enactment of the Mineral and Petroleum Resources Development Act 28 of 2008 (MPRDA), “the existence of minerals either under or on land does not bestow value on the owner of such land, except if the right to mine in relation with such minerals, is also conferred on to such an owner”.¹ The court went further to argue that the MPRDA was just another piece of legislation, which amongst other legislation, reaffirmed that the state controls the right to mine and apports the right to mine to persons who desire to use such a right.² Consequently, the court held that the mineral rights, as well as unused rights, held by Sebenza do not constitute constitutional property because the state always had control of the right to mine and thus there was no deprivation and hence there was no expropriation because Sebenza had no right to be expropriated. In other words, the state had the right to mine prior to the MPRDA and after it, and thus the state acquired nothing.³

There are two fundamental flaws that emerge from the confounding judgement of the SCA. First, the SCA argues that mineral rights do not constitute property for the purposes of section 25 of the Constitution.⁴ However, this is incorrect. First, the court in the *FNB*⁵ case held that the economic merit of the ownership right or the personal interest of the owner in the property cannot be determinative of the definition of property.⁶ The majority of the Constitutional Court judgement by Mogoeng cited this same argument when rejecting the SCA’s approach.⁷ The SCA also failed to heed the caution mentioned in the *FNB* case that it would be judicially unwise

and virtually arduous to provide an all-encompassing definition for property.⁸ Chief Justice Mogoeng also highlighted that before and after the enactment of MPRDA, the right to exploit or not to exploit is a vital constituent of mineral rights.⁹ The SCA ignored the right to not exploit minerals. Secondly, van der Vyver states that the state before the enactment of the MPRDA played a regulatory role, but after its enactment, it brought about great change because it gives the state vast powers to control and operate prospecting and mining rights with respect to the Republic’s minerals.¹⁰

After correctly rejecting the SCA’s approach, the majority judgement, Mogoeng CJ, held that in order to establish expropriation, the material and core content of the property, which the previous person held and has now lost must be acquired by the state.¹¹ In other words, there must be a mandatory acquisition of the expropriated property by the state.¹² The court consequently concluded that the state did not acquire the mineral resources and rights because it had not acquired such rights for its own enjoyment or benefit, but rather, the state is the custodian of such rights for the people of the Republic. Also, the court held that state acquisition is key distinguishing figure between deprivation and expropriation.

Albeit the majority judgement is undoubtedly correct in rejecting the approach employed by the SCA, the court’s reasoning for their final judgement contains three fundamental defects. First, the court makes an extensive assumption by averring that state acquisition is an absolute requirement in expropriation.¹³ This assumption by the court, which is rejected by the minority per Froneman of the same court, as it goes against two pre-constitutional expropriation law decisions¹⁴ whereby the Appellate Division in both cases held that state acquisition is a general hallmark of expropriation and that state acquisition is a consequence of expropriation but not a pre-requisite or absolute requirement for expropriation.¹⁵ Put differently, Marais argues that expropriation, in pre-constitutional law, was not caused by state acquisition but that in many cases, state acquisition was a by-product of

1 Mineral and Petroleum Resources Development Act 28 of 2008 paras 70 – 85.

2 Ibid.

3 Ibid para 85.

4 The Constitution of the Republic of South Africa, 1996.

5 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another* 2002 (4) SA 768 (CC)

6 Ibid para 56.

7 *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) para 42.

8 Supra note 7 para 51.

9 Supra note 9 para 43.

10 Johan D van der Vyver “Nationalisation of mineral rights in South Africa” (2012) 4 *De Jure* 125 at 134 -137.

11 Supra note 9 at para 58-59.

12 IM Rautenbach “Expropriation and Arbitrary Deprivation of Property: Five Forensic Constructions – *Agri South Africa v Minister for Minerals and Energy* 2013 7 BCLR 727 (CC), 2013 4 SA 1 (CC)” (2013) 4 *TSAR* 743 at 746.

13 Ben Winks “Expropriation - a minefield?” *De Rebus* July 2013 at 45.

14 *Beckenstrater v Sand River Irrigation Board* 1964 (4) SA 510 (T) and *Tongaat Group Ltd v Minister of Agriculture* 1977 (2) SA 961 (A).

15 EJ Marais When Does State Interference with Property (Now) Amount to Expropriation? An Analysis of the AgriSA Courts State Acquisition Requirement (Part I) 2982 at 3006.

expropriation.¹⁶ Equally as critical is the fact that state acquisition is not as useful when distinguishing between deprivation and expropriation.

In order to expose the fallacies behind the state acquisition requirement, Marais provides three “cases” that highlight why this assumption is misplaced.¹⁷ The first case entails situations whereby the state is explicitly authorised to expropriate property by legislation (“expropriation proper” cases).¹⁸

Essentially, one has focus on the source that authorises expropriation instead of the effect of the expropriation.¹⁹ Marais asserts that it is possible for expropriation to occur without the state acquiring the property if the empowering statute so requires.²⁰

Another situation involves instances where the state acquires property through laws that are inherently regulatory (referred to as “forfeiture type” cases). For instance, criminal forfeiture of property refers to a process whereby the state seizes and acquires the property of a convicted owner who has used such property in the commission of a crime.²¹ On a formalistic application of Mogoeng CJ’s judgement, criminal forfeiture of property can be said to result in expropriation rather than deprivation since state acquisition takes place (the property lost by the previous owner is now acquired by the state).²² However, this is highly problematic because the state would have to compensate criminals.²³ Forfeiture type cases illustrate the fact that the state acquisition requirement obscures and muddles deprivation and expropriation. The third type of situation refers to circumstances where a property encroachment, like criminal forfeiture of property, originates from a statute enacted for the prime purpose of property regulation and also permits expropriation. These are referred to as hybrid cases because such legislation involves both expropriation and deprivation, contingent on the facts of the case.²⁴

The second defect is the surprising conclusion that the state had not in fact acquired the property previously held by Sebenza.²⁵ Clearly, the state acquired the property because, as the minority of the same court implicitly recognises, the rights previously enjoyed and held by the previous mineral owners were now substantially and materially conferred on the state.²⁶

“... it is inconceivable how expropriation could ever occur under Mogoeng’s judgement because there is no current definition that sets out the “private” interests of the state – that is, if any actually exist.”

The reason provided by the court for such a finding is that the property is vested in the state for the benefit of the public and not for its own benefit. Does the state have some sort of private benefit? This reason is unconvincing because it is uncertain as to what benefit the state would aim to gain besides a public benefit. It is trite that expropriation is premised on the existence of a public interest or benefit and that lacking such a benefit

or interest would render the expropriation unconstitutional.²⁷ Consequently, it is inconceivable how expropriation could ever occur under Mogoeng’s judgement because there is no current definition that sets out the “private” interests of the state – that is, if any actually exist. Badenhorst argues that Mogoeng’s finding that the state had not acquired the mineral rights is at odds with legal logic

because the fact that the state could now, under the MPRDA, endow rights to other applicants indicated that the former old unused rights were now acquired by the state.²⁸

Furthermore, the third fault made by the judgement was examining acquisition as an enquiry of the objective instead of effect.²⁹ The majority incorrectly introduces, and thus conflates, the reasons behind the acquisition into the investigation of whether or not an acquisition actually took place.³⁰ The justification behind the MPRDA and the resultant state acquisition is that the MPRDA aims to redress the wealth/mineral disparities created by past injustices. However, contrary to the approach of the court, it has been widely accepted that the correct approach to such an enquiry is to ask “whether” the expropriation took place rather than “why” (justification) it took place.³¹ The fact that the MPRDA was introduced as a measure to redress past injustices³² does not negate the fact that it resulted in expropriation and subsequent state acquisition.

Also, the minority judgement as per Froneman J suffers from the same defect as the one aforementioned. Albeit the minority finding that state acquisition is not an indispensable requirement for expropriation³³, it held that state acquisition actually took place nevertheless, but bewilderingly failed to commit itself to finding that that effects of the MPRDA constituted an expropriation.³⁴ The minority found the state acquisition approach to be excessively formalistic and narrow and preferred an alternative approach in which the MPRDA is viewed against the backdrop of the object and spirit of the s 25 of the Constitution.³⁵ The MPRDA, according to Froneman J, was in line with the tenets of justice and equity

16 Ibid.

17 EJ Marais When Does State Interference with Property (Now) Amount to Expropriation? An Analysis of the *AgriSA* Courts State Acquisition Requirement (Part II) 3032 at 3034.

18 Ibid at 3035.

19 See *eThekweni Municipality v Spetsiotis* 2009 JOL 24536 (KZD) as an example of expropriation proper cases.

20 Op cite note 19 at 3037.

21 Ibid.

22 Ibid at 3038.

23 Ibid at 3039.

24 Ibid at 3039 = 3042.

25 Op cite note 15 at 46.

26 Pieter Badenhorst “A tale of two expropriations: Newcrestia and Agrizania” (2014) 47*De Jure* 258 at 279.

27 BV Slade “‘Public Purpose or Public Interest’ and Third Party Transfers” (2014) 17 PER 166 at 169.

28 Op cite note 28 at 279 – 280.

29 Op cite note 15 at 46.

30 Ibid.

31 Ibid.

32 Op cite note 17 at 2996.

33 Supra note 9 at para 79.

34 Op cit note 15 at 46.

35 Ibid.

in terms of s 25(3) because of the transformative measures contained in the Act (the learned judge refers to it as “compensation in kind”).³⁶

However, it is uncertain why the minority decided to introduce such an innovative approach because the minority could have reached the same conclusion by applying a more traditional examination of the Bill of Rights and s 36 of the Constitution (limitation clause), however, in more sound and persuasive way.³⁷ It is arguable that a traditional approach to the MPRDA and the Bill of Rights may reveal that the MPRDA acts as a limitation to s 25(2) of the Constitution. Section 25(2) is not absolute and there can be limited as set out in the limitation clause.³⁸ Moreover, s 25(8) provides that no provision under s 25 shall prohibit the state from taking legislative steps in order to attain land reform, *inter alia*, and redress the inequity caused by a racially divided past, as long as such steps are done in accordance with the limitation clause.³⁹ This approach was recognised in two cases⁴⁰ and therefore such an approach is not foreign to our law. Thus, it is submitted that the minority judgement’s approach is unwarranted and dismally fails to clear the uncertainty surrounding the interpretation of s 25.

Another fault present in the minority judgement is that Froneman states that expropriation without compensation is recognised in South Africa and cites paragraph of 98 of the *FNB* case in support of this argument. Froneman also asserts that compensation in kind is similar to expropriation without compensation.⁴¹ However, it must be noted that the *FNB* case makes no reference to expropriation without compensation. In fact, expropriation without compensation goes against section 25(2) and thus is unconstitutional.

