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Peacekeeping in Africa: Problems and Prospects

L. Juma*

ABSTRACT

Against the background of an expanded need for peacekeeping, the complexity that its programmes entail, and the belief that it will endure for a long time to come, this article discusses the propriety of international peacekeeping operations, its inherent features and weaknesses in creating or preserving peace, and the role that regional organisations play, or should play, in its enhancement. The article traces the history, albeit in brief, of peacekeeping in the continent while acknowledging the political and economic changes that have transformed its programmes. It also appraises the successes and failures against the background of the challenges that peacekeeping operations have had to contend with. Overall, the article draws the conclusion that much of what will become of peacekeeping in the future will depend on the reform of the UN Security Council and the level of participation of the African Union and sub-regional organisations in peacemaking and peacebuilding initiatives on the continent.

1. INTRODUCTION

The single most emphatic response to African conflicts by the international community has been through peacekeeping operations.¹ With over 54 missions established worldwide since 1948, the prominence of peacekeeping as an instrument of international peace and security cannot be overstated. In 1988, UN peacekeepers were awarded the prestigious Nobel Prize in recognition of their contribution to world peace.¹


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1 With over 54 missions established worldwide since 1948, the prominence of peacekeeping as an instrument of international peace and security cannot be overstated. In 1988, UN peacekeepers were awarded the prestigious Nobel Prize in recognition of their contribution to world peace.
Unfortunately, this evolution has engendered considerable criticism, especially on its viability as conflict reduction and stabilization mechanism. But this is not entirely without cause. Invariably all UN peacekeeping operations in Africa have been poorly managed, with Somalia providing a perfect example. In other cases, UN response to peacekeeping needs have been slow or simply absent, like in Rwanda. The greatest frustration has been the inability of peacekeeping operations to create conditions for sustainable peace. Civil wars in Angola, DR Congo, and even Somalia have continued for a long time with peacekeepers on the ground. Recently, analysts have pointed to the worsening situation in Darfur despite the presence of the UN/AU peacekeeping forces on the ground. Thus, the overall picture that seems to be associated with international peacekeeping is that of dismal resources, incongruence of mission, and even apathy to African problems.

Despite these weaknesses and problems, the need for peacekeepers has not abated. Currently, many nations and humanitarian organisations are demanding for an increased UN involvement in DR Congo. The political crisis in Ivory Coast and the humanitarian crisis currently developing in Zimbabwe have equally attracted calls for peacekeeping interventions.


8 Srebrenica in 1995, which is still remembered as one of the UN’s most appalling peacekeeping blunders. One analyst has summed it up as follows: “Srebrenica was militarily indefensible, but only because the UN military deterrent operated under ambiguous and unwieldy rules designed less to protect Bosnians than to avoid western casualties and obscure the accountability of western governments.”See Charles Lane, New Republic, 14 August 1995. See also, the Report of the UN Secretary General to the General Assembly, “The Fall of Srebrenica” 15 November 1999 (available at http://www.un.org/peace/srebrenica.pdf); See also, Jean-Marie Guéhenno, “On the Challenges and Achievements of Reforming UN Peace Operations,” 14(2) International Peacekeeping (2002), p. 69 at 72.

Somalia, a renewed interest by the international community accentuated by the fear that terrorist elements may have infiltrated the leadership ranks of the Islamic Courts, a group of fundamental Islamist group staking leadership to a greater portion of the country, has already spurred the African Union (AU) into sending a paltry contingent of peacekeepers there.\footnote{The African Union Mission to Somalia (AMISON) was created in January 2007 by the AU’s Peace and Security Council. It is now composed of soldiers from Uganda, Nigeria, Malawi, and Burundi. See also F. Fall, ‘UN Security Council Resolution 1744 (2007) Authorising the AU Mission in Somalia (AMISON)’ 14(5) International Peacekeeping (2007), pp. 675-678.} Given these developments, and the fact that the community of world nations by and large still share the view that the UN should play the central role in matters of international security, peacekeeping is unlikely to vanish from the international peace agenda anytime soon.\footnote{GA Res 58/317 adopted on 5 August 2004 where member states affirmed the role of the UN in the maintenance of peace and security.} Considering too, that the terminology of peacekeeping is slowly expanding to encompass conflict resolution strategies that hitherto had no recourse to the international system, the movement towards its reform is likely to overshadow any quest for its abandonment. And with continental efforts revealing acute paucity of resources needed to sustain lengthy engagements in conflict zones, the role of UN is likely to remain central to any peacekeeping programmes in Africa.

It against this background that this article examines the major constraints that attends to UN peacekeeping in Africa. It takes the view that peacekeeping could be an essential feature in peace-building, human rights enforcement and humanitarian intervention processes if its conceptual base were fortified with a strong normative regime, and its operational aspects matched with adequate resource and structural support.

2. THE NATURE OF INTERNATIONAL PEACEKEEPING

Peacekeeping evolved from a climate of international incongruity rendered by the Cold War superpower standoff. This climate, diminished the UN Security Council’s ability to make effective use of pacific measures to resolve conflicts and/or enforce peace, and threatened to make the entire UN system irrelevant to world security, and its peace functions, moribund.\footnote{See generally, R. Higgins, United Nations Peacekeeping: Documents and Commentary (4 Vols.) Oxford, Oxford University Press (1969-1981).} But world leaders, keen to preserve the image of the organisation, created a role for it in conflict resolution by devising a system of using impartial and non combative force to maintain ceasefires. The idea was based on the assumption that the interposition of “neutral” soldiers between two warring groups may reduce the chances of renewed combat, calm heated passions and ultimately deliver peace. Thus, international peacekeeping was born, and its first soldiers sent to
the Balkans in 1947 under the banner of the UN Special Mission to the Balkans (UNSCOB). The first period was between 1946 and 1956 and is often described as the nascent period; 1956 to 1967, the assertive period; 1967 to 1973 as the dormant period; 1973 to 1978 as the resurgent period; 1978 to 1993, the maintenance period; 1988 to 1993, the expansion period. Recently, Dennis Jett has labelled the period between 1993 to present day as the period of contraction.

Peacekeeping most invariably follows the conclusion of a peace agreement or accord. It does not bring about agreement between the fighting groups, but assists in implementing the agreements already reached. This may occur in situations where parties have agreed to a temporary cessation of hostilities, and the presence of a neutral force will then act as a deterrent measure. Also, it may create a favourable atmosphere for the implementation of other terms of the agreement. In the early days, it was anticipated that these objectives could be achieved without the use of force. However, modern manifestations have seen a continued increase of situations where UN peacekeepers are called upon to use force. Thus, even though the United Nations strategy in internal wars has always been to deny both combatants victory and to persuade them that “the use of force to resolve dispute will not succeed,” as suggested by John Ruggie, peacekeeping is an undertaking that today exceeds the mere stabilisation of a conflict situation. That is why the term peacekeeping has become the “catch all” phrase that encompasses a varying range of tasks which UN forces in a conflict arena are often called to do. In Africa, UN peacekeeping activities have included the general freezing of conflict and maintenance of ceasefires; assisting in disarmament and decommissioning in DR Congo and Sierra Leone; monitoring of elections in Namibia; assisting in the delivery of humanitarian