In light of the flaws in the three judgements, I offer a two-pronged approach to expropriation for future cases. The first leg stems from a qualification provided by *Harksen*⁴², which is that the courts must first look at the purpose and context behind the impugned statute. In other words, the first leg of the enquiry is to determine if the impugned statute authorises the state to expropriate property. This approach ensures that state acquisition is seen as a consequence and not the cause. The second leg of the test is to ensure that the state is not burdened to the extent that it cannot actively pursue reform and enact legislation that will aim to redress the injustices of the past. Accordingly, the second leg asks whether the expropriation that has taken place can be limited in terms of s 36 of the Constitution as provided for in section 25(8) of the Constitution. If this question is answered in the affirmative, then the objectives of the reform provisions found in section 25 are satisfied.

Applying this two-pronged approach to the *Agri SA* scenario will reveal that in terms of the first leg test, the MPRDA actually in terms of item 12 of schedule 12 authorises expropriation and makes provision for affected parties to

claim for compensation. However, the second leg of the test indicates that the limitation clause is applicable due the transformative measures and institutional change the MPRDA aims to achieve, which make the limitation reasonable, just and equitable.

In conclusion, the three decisions discussed in this paper provide no clarity to the question of expropriation. The three decisions are fundamentally flawed in their approach to expropriation and complicate expropriation laws. Consequently, I suggest a two pronged approach in order to determine whether an expropriation took place or not. ●

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³⁶ Supra note 9 at paras 88 – 90.

³⁷ Op cit note 28 at 262.

³⁸ Op cit note 15 at 46.

³⁹ Op cit note 28 at 262.

⁴⁰ Supra note 7 and *Nhlabathi v Fick* 2003 (2) All SA 323 (LCC).

⁴¹ Supra note 9 para 99.

⁴² *Harksen v Lane* 1998 (1) SA 300 (CC) paras 35-36

Case note: The right to citizenship (*Anudo Ochieng Anudo v Tanzania*)

Yeukai N D Mahleza*

Photo: Rowen Smith on Unsplash

Introduction

To have a nationality means one has a right that allows access to other rights, therefore it is important that this right is protected and that everyone has a nationality. The right can be protected by means of rules and standards of proof of nationality that are effective. The burden of proving Tanzanian citizenship is placed upon the person claiming to be a citizen in accordance with the Tanzanian law. Further to this, there are no guidelines to follow for one to prove nationality.

The African Court on Human and Peoples' Rights (the Court) had its first opportunity to decide on the right of nationality in the case of *Anudo Ochieng Anudo v Tanzania* (Anudo case).¹ In this case, it was found that Tanzania had arbitrarily denied

the applicant his nationality and also was wrong in deporting him to another country. One of the important issues the court touched on in this matter was on whom the burden of proof fell in determining nationality where a person had previously been issued with documents. The court decided that the burden of proof was on the government of Tanzania. According to the Tanzanian Citizenship Act 1995, when a Minister makes a decision under the Act, such decision is not subject to appeal

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¹ *Anudo Ochieng Anudo v United Republic of Tanzania* Application No. 012/2015 Judgment 22 March, 2018 (Anudo case).

or review in any court, thereby making such a decision final.² This led the court to hold that decisions that have anything to do with an individual's nationality should also be heard by an independent body after it has gone through the administrative level.³

Facts

Mr Anudo approached a local police station in a quest to get his marriage papers in order as per the Tanzanian laws. Little did he know that he would be stripped of his nationality, become stateless, and later on become part of history through a judgment of the African Court on Human and Peoples' Rights. The police denied him his passport alleging that there were suspicions in terms of his citizenship. This led to him being declared a non-Tanzanian citizen and being deported to Kenya.

Upon arriving in Kenya, the Kenyan authorities denied him too and he was sent back to Tanzania. However, without any documents allowing him to enter Tanzania – a country he considered to be where he belonged – he ended up living in no man's land close to the border for four years. All this time life was not easy for Mr Anudo as being stateless meant that his living conditions excluded access to social or health services.⁴

Court Proceedings

Mr Anudo made an application for the registration of his case at the court in 2015. He was then provided with legal assistance through the court and a Tanzanian non-governmental organisation called the Asylum Access Tanzania went on to represent him. In his application, Mr Anudo asked the court to order the decision made by Tanzania expelling him to be null and void and for his nationality to be reinstated. Furthermore, he asked for Tanzanian laws to be re-visited in order to not deprive any other person their rights to fair trial who may be in the same position as he was in.

In response to Mr Anudo's application, Tanzania argued that the court did not have jurisdiction to hear the matter and in the case that it did, the court should find that Tanzania had not violated Mr Anudo's rights and that the allegations had no substance. The basis of the jurisdiction argument was that Mr Anudo had not specified which instruments consisted of the alleged violations; that the domestic remedies had not been exhausted; and that the claim had been filed late.⁵

In response to this, the court rejected the arguments and

pointed out that in his response to the state after seeking legal advice Mr Anudo had mentioned the alleged claims;⁶ Mr Anudo had exhausted the only administrative remedy that was available to him (writing to the Minister).⁷ In respect of the alleged late filing of the case, the court found that Mr Anudo had actually brought the matter to court within five months after receiving the response from the Minister and the response had come five months after his complaint to the Minister.⁸ The court also supported the African Commission's view on the issue that in a case where there is no judicial review available, it meant that the domestic remedies would have been exhausted after the completion of an administrative review.⁹

Decision

The court accordingly found that it had jurisdiction and went on to consider whether the withdrawal of Mr Anudo's nationality was within the confinements of the international human rights standards. In general, deprivation of nationality is not allowed by international law. In this case, the court held that Tanzania had the burden to disprove the validity of Mr Anudo's claim. The state had argued that the person Mr Anudo had alleged was his biological father, was in fact, not. However, the state refused for DNA testing to take place, which would have settled the issue beyond doubt. This led to the state's withdrawal of Mr Anudo's nationality to be unjustified and the court regarded this as

a violation of the Universal Declaration of Human Rights (UDHR).

Another issue was the right to be heard by a court of law which according to Mr Anudo's submissions, was arbitrary arrest as the authorities denied him of this right. In cases that involve deprivation of nationality, the court has held that "the state has the obligation to offer the individual the opportunity to challenge the decision" and a thorough judiciary inquiry follows.¹⁰

In its findings, the court observed that the Tanzanian Citizenship Act has gaps and bars, citizens, through birth the opportunity to "exercise judicial remedy where their nationality is challenged as required by international law".¹¹ The court was of the view that various violations against Mr Anudo's rights took place and as such he deserved some kind of reparation.

In the circumstances, the court declared that Tanzania had arbitrarily deprived Mr Anudo of his nationality and such was a violation of the UDHR under article 15,¹² and that the state further violated his rights by expelling him arbitrarily and

“In cases that involve deprivation of nationality, the court has held that “the state has the obligation to offer the individual the opportunity to challenge the decision” and a thorough judiciary inquiry follows.”¹⁰

² Immigration Act of 1995 art. 10(f) (Tanzania).

³ *Anudo* case above n2 at 18.

⁴ *ibid* at 4.

⁵ *Anudo* case above n2 at 10-14.

⁶ *Ibid* at 9.

⁷ *Ibid* at 12-13.

⁸ *Ibid* at 13-14.

⁹ Bronwen Manby, "Civil and Political Rights in the African Charter on Human and Peoples' Rights: Articles 1-7 in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006* (Cambridge University Press, 2nd ed, 2008) 171.

¹⁰ *Matter of Amnesty international v Zambia*, Communication No. 21298 (1999) para 36-38. See also *Anudo* case above n2 at 24.

¹¹ *Anudo* case above n2 at 25

¹² *Ibid* at 20.

denying him his right to be heard in court.¹³ Furthermore, it was ordered that Tanzania should align and fix its laws such that when individuals find themselves in disputes regarding their citizenship, there are judicial remedies available.¹⁴ Tanzania was accordingly ordered to allow Mr Anudo back in the country and provide him with protection against any kind of threat including reporting back to the court within 45 days on whether they had complied or not. The decision on reparations and costs was reserved awaiting submissions on them by the parties. In noting that the nationality provision is not provided for in the African Charter on Human and Peoples Rights (ACHPR) or the International Covenant on Civil and Political Rights (ICCPR), the court derived the provision from the UDHR under art 15(2), which stipulates that “[n]o one shall be arbitrarily deprived of his nationality”. By doing this, the court declared that the UDHR forms part of customary international law. Further, the court was of the view that even if the issue of nationality falls under states’ sovereignty rights, international law only allows it in very exceptional situations.¹⁵ It was also noted that the fact that Mr Anudo was rejected both in Tanzania and in Kenya meant that he was now stateless, and the court stated that Tanzania should have considered whether he was Kenyan if he was not Tanzanian before deporting him to Kenya.¹⁶

Conclusion

To give emphasis to the sense of belonging, it should exist in one’s life with respect and honour towards their dignity. The following was emphasised about dignity and nationality in the case of *Watchenuka*:¹⁷

“[25] Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this country – for whatever reason – it must be respected, and is protected, by s 10 of the Bill of Rights.

[26] The inherent dignity of all people – like human life itself – is one of the foundational values of the Bill of Rights. It constitutes the basis and the inspiration for the recognition that is given to other more specific protections that are afforded by the Bill of Rights.”

This calls to question the manner in which Tanzania has treated Mr Anudo, who was rendered stateless, thus depriving him of honour, dignity, and respect. Honouring and respecting the dignity of those that find themselves in such a situation can only be done through effective legislation, policies, rules, and regulations.

The *Anudo* case is considered a landmark case as it was found that nationality is a right that exists under customary international law. This means that even though the right is not specifically provided for in the African Charter, countries like Tanzania will be bound by the UDHR as it provides for



the right to nationality and also non-arbitrary deprivation of nationality. This is very important considering the fact that some states in Africa have not ratified the conventions in relation to statelessness. Therefore, in instances where other conventions do not specifically provide for nationality, the UDHR will suffice as part of customary international law, which in turn will bind countries that are not party to conventions dealing with statelessness specifically.

In Mr Anudo’s case, even though the judgment missed an opportunity to recognise into the ACHPR the right of nationality, the court, however, recognised that the UDHR forms part of customary international law. Further, the case added to the international jurisprudence by ruling on the issue of burden of proof, which was shifted to Tanzania. In most African countries, governments always declare that people acquired nationality in an unauthorised manner. However, there are no formal procedures followed to reach such a decision. This then means that there is limited or no due process followed and it becomes a disadvantage to the individuals who find themselves facing that problem. This approach was then outlawed by the court by allowing that in the instance that an individual previously had documentation stating that they were citizens of a particular state, the state should be the one to prove that he or she is not a citizen and this should be done before an independent body.¹⁸ The law in Tanzania, which did not provide for court review gave the executive more power with no limits in matters relating to nationality and the judgment is a gateway to limit this.¹⁹ ●

¹³ Violation of art. 12 of the African Charter on Human and Peoples Rights (ACHPR) and art 13 of the International Covenant on Civil and Political Rights (ICCPR).

¹⁴ *Anudo* case above n2 at 28-29.

¹⁵ *Ibid* at 18.

¹⁶ *Ibid* at 22.

¹⁷ *Minister of Home Affairs and Others v Watchenuka and Others* [2003] ZASCA 142; [2004] 1 All SA 21 (SCA).

¹⁸ *Anudo* case above n2 at 18.

¹⁹ See Bronwen Manby, *Citizenship in Africa: The Law of Belonging* (Hart 2018) (‘*Citizenship in Africa*’); Bronwen Manby, *Citizenship Law in Africa: A Comparative Study* (Open Society Foundations, 3rd ed, 2016) at 126-46.

Commentary on Banking Law Perspective on the Nationalisation of the South African Reserve Bank (SARB)

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An interesting paper, *Banking Law perspective on the nationalisation of the South African Reserve Bank (SARB)* by Adv Fhumulani Mbedzi, was recently published in this journal.² In this paper the author analyses and evaluates various aspects pertaining to the possible nationalisation of the SARB, the South African central bank.

In the analysis in the earlier paper, it is correctly explained that the importance of central banks in economic policy and stability cannot be overemphasised. It is also explained correctly that the functions of the central bank includes (i) responsibility for monetary affairs and monetary policy; (ii) the protection of the value of currency of a country; and (iii) ensuring price stability through containing inflation in the interest of sustainable economic growth, while central banks also serve as the bankers of their respective governments. However, the author of the earlier paper adds job creation as a function of the central bank. The latter aspect is inappropriately stated: Job creation is a consequence of sustainable economic growth, not a primary object of central bank policy.

It is also correctly observed in the earlier paper that central banks are creatures of statute: They are created by means of legislation in their respective jurisdictions. In this regard it is important to point out that central banks can exist for individual countries, for instance the SARB in South Africa, or for regions, such as the European Central Bank in Europe. In the latter instance the central bank is a creature of a multilateral agreement.

The earlier paper elucidates the fact that the creation of central banks through parliamentary processes, which makes



Photo:DOJCD

¹ The author holds shares in the SARB

² Mbedzi, F. (2020) Banking law perspective on the nationalisation of the South African Reserve Bank (SARB). *African Law Review*. 2020

it difficult to separate these institutions from politics. For this reason, the author explains, it is therefore widely accepted that central banks must operate with a enough autonomy and independence from political pressure and undue influence to achieve their goals and objectives. Naturally the pressure will be less when the central bank is a multilateral institution such as the European Central Bank, rather than a national central bank subject to possible pressure by a single government.

The author points out that many economic and political factors and conditions prevailing at the particular time of the establishment determined the ownership structure of the central bank and adds that the SARB is owned by private shareholders. In South Africa, the nationalisation of the SARB has been debated at various occasions, going back nearly as far as the establishment of the SARB nearly a century ago.

In focusing on the matter of the possible nationalisation of the SARB, the author of the earlier paper –

- (i) traces the evolutionary course that central banks have taken to date;
- (ii) their traditional role;
- (iii) the jurisprudence behind their independence; and
- (iv) the concept of and advisability of the nationalisation the SARB.

The author points out in the earlier paper the limited research in the area of central banking law, arguing that this void makes it difficult to trace the evolutionary course of central banking around the world. However, in the earlier paper the author fails to highlight, after a literature review, that this matter received more attention in recent years. The author identifies, for instance, Breytenbach and Rossouw (2011)³ as a source, but does not recognise further analysis in literature sources such as Bartels et al. (2017)⁴; Hampl & Havranek (2020),⁵ Rossouw (2016),⁶ and Rossouw & Rossouw (2017).⁷ To the contrary, the author argues quite correctly, but again without providing a literature review, that the philosophy behind the autonomy and independence of central banks has received enough research attention.

The author of the earlier paper also points out quite correctly the difference between goal and instrument independence of central banks. Goal independence implies that the central

bank, rather than the government, set its policy goal.

Instrument independence implies that the central bank can use independently its policy instruments, for instance the level of interest rates, at its disposal and can make policy decisions independently. In this construct the SARB has instrument independence, but the goal (target) of monetary policy, namely, to contain inflation between 3 and 6 per cent per annum is set by the South African government, thus implying that the SARB

does not have goal independence.

In an analysis of the ownership structures of central banks with shareholders, the author of the earlier paper uses the analysis of De Kock (1939)⁸ to distinguish between different shareholder constructs in instances where central banks indeed have shareholders. However, in analysing the ownership of the small number of central banks owned by their governments before 1935, the author of the earlier paper incorrectly ascribes to De

Kock the statement that the governments in Sweden, Russia, Uruguay, Finland, Australia, Latvia, China, Costa Rica, and Bulgaria nationalised or had their central banks nationalised by 1935. This is indeed not the case, as some of these central banks were established from the outset as institutions without shareholders, thus owned from the outset by their governments. At the time the remainder of the 33 central banks in existence had one or another form of private shareholding. The author then correctly argues that the trend for central bank nationalisation commenced in 1935 (Breytenbach & Rossouw, 2011),⁹ when the central bank of New Zealand was nationalised, but is then somewhat contradictory in stating that ‘(a)ccording to De Kock (sic), the Danish government took a decision to nationalise the central bank of Denmark in 1936, making it the first central bank in history to be nationalised (Mbedzi, 2020).¹⁰ No explanation is offered for this contradiction.

The author also explains that the nationalisation of central banks gained momentum, while it is known that only two central banks with private shareholders were established after 1945: Pakistan and San Marino (Rossouw, 2016).¹¹ However, the central bank of Pakistan was subsequently nationalised.

The author then identifies as the remaining countries with central banks with shareholders Belgium, Greece, Italy, Japan, South Africa, Switzerland and Turkey, while the 12 Federal Reserve Banks in the United States also have a legal form of shareholding, albeit not according to the strict definition of shareholding (Rossouw, 2016).¹² In this analysis the author of the earlier paper mistakenly omits the central bank of San Marino as a central bank with private shareholders; the same mistake as was made by Breytenbach & Rossouw (2011).¹³

“ In South Africa, the nationalisation of the SARB has been debated at various occasions, going back nearly as far as the establishment of the SARB nearly a century ago.”

3 Breytenbach, A and Rossouw, J (2011) Identifying central banks with shareholding: A review of available literature. *Economic History of Developing Regions*. Vol. 26, Supplement 1

4 Bartels, B, Weder di Mauro, B, and Eichengreen, B (2017) No Smoking Gun: Private Shareholders, Governance Rules and Central Bank Financial Behavior. In *Annual Conference 2017: Alternative Structures for Money and Banking*. Economic Association.

5 Hampl, M and Havranek, T (2020) Central Bank Equity as an Instrument of Monetary Policy. *Comparative Economic Studies*. Vol 62.

6 Rossouw, J (2016) Private shareholding: An analysis of an eclectic group of central banks. *SA Journal of Economic and Management Sciences*. Vol 19, No 1, April

7 Rossouw, C and Rossouw, J (2017) Forcing the few: Issues from the South African Reserve Bank's legal action against its delinquent shareholders. *SA Business Review*. Vol 21

8 De Kock, M H (1939) *Central Banking*. P S King and Son Ltd: London.

9 Op cit.

10 Op cit.

11 Op cit.

12 Ibid.

13 Ibid.

It is correctly pointed out in the earlier paper that the matter of private shareholding in central banks are questioned from time to time. In practice, the system of private shareholding enhances transparency and accountability of central banks, while it has no impact on monetary policy decision-making processes at these institutions.

It is also explained that values such as openness and transparency are some of the fundamental pillars of central banks independence, but it is observed very correctly that there is currently no consensus amongst experts as how independent these banks should be. Indeed, Mbedzi (2020)¹⁴ correctly argues that “(t)he idea of central banks being independent is debatable around the world. Although many experts in the field advocate for central banks independence, many others also strongly argue that the independence of these banks need to be curtailed”. He continues by stating correctly that “(t)he philosophy underpinning the central banks independence is often that those banks that are not independent are likely going to be influenced by considerations that should ordinarily find relevance at the periphery of their core-mandate. Banks that are not independent are likely going to advance the short-term interests of the executive or government” Mbedzi (2020).¹⁵ The author continues in stating “(p)ersonally, I have come to embrace this important principle” (Mbedzi 2020).¹⁶

The author of the earlier paper provides a comprehensive overview of the history pertaining to the establishment of the SARB, which opened its doors for business on 30 June 1921. This makes the SARB the oldest central bank in the southern hemisphere and in Africa. In dealing with the policy conduct of the SARB, the author states that “(t)hroughout the history of its existence, SARB has demonstrated a sufficient commitment to stabilise inflation” (Mbedzi 2020).¹⁷ This statement is incorrect. In the 1990s the SARB suffered considerable interference in its policy activities, with the then state President, Mr PW Botha, dictated interest rate decisions (see for instance Rossouw, 2018),¹⁸ despite the private shareholder structure of the SARB. This confirms that the SARB shareholder structure indeed has no role to play in the formulation or execution of monetary policy.

The author correctly points out that the dawn of democracy in 1994 ushered in a new dispensation with fresh economic ideas, also for the SARB. The independence and autonomy of the SARB was enshrined in the South African Constitution.

The author also correctly points out that the ownership structure (ie, private shareholding) of the SARB has not changed since its establishment. This happened despite the trend of nationalisation internationally since 1935. Nevertheless, since 1921, the number of shares that a single shareholder or a group of accosted shareholders can hold, has changed from time to time.¹⁹ This is currently limited to 10 000 shares.

The author argues correctly that the nationalisation of a central bank “... is not a peculiar phenomenon in the central

banking industry today. Many countries have nationalised their central banks ... ” (Mbedzi 2020)²⁰ and adds (again correctly) that “(t)he problem appears to be the politicisation of the concept. For example, when some political formations argue that private shareholding of the Reserve Bank impedes radical economic transformation, one wonders what the motives of these formations are” (Mbedzi 2020).²¹ He adds that this reality alone makes any rationale to nationalise the SARB a bit obscure, as the nationalisation without changing its constitutional mandate will change very little. It is indeed therefore not clear what the political parties want to achieve through the nationalisation of the SARB without altering its constitutional mandate.

The author provides a personal reflection on the matter of private shareholding and nationalisation of the SARB and states that the disadvantages of retaining the shareholders of the SARB outweighs the advantages (Mbedzi 2020)²² and calls this a *progressive* move, despite his earlier assessment about obscurity of the move of nationalisation. This is a thin and somewhat contradictory argument by the author of the earlier paper, as it is not immediately obvious why nationalisation should be regarded as a *progressive* move. It might as well be regarded as a *regressive* move, particularly if it undermines central bank autonomy and independence. In this regard Mbedzi (2020) states that nationalisation is opposed owing to concerns about the independence of the SARB.²³ He continues by adding that “I concede that nationalising SARB can also be a move South Africa can wake-up to regret one day” (Mbedzi 2020).²⁴ This is indeed exactly the reason why any notion of nationalisation should be resisted from the outset.

The author deals with a Bill for the nationalisation tabled in Parliament by the EFF.²⁵ He argues that it is not a Bill to take away the constitutionally entrenched independence of the SARB, but seeks to modify its ownership structure and consolidate government control of the SARB. However, Mbedzi (2020)²⁶ is correct in assessing that “... nationalising the SARB without amending section 224 and 225 of the Constitution wouldn’t change much. It wouldn’t make the SARB an extension of the government or a rubber stamp”.

However, where Mbedzi (2020)²⁷ goes wrong in his assessment of the EFF Bill, is in stating that “... taxpayer’s monies will have to buy these shares from current shareholders. This will surely have an effect on the national purse”. The *Explanatory Memorandum* tabled with *The South African Reserve Bank Amendment Bill* states in Section 12 (*Financial implications*) that there will be no financial implications for the government from adopting the Bill. To restate: The EFF Bill proposes nationalisation without compensation. The adoption of the Bill as legislation will therefore introduce a dangerous principle of nationalisation without compensation of any financial assets in South Africa, irrespective of ownership. This is a risk South Africa can ill afford. ●

14 Op cit.

15 Ibid.

16 Ibid.

17 Ibid.

18 Rossouw, J (2018) Politics and policies: Determinants of South Africa’s monetary policy problems in the 1980s. *Economic History of Developing Regions*. Vol 33, 2018.

19 SA Reserve Bank Act 90 of 1989, as amended.

20 Op cit.

21 Ibid.

22 Ibid.

23 Ibid.

24 Ibid.

25 *The South African Reserve Bank Amendment Bill and Explanatory Memorandum*. Tabled in Parliament in 2018 by the EFF

26 Ibid.

27 Ibid.

Reinforcing the Indigenous peoples rights to health in the wake of Covid-19 pandemic: A panacea for sustainable human rights protection.

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ABSTRACT

The rights of indigenous people have over the past three decades become an important issue of international law and policy as a result of movement driven by indigenous peoples, civil society, international mechanisms and states at the domestic, regional and international levels. Indigenous peoples are recognised as being among the world's most vulnerable, disadvantaged and marginalised peoples. In order to identify, recognised and protect indigenous people rights, it is necessary to know who are indigenous people? The definition cannot be static, but must change with times and from place to place. This paper analyses the statutory definitions of indigenous peoples, and their rights as provided under the United Nations legal framework and other regional frameworks. This paper examines the Indigenous Peoples distinctive concepts of health and their vulnerability to COVID-19 pandemic. This paper, however, asked: whether the Rights to Health Covers the indigenous people, thereby making it binding on a far greater number of actors? And what are Indigenous Peoples Human Rights issues? However, this paper noted that the United Nations Human Rights System, its mechanism, laws and policies have been at the heart of these developments. This paper adopts analytical and qualitative approach and builds its argument on existing literatures, which is achieved by a synthesis of ideas. This paper has drawn the conclusion that the right of indigenous peoples are also increasingly being formally incorporated into domestic legal systems.

Keywords: Indigenous, Peoples Rights, Health, COVID-19, Pandemic.

1. Introduction

Generally, indigenous peoples each have a unique and distinctive cultures, languages, legal systems and histories. The notion of Indigenous Peoples rights has been recognised by the United Nations.¹ However, it applies human rights to indigenous peoples and their specific situations, thereby helping to reverse their historical exclusion from the international legal system. Furthermore, it must be emphasised that the indigenous peoples rights, which are considered as part of international human rights law are *sui generis* because of its inclination in the customs and traditions of the people concerned rather than established corpus of positive law.² Also, it is important to understand that international activity on indigenous peoples issues had been expanding also in regional human rights bodies, such as the African and the inter-American human rights systems, and into international law and policy areas as diverse as the environment, including climate change, intellectual property and trade.

In the same vein, it should be noted that the United Nations system has established a number of mechanisms with specific

mandates to address the rights of indigenous peoples through an advisory body of the Economic, and Social Council having the mandate to discuss indigenous issues relating to economic and social development, culture, environment, education, health and human rights.³ In sum, the purpose of this paper is to examine and analyse the Indigenous Peoples rights to health under international human rights law in the wake of COVID-19 pandemic widely recognised under the International Covenant on Economic, Social and Cultural Rights.⁴ Lastly, this paper will examine the COVID-19 pandemic, the attendant World Health Organization regulations and its effect on fundamental rights to health of the indigenous peoples. It may be argued that even when there are no such extraordinary circumstances like COVID-19 pandemic, indigenous people rights to health are rarely respected globally. These views are justified considering the chequered history of rejection of the rights of indigenous peoples, but this paper will be restricted to the indigenous peoples rights to health under the COVID-19 pandemic.

This paper will commence by providing an overview of the indigenous peoples rights in order to demonstrate the importance of right to health to the indigenous peoples. Subsequently, a conceptual clarification of key terms pertaining to indigenous peoples human right. In addition, this paper will examine COVID-19 pandemic and Indigenous Peoples right to health. Also, this paper examines the right to health under international human rights law and through other international legal instruments. In this regard, this paper finalise with conclusion.

Conceptual Clarification

i) Who are indigenous people?

The term 'indigenous peoples' has no singularly authoritative definition under international law and policy, and as well as by the Indigenous Declaration. Ordinarily, indigenous person may be defined as:

One who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognised and accepted by these populations as one of its members (acceptance by the group) these preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.⁵

In short, no formal definition has been adopted in international law. However, a strict definition is seen as unnecessary and undesirable. In addition, it is essential to emphasise that articles 9 and 33⁶ state that:

Indigenous peoples and individuals have the right to belong to an Indigenous Community or Nation, in accordance with the traditions and customs of the community or nation concerned, and that they have the right to determine their own identity.

¹ See GA Res 61/295 UN Doc A/Res/61/295 2007.

² *Cal v. Attorney General*, Claim Nos. 171 and 172 (2007), Para. 101.

³ United Nations Permanent Forum on Indigenous Issues General Comment on Economic and Social Council Resolution 2000/22

⁴ Article 12 of the International Covenant on Economic, Social and Cultural Rights, (1966)

⁵ A. Erica-Irena, "On the Concept of Indigenous Peoples", E/CN-4/Sub. 2/ Ac.4/1996/2, Paras 38/- 382.

⁶ Ibid

In this issues, in order to better understand the definition of the term indigenous people, Martinez Cobo study⁷ provided the most widely cited working definition of indigenous peoples as thus:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them they form at present non- dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identify, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institution and legal system.

In a similar vein, efforts to gain an accurate insight into who are indigenous peoples? Of course, led to the International Labour Organization (ILO) convention⁸ defining it as:

descents of populations, which inhabited a country or geographical region during its conquest or colonisation or the establishment of present state boundaries and retain some or all of their own social, economic, cultural and political institutions.

In all contexts, there seemed to be efforts made to understand the concept of “indigenous by the international labour organisation convention such as:

- i. Priority in time, with respect to the occupation and use of a specific territory
- ii. The voluntary permutation of cultural distinctiveness, which may include language social organization, religion and spiritual values.
- iii. Self-identification
- iv. Experience of subjugation, marginalization, dispossession, exclusion or discrimination”.

The analysis above makes it clear that the term “indigenous peoples” in the Asian context is generally understood to refer to distinct cultural groups, such as “Adivasis”, tribal peoples, “hill tribes”, or “scheduled tribes”, while on the other hand indigenous peoples in Africa are referred to as “pastoralists” “vulnerable groups” or “hunter-gatherers”, it should be noted that from the analysis presented, the Asian context of the term “indigenous peoples” is attributed the positive element of the indigenous peoples definition, even if it satisfies the criteria of the indigenous peoples definition, even if it satisfies the criteria of the indigenous peoples definition, while the negative element of the definition of “indigenous peoples is attributed to the African contest of the definition.

“Conceptually, the right to health is an inclusive right¹³ that is frequently associated with access to health care and the building of hospitals.”

However, in order to understand and correctly appreciate who an indigenous people are under the international conventions, a modern approach should put less emphasis on the early definitions that focuses on aboriginality and instead focused on: Self-definition as indigenous and distinctly different from other groups within a state, a special attachment to and use of their traditional land whereby their ancestral land and

territory has a fundamental importance for their collective physical and cultural survivals, and thirdly, an experience of subjugation, marginalisation, dispossession, discrimination because of their different cultural ways of life or modes of production than the dominant model.⁹

The benefits of this integrated approach are clearly evident in the definition of indigenous peoples since there is no-universally agreed definition. Thus, this paper noted that despite the lack of an authoritative definition, there are three

criteria that help to define indigenous peoples. While this may be desirable in a modern approach, this paper noted that among the three criteria, the criteria of self-identification as the expression of the right to self-determination of indigenous peoples appears widely recognised today.

Given this scenario, Article 33 of the Convention¹⁰ states that, “indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions”. Similarly, International Labour Organization Convention No. 169 also asserts that self-identification as indigenous is a “fundamental criterion for determining the groups” which are indigenous.¹¹

ii) What is the Right to Health?

Conceptually, the right to health is an inclusive right¹² that is frequently associated with access to health care and the building of hospitals. This description is somehow correct, but the right to health appears to have gone beyond that. In a similar fashion, the committee on Economic, Social and Cultural Rights, a body responsible for monitoring the International Covenant on Economic, Social and Cultural Rights¹³ refers to the right to health as “an underlying determinants of health”.

Additionally, the question as to what constitutes the right to health is dependent on the satisfaction of the following definitional requirements –

- first, the right to health must be an inclusive one;
- second, the right to health must contains freedom;
- third, the right to health must contains entitlements;

⁹ See Report of the African Commission’s Working Group on Indigenous Populations/ Communities, Adopted by the African Commission on Human and Peoples Rights (2005), pp 92-93

¹⁰ Article 33 of the International Labour Organization Convention (1989)

¹¹ Article 1(2) of the International Labour Organization Convention (1989)

¹² See General Comment No. 14 on the Right to Health, Adopted by the Committee on Economic, Social and Cultural Rights (1966)

¹³ International Covenant on Economic, Social and Cultural Rights (1966).

⁷ E/CN.4/Sub.2/1986/7/Add.4 Para. 379

⁸ Article 1(1)(b) of the Indigenous and Tribal Peoples Convention, (1989) No. 169

- fourth, health services, goods and facilities must be provided to all without any discrimination; and
- fifth, all services, goods and facilities must be available, accessible, acceptable and of good quality.

Noteworthy in this paper is that, despite the understanding of the right to health, there are still common misconceptions about the right to health. However, it has been misconceived on the following grounds: firstly, the right to health is not the same as the right to be healthy. A common misconception in this regard is that the state has to guarantee a good health. However, good health is influenced by several factors that are outside the direct control of states, such as an individual biological make-up and Social Economic Conditions. In this context, instead of describing the right to health as the right to the highest attainable standard of physical and mental health, it was rather described as an unconditional right to be healthy. Secondly, the right to health is not only a programmatic goal to be attained in a long term. It must be emphasised that the fact that the right to health should be a tangible programmatic goal does not mean that no immediate obligations on states arise from it. Thirdly, a country's difficult financial situation does not absolve it from having to take action to realise the right to health. Furthermore, it is often argued that states that cannot afford it are not obliged to take steps to realise this right or may delay their obligations indefinitely. Nonetheless, no state can justify a failure to respect its obligations because of lack of resources. Keeping in view these three misconceptions, it must be borne in mind that the importance given to the "underlying determinants of health", that is, the factors and conditions that protect and promote the right to health beyond health services, goods and facilities shows that the right to health is dependent on, and contributes to, the realisation of many other human rights. It is relevant to mention that individual's right to health cannot be realised without realising their other rights, violations of which are at the root of poverty, such as the rights to work, food, housing and education, and the principle of non-discrimination.

iii) Principle of Non-discrimination and Equality

In order to provide clarity as to the application of the principle of non-discrimination to the right to health, the principle of non-discrimination and equality are fundamental human rights principles and critical components of the right to health. In other words, the international covenant on Economic, Social and Cultural Rights¹⁴ and the Convention on the Rights of the Child¹⁵ identify the following non-exhaustive grounds of discrimination: race, colour, sex, language, religion, social origin, disability, birth or other status such as HIV/AIDS. In a similar manner, the International Convention on the

Elimination of All Forms of Racial Discrimination¹⁶ also stresses that states must prohibit and eliminate racial discrimination and guarantee the right of every one to public health and medical care. It is argued here that there is no justification for the lack of protection of vulnerable members of the society from health-related discrimination, be it in law or in fact. In this regard, it is pertinent to note that even in times of disaster like COVID-19 pandemic, vulnerable members of the society must be protected.

iv) Indigenous Peoples Rights

Indigenous peoples rights under international law have evolved from existing international law, including human rights treaties to address the specific circumstances facing indigenous peoples as well as their priorities, such as rights to their lands, territories, resources, and self-determination.

It must be emphasised that despite the evolution of the indigenous peoples rights from the existing international law, today, many indigenous peoples continue to face a wide range of human rights issues. In particular, the implementation of the rights of indigenous peoples has remained far from perfect. Aside, from the Declaration on the Rights of the Indigenous peoples by the United Nations,¹⁷ there has been series of violations of their rights ranging from pressures on their lands, territories and

resources as a result of activities associated with development and extraction of resources. Also, their cultures continued to be threatened, and the protection and promotion of their rights resisted. These have remained a human right issue today. More so, it is important to point out the fact that while the United Nations Declaration is the most comprehensive instrument detailing the rights of indigenous peoples in international law and policy, it would appear that it contains minimum standards for the recognition, protecting and promotion of these rights. However, in terms of the obligation to fulfil the rights of the indigenous peoples, the question that remains pertinent is why not uniformly or consistently implement these declarations regularly that guides states and indigenous peoples in developing law and policy that will have an impact on indigenous people as well as devising means that will best address their claims?

In the light of the foregoing, it is relevant to mention that the United Nations Declaration on the Rights of Indigenous People contained some of the most important substantive rights and also under International Law and Policy such as:

a) The right to self-determination, autonomy, self-government and indigenous institutions.

Indigenous peoples as people having long traditions of self-government, independent decision-making and institutional self-reliance over the years have exercised what is now

“no state can justify a failure to respect its obligations because of lack of resources.”

14 Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (1966)

15 Article 2(1) of the Convention on the Rights of the Child (1989)

16 Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (1965)

17 United Nations Declaration on the Rights of Indigenous Peoples (2007)

described as the right to self-determination as an inherent right derived from their political, Economic, Social structures, as well as their cultures, spiritual traditions, histories and philosophies, throughout their histories.¹⁸

“... the right to self-determination has been seen as a fundamental right, without which the other human rights of indigenous peoples, both collective and individual, cannot be fully enjoyed.”²⁶

A key point to note is that, the lack of meaningful involvement of indigenous peoples in decision-making processes, which has resulted in detrimental impacts, marginalisation and a legacy of Economic, Social, Cultural and Physical challenges has of course, raised the questions on what can indigenous peoples do to promote and exercise their right to self-determination? And why is the right to self-determination important for indigenous peoples?

Similar concerns have already been expressed on what procedures should be used for consultations with indigenous peoples? What does free, prior and informed consent mean? According to Articles 3 and 4 of the Declaration, which provides that:

Indigenous peoples have the right to self-determination, they have the right to autonomy and self-government in matters relating to their internal and local affairs.

In the same vein, article 3 of the Declaration mirrors common article 1 of the International Covenant on Civil and Political Rights¹⁹ and International Covenant on Economic, Social and Cultural Rights.²⁰ It must be emphasised that the above overview of the Declaration highlights that the indigenous peoples sees self-determination as a central right recognised at the international level. In this context, the implementation of the right to self-determination also complements the implementation of other rights.

Consequently, given the increasing importance of the Indigenous Peoples Right to determine their own economic, social and cultural development and management, it has become necessary to consult with indigenous peoples and obtain their free, prior and informed consent, which is a crucial element of the right to self-determination.²¹ It is commonly said that the committees that oversee the implementation of common article 1 of the covenants have confirmed that the

right applies to indigenous peoples, among other peoples. This statement does have an essential kernel of truth. In this regard, the committee on Economic, Social and Cultural Rights expressed its concern as follows:

About the precarious situation of indigenous communities in the state, affecting their right to self-determination under article 1 of the covenant, the state parties are to intensify its efforts to improve the situation of the indigenous peoples and to ensure that they are not deprived of their means of subsistence.²²

Another important point to note with regard to the right to self-determination is that the right to self-determination is a collective right held by all members of the indigenous community or nation as a group and must be exercised in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.²³ In a similar fashion, and with regards to all rights in the Declaration, this paper notes that the right to self-determination is universal, in alienable and indivisible. Also, it is interdependent and interrelated with all of the other rights in the Declaration.²⁴ Arguably, while all rights in the Declaration are understood to have equal states, the right to self-determination has been seen as a fundamental right, without which the other human rights of indigenous peoples, both collective and individual, cannot be fully enjoyed.²⁵

According to Article 27 of the covenant,²⁶ it had been generally perceived that individuals rights would be sufficient to ensure adequate protection and promotion of rights with a collective dimension, such as the right to culture. On the other hand, it should be fairly uncontroversial that the Declaration recognises the right of indigenous peoples to autonomy or self-government in matters relating to their internal and local affairs,²⁷ as well as the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the state.²⁸ Also, the Declaration in view of the emerging development recognises that indigenous peoples have the right to promote, develop and maintain their institutional structure and their distinction, customs, spirituality, traditions, procedures, practices and of course, in cases where they exist, judicial systems or customs, in accordance with international human rights standards.²⁹

In the light of the above development, and given the significant challenges on the rights to self-determination of the indigenous peoples, it can be argued that indigenous peoples are distinct from, yet joined to, larger units of social

18 See the United Nations Declaration on the Rights of the Indigenous Peoples, Seventh Preambular paragraph.

19 Articles 3 and 4 of the United Nations Declaration on the Rights of Indigenous Peoples (2007)

20 Article 1 of the International Covenant on Civil and Political Rights (1966).

21 Article 1 of the International Covenant on Economic, Social and Cultural Rights (1966)

22 See “The Final Report of the Study on Indigenous Peoples and the Rights to Participate in Decision-Making” (A/HRC/EMRIP/2011/2).

23 The Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation, (E/C.12/1/Add. 94). Para.11 and 39.

24 Article 46(3) of the United Nations Declaration on the Rights of Indigenous Peoples (2007).

25 See Inter-Agency Support Group on Indigenous Issues, United Nations Development Group Guidelines on Indigenous Peoples Issues (2009) P-27.

26 Special Rapporteur on the Rights of Indigenous People, “The Situation of Indigenous People in Brazil” (A/HRC/12/34/Add.2, 2009), Para. 22.

27 Article 27 of the International Covenant on Civil and Political Rights, (1966).

28 Article 4 of the United Nations Declaration on the Rights of Indigenous of Peoples (2007).

29 Article 5 of the United Nations Declaration on the Rights of Indigenous Peoples (2007).

and political interaction.³⁰ However, it should be pointed out that the question of self-determination is extremely important to indigenous peoples, especially when it serves as a basis for social interactions and meaningful participation in effective dialogue. Indeed, this paper also argued that there are many approaches to achieving effective implementation of the right to self-determination within the state context and of course, the most effective are those that are developed in cooperation with indigenous peoples. Nevertheless, it should be noted that the exercise of the right to self-determination is often expressed through the development of treaties, agreements and constructive arrangements based on the mutual agreement of indigenous peoples and states.³¹

Right to equality and non-discrimination

Interestingly, equality and non-discrimination are significant objectives of, and underpinned both the Declaration and International Labour Organization Convention No 169 on Indigenous and Tribal Peoples. According to Articles 1 and 2 of the Declaration,³² it is relevant to mention that both articles articulate the right of indigenous peoples as a collective or as individuals, to all human rights.

In the strict sense, it means that the recognition of their rights overall is fully justified from an equality and non-discrimination perspective, taking into cognisance the discrimination they have experienced historically as peoples and individuals. It is necessary to mention here briefly that an equality and non-discrimination approach also supports the recognition of their collective rights to their lands, territories and resources as being equivalent to the rights of non-indigenous individuals to their property, as the inter-American Court of Human Rights³³ has held. The important aspect in this regard is that the United Nations Declaration on the Rights of Indigenous Peoples³⁴ provides that:

Indigenous peoples and individuals are free and equal to all other peoples and that indigenous individuals have the right to be free from any kind of discrimination in the exercise of their rights.

In response to the above development and taking into account the real or actual causes of discrimination and inequality as well as discrimination and social economic conditions

“...there are many approaches to achieving effective implementation of the right to self-determination within the state context and of course, the most effective are those that are developed in cooperation with indigenous peoples.”

of the indigenous peoples, the United Nations through the Declaration has specifically call on states to take measure to combat prejudices and eliminate discrimination, promote good relations between indigenous and non-indigenous people; and provided prevention of, and redress for any form of propaganda designed to promote or incite racial or ethnic discrimination directed against indigenous peoples.³⁵

In view of the above, it is worthwhile to asked whether states are ready to eliminate both formal and substantive or defector forms of discrimination: and secondly, why is there

a need to adopt special measures for indigenous peoples in its essence, the elimination of formal discrimination may require that a state's constitution, legislation, regulations or policies do not discriminate against indigenous peoples also, the elimination of defacto discrimination requires states to implement laws and policies that facilitate substantive equality for indigenous peoples in the enjoyment of their rights. The above position is among other things based on belief that the obligation to eliminate discrimination on and provide for equality requires states to regulate the conduct of both public

and private actors, as well as implement policies that provide for substantive equality.³⁶

In the context of indigenous peoples, it may be worth bringing attention to the right to equality and non-discrimination when it comes to indigenous peoples rights. However, this two concepts are viewed as offering a dual protection. It would also incidentally mean that on the one hand, it focuses on the conditions inherently requires to maintain indigenous people's way of life, and on the other, it focuses on attitudes and behaviour that exclude or marginalise indigenous peoples from the wider society.³⁷ Indeed, while it is true that some states maintained that the principle of equality prohibits states from treating any group differently from the other, it should be stressed that in order to achieve substantive equality, it is necessary to treat indigenous people as a distinct group experiencing unique circumstances that deserves the right to equality and non-discrimination.³⁸ According to the committee on the Elimination of Racial Discrimination³⁹:

To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the equal treatment of persons whose situations are objectively the same.

30 Article 34 of the United Nations Declaration on the Rights of Indigenous Peoples (2007).

31 J. Anaya, “The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era” in *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (2009) P. 193

32 Article 37 of the United Nations Declarations on the Rights of Indigenous Peoples (2007), and Expert Mechanism on the Rights of Indigenous Peoples Advice No. 2 (2011) on Indigenous Peoples and them to Participate in Decision –Making, Para-34.

33 Articles 1 and 2 of the United Nations Declaration on the Rights of Indigenous Peoples (2007).

34 Case of the *Mayagna (SUMO) Awas tingi Community v Nicaragua*; Case of the *Sawhayamaxa Indigenous Community v Paraguay*, series C, No 146, judgement (2006).

35 Article 2 of the United Nations Declaration on the Rights of Indigenous Peoples (2007).

36 Ibid, Article 15(2).

37 See Committee on Economic, Social and Cultural Rights, General Comment No 20 (2009) on Non-Discrimination in Economic, Social and Cultural Rights.

38 See E/CN.4/1989/Para 5.

39 A/HRC/EMRIP/2012/4, Para 87.

In other words, the Committee on Economic, Social and Cultural Rights in its own view held that “where discrimination of a particular group has been pervasive, states should take adequate necessary to eliminate such discrimination that are not governed by the principle of international law.⁴⁰ Thus, while some of the more specific content of the committee on the Elimination

of Racial Discrimination and the Committee on Economic, Social and Cultural Rights might address the specifics of discrimination, there is a good argument that policies that discriminate against indigenous peoples cannot entirely exempt indigenous women given their gender status.⁴¹ However, since there is disagreement about this position, it is essential that states empower indigenous women and ensure their participation in the design, delivery and monitoring of programmes; that will affect their collective interest. Also, it can be argued that indigenous traditions and customs most times are discriminatory, especially towards women. This view is predicated on the provisions of Article 46(2) of the Declaration,⁴² which states that:

Any limitation must be in accordance with international human rights obligations. It must also be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirement of a democratic society.

b) Right of indigenous peoples to participate in decision-making

According to Article 18 of the Declaration,⁴³ indigenous peoples have the right to participate in decision-making in matters, which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making. As the wording of Article 18 of the Declaration makes clear, states are to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect their general well-being.⁴⁴ In this context, it is relevant to mention that the institutions of decision-making should be devised to enable indigenous peoples to make decisions related

“...it is essential that states empower indigenous women and ensure their participation in the design, delivery and monitoring of programmes; that will affect their collective interest.”

to their internal affairs, as well as to participate collectively in external decision-making processes.

Free, prior and informed consent

It could be argued that free, prior and informed consent is more than consultation, but that the same conclusion is not necessarily valid with respect to the states obligation to obtain the prior consent of the indigenous peoples before adopting any legislation or administrative

policies that affect indigenous people,⁴⁵ undertaking of projects that affect indigenous peoples rights to land, territory and resources including mineral extraction or exploitation of resources,⁴⁶ relocation of indigenous peoples from their lands or territories,⁴⁷ and/or the storage or disposal of hazardous materials on indigenous peoples land or territories.⁴⁸ Here again, argument to the contrary may be made. It is posited that indigenous peoples who have unwillingly lost possession of their lands, when those lands have been confiscated, taken, occupied or damaged without their free, prior and informed consent are entitled to restitution or other appropriate redress that can include lands equal in size and quality or just fair and equitable compensation.⁴⁹

For analytical reasons, an obvious and fundamental, but sometimes overlooked threshold issue in relation to the principle of free, prior and informed consent generally is the practical application of the principle. As the United Nations permanent forum on indigenous issues⁵⁰ has noted in its report that:

Free should imply that there is no coercion, intimidation or manipulation, and prior should imply consent being sought sufficiently in advance of any authorisation of commencement of activities and respective requirements of indigenous consultation processes. While informed should imply that information is provided that covers a range of aspects.

It is then necessary to state that in order to achieve the practical application of this principle, the process should include the option of withholding consent.

c) COVID-19 pandemic

To understand the term “COVID-19” as used in this paper, it is important to understand that the above term is commonly referred to as “Corona Virus disease 2019”. In other words, COVID-19 is a new disease, and details of its spread are still under investigation.⁵¹ It must be emphasised that the ongoing Corona Virus pandemic is caused by severe acute respiratory

40 International Convention on the Elimination of All Forms of Racial Discrimination (1965), General Recommendation No 32 (2009).

41 See General Comment No 20 (2009) on Non-Discrimination in Economic, Social, and Cultural Rights, Para 12.

42 General Recommendation of the Committee on the Elimination of Racial Discrimination, No 25 (2000), on gender-related dimensions of Racial Discrimination, Para 69.

43 Article 18 of the United Nations Declaration on the Right of Indigenous Peoples (2007).

44 Ibid, Article 19

45 Ibid, Article 19

46 Ibid, Article 32

47 Ibid, Article 10

48 Ibid, Article 29

49 Ibid, Article 28

50 United Nations permanent Forum on Indigenous Issues, “Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous People”, New York, United States, (2005) Paras 46-49.

51 World Health Organization, “Coronavirus very likely of animal origin, no sign of lab manipulation” Reuters 21 April 2020 accessed 19 May 2020.

syndrome Corona Virus 2 (SARSCOV.2).⁵² This paper noted that the outbreak of this pandemic was first identified in Wuhan, China, in December 2019.⁵³ The first step taken by the World Health Organization (WHO) in this regard was to declare the outbreak a Public Health Emergency of International concern on 30 January 2020, and a pandemic on 11 March 2020.⁵⁴ However, available research has shown that as at 17 May 2020, more than 4.66 million case of COVID-19 have been reported in more than 188 countries and territories, resulting in more than 312,000 deaths.⁵⁵

It should be noted that the virus is primarily spread between people during close contact, most often via small droplets produced by coughing, sneezing and talking.⁵⁶ It is most contagious during the first three days after the onset of symptoms, although spread is possible before symptoms appear, and from people who do not show symptoms.⁵⁷ Of course, common symptoms include fever, cough, fatigue, shortness of breath, and loss of smell.⁵⁸ Also, complications may include pneumonia and acute respiratory distress syndrome.⁵⁹ In this context, it is worth noting that the time from exposure to onset of symptoms is typically around five days, but may range from two to fourteen days.⁶⁰

As seen above, it is clear that the pandemic has caused severe global economic disruption,⁶¹ including the largest global recession, which has led to the postponement or cancellation of sporting, religious, political and cultural events,⁶² wide spread shortages exacerbated by panic buying,⁶³ and decreased emissions of pollutants and greenhouse gases.⁶⁴ The further implications of this pandemic was the closure of schools, universities, colleges, and churches either on a nationwide or local basis in 186 countries, affecting

approximately 98.5 per cent of the world's student population.⁶⁵ It is important to emphasise that the general notion about this virus has spread online,⁶⁶ and there have been incidence of xenophobia and discrimination against Chinese people and

against those perceived as being from areas with high infection rates. It is significant to note that the pandemic has resulted to many conspiracy theories and misinformation about the scale of the pandemic and the origin, prevention, diagnosis, and treatment of disease.

2. COVID-19 pandemic and indigenous peoples rights to health

Obviously, indigenous peoples in many regions have a long history of

devastation from epidemics brought by colonisers from the arrival of the first Europeans in the Americas who brought small pox, influenza and a measles outbreak among the Yanonami of Brazil and Southern Venezuela in the 1950s/60s that nearly decimated the tribe.⁶⁷ The COVID-19 pandemic has led to the suspension or restriction of some of the otherwise guaranteed fundamental human rights of indigenous peoples. Chiefly among these rights that have been violated is the right to health. The right to health is an inclusive right.⁶⁸ However, it should be noted that prior to this pandemic, the right to health was perhaps the least respected rights by state actors on indigenous people. This perspective is particularly significant for an understanding of the COVID-19 pandemic, which, has presented a new threat to the health and survival of indigenous peoples within the global emergency zone as well as in society at large. In this regard, it must be emphasised that indigenous peoples in nearly all countries fall into the most "vulnerable health category".

At the same time, the COVID-19 pandemic is disproportionately affecting indigenous peoples, exacerbating underlying structural inequalities and pervasive discrimination. Also they have significant higher rates of communicable and non-communicable diseases that their non-indigenous counterparts, high mortality rates and lower life expectancies contributing factors that increase the potential for high mortality rates caused by COVID-19 in indigenous communities include malnutrition, poor access to sanitation, lack of clean water, and inadequate medical services.

Admittedly, indigenous peoples like all individuals, are entitled to all human rights. Human rights are interdependent,

“The COVID-19 pandemic has led to the suspension or restriction of some of the otherwise guaranteed fundamental human rights of indigenous peoples.”

52 World Health Organization, "Novel Corona Virus – China" accessed on May, 2020.

53 See "The World Health Organization Director – General's Opening Remarks at the media Briefing on Covid-19, 11 March, 2020" accessed May 19, 2020.

54 See "COVID -19 Dashboard by the Centre for systems science and Engineering at John Hopkins University", Arcegis John Hopkins University accessed 19 May, 2020.

55 See "Centres for Disease Central Spreads", 2 April 2020. Accessed 19 May 2020

56 J Hopkins, "Loss of sense of smell as marker of COVID-19 Infection". Ear, Nose and Throat Surgery Body of United Kingdom 2020. Accessed 19 May, 2020.

57 United States Centre for Disease Control and Prevention, "Corona Virus Disease 2019 (COVID-19) Symptoms" 20 March, 2020, accessed 19 May, 2020.

58 See United States Centres for Disease Control and prevention, "Interim Clinical Guidance for Management of patients with Confirmed Coronavirus Disease. (COVID-19)" 4 April 2020 accessed 19 May, 2020.

59 United States Centres for Disease Control and Prevention, "Symptoms of Novel Coronavirus (2019-NCOV)" 10 February 2020, accessed 10 May, 2020.

60 T P Valavan and C.G Meyer, "The COVID-19 Epidemic" Tropical Medicine and International Health 25(3) (200) pp.278-280.

61 "A List of What's Been Cancelled Because of the Coronavirus" The New York Times accessed 19 May, 2020.

62 S Jade, "Why there will soon be tons of toilet papers, and what food may be scarce, according to supply chain experts". 18 March, 2020.

63 J Watts and N. Kommeda, "Coronavirus Pandemic leading to huge drop in Air Pollution" The Guardian Newspaper (London, 23 March, 2020).

64 United Nations Educational, Scientific, Cultural Organization (UNESCO), "COVID-19 Educational Disruption and Response" 4 March 2020 accessed 19 May, 2020

65 R Clamp, "Coronavirus and the Black Death: Spread of Misinformation and Xenophobia shows we haven't Learned from our past" 5 March, 2020.

66 S Tavenise and RA Oppel, "Spit on, Yelled at, Attacked: Chinese Americans Fear for Their Sates" The New York Times (New York, 23 March 2020)

67 P Heather, "How Europeans Brought Sickness to the New World (2015) <https://www.sciencemag.org/news/2015/06/how-europeans-brought-sickness-new-world> accessed 18 July, 2020.

68 General Comment No 14 on the Right to Health, Adopted by the Committee on Economic, Social and Cultural Rights (2000).

indivisible and interrelated.⁶⁹ This means that violating the right to health may often impair the enjoyment of other human rights. It should be borne in mind that the importance given to the “underlying determinants of health”, that is the factors and conditions, which protect and promote the right to health is dependent on, and contributes to, the realisation of many other human rights. It has often been argued that individual’s right to health cannot be realised without realising their other rights, the violations of which are at the root of poverty, such as the rights to work, food, housing and education, and the principle of non-discrimination. Essentially, specific rights that are of particular relevance to indigenous peoples during this crisis, both individual and collective in nature include the right to self-determination,⁷⁰ and the right of indigenous peoples to participate and be consulted on measures that affects them in both general and specific forms,⁷¹ and of course, the requirement to seek their free, prior and informed consent.⁷²

However, the implementation of the COVID-19, restrictions has left much to be desired as it relates to the right to health of indigenous peoples. The impact of COVID-19 pandemic has posed a great risk to indigenous peoples living remotely or in voluntary isolation, who lacked immunity to many infectious diseases. Indeed, it has been argued that the health rights of indigenous peoples were already at risk prior to the pandemic, and the vulnerable situation they are in has been exacerbated by the COVID-19 pandemic, as the underlying challenges have not been addressed by state actors.⁷³ It is also submitted here that indigenous communities are often located in remote, regions, usually left behind with limited or no access to healthcare and medical support. In this regard, it is also relevant to mention that indigenous elders and those with underlying medical conditions are more likely to require urgent and intensive respiratory care, and may have difficulty accessing medical care in these areas. However, it is very much open to question whether the principle of non-discrimination apply to the right to health of the indigenous peoples? Firstly, an understanding of the term “Discrimination” is fundamental. In this context, discrimination means any distinction, exclusion

or restriction made on the basis of various grounds, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of human rights and fundamental freedoms. Thus, it is linked to the marginalisation of specific population groups and is generally at the root of fundamental structural inequalities in society. This, in turn, may make these groups more vulnerable to ill-health.

According to the International Covenant on Economic, Social and Cultural Rights,⁷⁴ and the Convention on the Rights of the Child,⁷⁵ non-discrimination and equality are fundamental human rights principles and critical components of the right to

health. Therefore, it is submitted here that Articles 2(2) of the International Covenant on Economic, Social and Cultural Rights, Article 2(1) of the Convention on the Rights of the Child and of course, Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination thus have created an inseparable connection between non-discrimination and equality, which presupposes that the obligation to ensure non-discrimination requires specific health standards to be applied to particular population groups, such as the indigenous peoples.

This position was endorsed by the Committee on Economic, Social and Cultural Rights that there is no justification for the lack of protection of these vulnerable members of the society from health-related

discrimination, be it in law or fact,⁷⁶ but this paper noted that it does not necessarily reflect current practice today. In a similar vein, it is submitted that states failing to comply with their duty to consult with indigenous peoples on matters affecting them is a deeply rooted challenge that has been an area of concern in recent past.⁷⁷ Therefore, it is argued here that the lack of appropriate mechanisms for the consultation and participation of indigenous peoples in designing, implementing and evaluating measures, which may affect them often leads to responses that are not culturally appropriate and that may not be in conformity with indigenous peoples rights in international law, which of course, include the requirement to seek their free, prior and informed consent. It must be established that consent in this context, has to be genuine, valid, and explicit in order to guarantee their participation in adopting measures to combat the COVID-19 health crisis that directly affects them.

However, it can also be argued that the consent that counts is that which takes into account indigenous peoples distinctive concepts of health, which are inextricably linked

“...the consent that counts is that which takes into account indigenous peoples distinctive concepts of health, which are inextricably linked with the realisation of other rights, including the rights to self-determination, development, culture, land, language and the natural environment.”

69 See Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights, held in Vienna, (1993).

70 Articles 3 and 4 of the United Nations Declaration on the Rights of Indigenous Peoples (2007).

71 See the Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making (A/HRC/15/35) 2010.

72 See Articles 10, 19, 21, 22, 23, 24, 28, and 29 of the United Nations Declaration on the Rights of Indigenous Peoples (2007).

73 See the Statement by the United Nations Expert Mechanism on the Rights of Indigenous Peoples, COVID-19 yet Another Challenge for indigenous Peoples <https://www.ohchr.org/EN/issues/peoples/EMRIP/pages/EMRIP/index.aspx> accessed 19 July 2020.

74 Ibid, Article 2(2)

75 Ibid, Article 2(1)

76 The Committee on Economic, Social and Cultural Rights, General Comment No 14, Para 18.

77 Ibid

with the realisation of other rights, including the rights to self-determination, development, culture, land, language and the natural environment. It can therefore be said that free consent can be given only when both parties possess some measure of independence.

“...the question that remains pertinent is whether these rights to health can be restricted without necessarily subjecting the indigenous peoples to inhuman and degrading treatment?”

Right to health under international human rights law

In light of what have been discussed above, one may be tempted to ask whether the right to health is an integral part of human rights law. However, it must be emphasised that any right to the highest attainable standard of health is regarded as an integral part of human rights recognised in international human rights law. According to the International Covenant on Economic, Social and Cultural Rights, which is widely considered as the central instrument of protection for the right to health, recognises that “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.⁷⁸

However, today, there are many United Nations Human Rights Treaties relevant to the right to health of indigenous women and men. These treaties are as follows: International Covenant on Economic, Social and Cultural Rights (ICESCR),⁷⁹ International Convention on the Elimination of All Forms OF Racial Discrimination (ICERD),⁸⁰ Convention on the Elimination of All Forms of Discrimination Against Women, (CEDAW),⁸¹ and International Covenant on Civil and Political Rights (ICCPR)⁸². In addition to core human rights treaties, health rights of indigenous peoples are covered by a number of other international Instruments, Notably International Labour Organization Convention No 169 concerning Indigenous and Tribal Peoples.⁸³

International Covenant on Economic, Social and Cultural Rights

In response to the right to adequate health care of indigenous peoples and taking into account their vulnerability to pandemics, which tend to deepen existing inequalities and

discrimination, the International Covenant on Economic, Social and Cultural Rights has developed the corresponding rights in the Universal Declaration in considerable detail, specifying the steps required for the full realisation of the right to health of the indigenous peoples. In light of the above, it can be asserted that the right to health, which the Declaration covers as part of an adequate standard of living, has a separate article in the covenant. Thus, Article 12 of the Covenant⁸⁴ recognises the right to the highest attainable standard of physical and mental health as well as specific health-related issues such as environmental hygiene and epidemic and occupational disease. Also, it should be noted that this covenant has codified the right to health as a constituent element of the right to an adequate standard of living.

The above analysis of the legal framework on the right to health for indigenous peoples under the covenant also reveals that all the rights in the international Covenant on Economic, Social and Cultural Rights must be exercised in accordance with Article 2(2)⁸⁵ and Article 3⁸⁶ of the covenant. To be specific, this means that indigenous peoples are entitled to enjoy the right to adequate health during this COVID-19 pandemic without discrimination and equally with the majority population. Similarly, indigenous women are entitled to enjoy the right to health without discrimination and equally with indigenous men and the majority population. In sum, having due regard to the provisions of the covenant which recognises the right to the highest attainable standard of physical and mental health, it is thus important to note that the actions of the security agents in enforcing the lockdown orders orchestrated by COVID-19 pandemic can of course lead to the derogation of these right especially where such persons or group of persons are suffering from infectious or contagious disease, as is presently the case. However, the question that remains pertinent is whether these rights to health can be restricted without necessarily subjecting the indigenous peoples to inhuman and degrading treatment? The obvious answer to the poser is in the affirmative: International convention on the Elimination.

International Convention on the Elimination of All Forms of Racial Discrimination

By virtue of Article 1 and 5 (e) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination,⁸⁷ state parties are prohibits racial discrimination and to guarantee the right to equality in the enjoyment of economic and social rights, including the right to health.⁸⁸ In other words, the convention has adequate provisions for the protection of indigenous peoples health rights. Also, while there is no explicit guarantee in the convention of equality between men and women within racial groups, the Convention General Recommendation xxv deals

78 Article 12 of the International Covenant on Economic, Social and Cultural Rights (1966).

79 International Covenant on Economic, Social and Cultural Rights (1966).

80 International Covenant on the Elimination of All Forms of Racial Discrimination (1979).

81 Convention on the Elimination of All Forms Discrimination against Women (1979).

82 International Covenant on Civil and Political Rights (1966).

83 International Labour Organization Convention No 169.

84 Article 12 of the International Covenant on Economic, Social and Cultural Rights (1966).

85 Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (1966).

86 Article 3 of the International Covenant on Economic, Social and Cultural Rights (1966).

87 Article 1 and 5 (e) (iv) of the International Convention on the Elimination of All Forms of Discrimination (1979).

88 Ibid

with gender-related dimensions of racial discrimination, noting that:

There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men.⁸⁹

It has been argued that while the right to adequate health services to the indigenous peoples has gone beyond a mere humanitarian services in the wake of COVID-19 pandemic, the convention and that except for reasonable cause, the right to health shall not be denied: Convention on the Elimination of All Forms of Discrimination Against Women.

By the provisions of Article 12 of the Convention,⁹⁰ state parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis equality of men and women, access to healthcare services, including those related to family planning. This implies that except for reasonable, the right to health of women shall not be infringed upon. However, it should be noted that several restriction orders across the globe has affected the aforementioned rights of indigenous women. In practice, one will therefore ask is this not a derogation from the convention? The answer must be in the affirmative. It is widely accepted that the language formulation used by the United Nations in the convention is that aimed at protecting women against discrimination and ensuring women's equality in political, economic, social and cultural realms. However, it must be emphasised that the denial of the right to health or discrimination against women in health care services are done in the guise of COVID-19 restriction orders.

“...the denial of the right to health or discrimination against women in health care services are done in the guise of COVID-19 restriction orders.”

International Covenant on Civil and Political Rights

Pursuant to Article 1 of the Covenant,⁹¹ all persons have the right of self-determination. By virtue of this right they freely determine their political status and freely pursue their Economic, Social and Cultural Development. But conversely, it is arguably that in time of public emergency, which threatens the life of the nation and the existence of which is officially proclaimed, states parties may take measures derogating from their obligations under the present covenant to the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, Language, religion or social origin. Ironically, the central theme of the government regulation on COVID-19 is the restriction of freedom of assembly and

association, and not restriction or denial of the right to health of the indigenous peoples. One will as well ask if this is not a derogation from the covenant? The answer must be in the affirmative. Beyond the immediate impact this can have on the indigenous peoples, it is evident that the International Covenant on Civil and Political Rights contained five provisions of particular relevance to this paper as follows:

- a) Article 3 calls for equality between men and women.
- b) Article 1 recognises the right of all persons to self-determination, and to freely determine their political status and freely pursue their economic, social and cultural development.
- c) Article 26 prohibits any discrimination on a variety of grounds including race, national and social origin, property or birth or other status.
- d) Article 17 protects everyone from arbitrary or unlawful interference with their privacy, family, or home.
- e) Article 27 states that ethnic, religious or linguistic minorities should not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

To be fair, one should recognise that, theoretically at least, the above five provisions are particularly relevant to the indigenous peoples, but in an ideal scenario like the COVID-19 pandemic, there is therefore a clash between the indigenous peoples right to health and the rights of the government at all levels to protect the indigenous peoples against infectious diseases

like COVID-19 pandemic.

International Labour Organization Convention No 169 on indigenous and tribal peoples

Despite the relatively conservative language used in the text of the convention,⁹² it is increasingly seen and presented within the United Nations system as the most comprehensive and up-to-date international instruments on the conditions of life and work of indigenous and tribal peoples. However, under Article 25 of the convention,⁹³ health services shall be the sole responsibility of the government and should be provided in such a way that they may enjoy the highest attainable standard of physical and mental health. By a perusal of this Article, it becomes clear that the first two clause (1) and (2) of Article 25 refers to government responsibility to ensure that adequate health services are made available to the people concerned so that they may enjoy the highest attainable standard of physical and mental health, and also health services shall to the extent possible, be community-based. These suggests in both clauses that government should assist indigenous peoples to eliminate socio-economic gaps that may exist between indigenous

89 See The Committee on the Elimination of Racial Discrimination, General Recommendation xxv: Paragraph 1.

90 Article 1 of the International Covenant on Civil and Political Rights (1966).

91 International Labour Organization Convention on Indigenous and Tribal Peoples (1989) No 169.

92 Article 25 (1-4) of the International Organization Convention on Indigenous and Tribal Peoples (1989) No 169.

93 Article 2(2) (c) of the International Labour Organization Convention (1989) No 169.

and other members of the national community, in a manner compatible with their aspirations and ways of life.⁹⁴

On the other hand, clauses (3) and (4) of Article 25 of the convention provides that health care system shall give preference to training and employment of local community health workers and focus on primary health care services and also such provision of health services shall be coordinated with other social economic, and cultural measures in the central. From the above provisions, it becomes clear that the convention in its clauses contains a non-discrimination clauses, which shall be applied without discrimination to male or female members of these population groups.⁹⁵ The convention also emphasises the right of indigenous and tribal peoples to decide their own priorities for the process of development and to exercise control, to the extent possible, over their own economic, social and cultural development. However, it remains questionable whether the aforementioned frameworks would really make a difference when medical practitioners sometimes treat indigenous peoples as objects of treatment rather than rights-holders and do not always seek their free and informed consent when it comes to treatments. In these contest, it seems legitimate to argue that such a situation is not only degrading, but a violation of human rights to health under the conventions. This position is also reflected in the current COVID-19 pandemic, which led to the suspension or restriction of some of the otherwise guaranteed fundamental human rights of the indigenous peoples, particularly the right to health.

Lastly, it is relevant to mention that aside international instruments as rightly noted above, the right to health is also recognised in several regional instruments, such as the African Charter on Human and Peoples Rights,⁹⁶ the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, known as the protocol of San Salvador,⁹⁷ and the European Social Charter⁹⁸. Also, the American Convention on Human Rights,⁹⁹ and the European Convention for the Promotion of Human Rights and Fundamental Freedoms¹⁰⁰ contain-provisions related to health, such as the right to life, the prohibition on torture and other cruel, inhuman and degrading treatment, and the right to family and private life.

3. Conclusion

This paper has largely dealt on the ongoing COVID-19 pandemic and its corresponding health implication on the indigenous peoples constitutionally guaranteed right to health, which is recognised in several international and regional instruments. The phenomenon of COVID-19 is a new infection that perhaps requires strategic interest and protection desired by the indigenous peoples beyond humanitarian paradigm, especially the existing legislations and or the regulatory agencies in place so as to ascertain its functionality in terms of the protection of the indigenous peoples right to health. What this paper has done therefore is to examine whether the existing legal frameworks and policies are tailored towards providing adequate healthcare to the indigenous peoples, rather than passively allowing seemingly neutral laws and policies to benefit mainly the majority groups. This paper has equally examined the concept “indigenous peoples” from different perspectives and of course noted that there are three criteria, the criteria of self-identification, as an expression of the right to self-determination of indigenous peoples appears to be widely recognised today.

Furthermore, it can be concluded that the COVID-19 pandemic experience of the indigenous peoples highlights that their right to adequate healthcare are more than an abstract code or ideological commitment. The health rights of indigenous peoples were already at risk prior to the COVID-19 pandemic and the vulnerable situation they are in has been exacerbated by the crisis as the underlying challenges have not been addressed.

Despite the significance of the fundamental principles of the non-discrimination and equality applicable to the right to health and its enduring effectiveness as operational tools, it is surprising to note that indigenous peoples are traditionally discriminated and marginalised, often bears a disproportionate share of health problem. The principles of non-discrimination and equality are fundamental human rights component of the right to health. Questions are sometimes raised as to the impact of COVID-19 pandemic on indigenous peoples right to participation and consultation. The lack of appropriate mechanisms for the consultation and participation of indigenous people in designing, implementing and evaluating measures, which may affect them often leads to responses that are not culturally appropriate and that may not be in conformity with indigenous peoples right in international law, including with the requirement to seek their free, prior and informed consent.

What proceeds from the foregoing, therefore, is that states should adopt measures to combat the COVID-19 health crisis that directly affect indigenous people since the pandemic has presented even greater risk for the indigenous people when public information on prevention and access to health care is not available in indigenous languages. ●

⁹⁴ Article 3 of the International Labour Organization Convention (1989) No 169.

⁹⁵ Article 7(1) of the International Labour Organization Convention (1989) No 169.

⁹⁶ African Charter on Human and Peoples Rights (1981).

⁹⁷ The Protocol of San Salvador (1988).

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Black Excellence: **Advocate Mojankunyane Gumbi**

By Adv Fhumulani Mbedzi

A human rights lawyer, Advocate Gumbi has worked as both an attorney and advocate and has over 30 years of experience in private practice, public policy development, and African conflict resolution.



Photo:Univen

...as an Advisor to then-Deputy President Mbeki in the Mandela administration, she spearheaded South Africa's economic diplomacy, ensuring a global presence for South African companies."

Advocate Gumbi holds law degrees from the University of Limpopo (former University of the North) and the University of Witwatersrand, as well as a certificate in Trial Advocacy from the University of Texas in Austin. She is the current Chancellor of the University of Venda.

She was a Special Advisor to the former South African President Thabo Mbeki from 1999 to 2008. From 1994 to 1999, as an Advisor to then-Deputy President Mbeki in the Mandela administration, she spearheaded South Africa's economic diplomacy, ensuring a global presence for South African companies. She was involved in peace-making initiatives in the Democratic Republic of the Congo, Cote d'Ivoire, Comoros, Sudan, Lesotho, Somalia, Zimbabwe, Iran, and the Middle East.

In addition to this role, Adv Gumbi advised on domestic policy issues including the reform of the local healthcare industry, the expansion of South African industry to the rest of Africa and the world, as well as banking and mining sector reforms.

Advocate Gumbi was one of South Africa's principal negotiators at the Seattle and Doha rounds of the World Trade Organization and served as President Mbeki's representative to the G8, where she played a leading role in the establishment of the G5 Group (Brazil, China, India, Mexico, and South Africa). She served as President Mbeki's representative in the Progressive Governance Network and continues to advise on several African issues.

Before serving in the Presidency, Advocate Gumbi was an attorney from 1984 and an advocate from 1993. In these capacities, she defended political activists from all political organisations in South Africa. She acted as the Head of the Adjudication Secretariat of the Independent Electoral Commission (IEC) during South Africa's first democratic elections in 1994, bearing the ultimate responsibility within the IEC for the resolution of all disputes arising out of those elections.

She serves and has served on the boards of many companies, trusts, and philanthropic associations including the Nelson Mandela Children's Fund, the Open Society Foundation, African Bank, LexisNexis, PPC, the Southern African Political and Economic Trust, the Black Lawyers Association and the Thabo Mbeki Foundation. Advocate Gumbi also joined the BLA-LEC as a Project Director in the period 1987 to 1989 and subsequently became the Centre's Director.

She served as a member of the Council of the then Technikon Witwatersrand, which is part of the University of Johannesburg, and the Council of the then University of the North, under the Chancellorship of President Nelson Mandela and Minister Kader Asmal as Chairperson of Council. She served as the Ombud of the University of Johannesburg. ● ●

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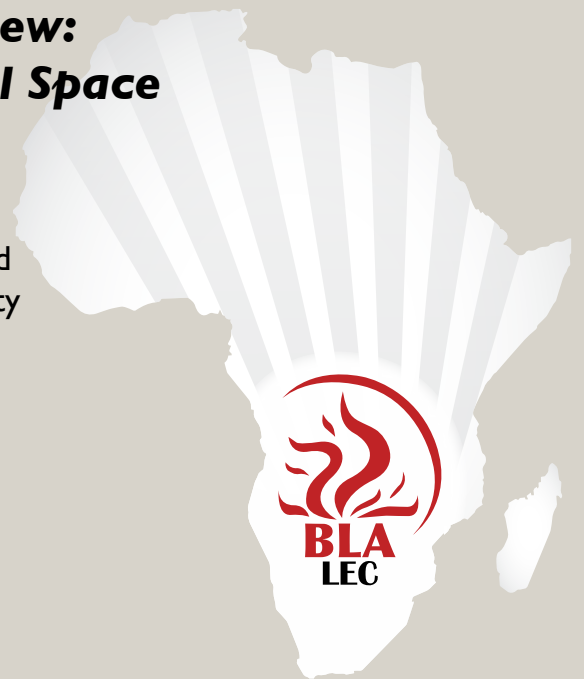
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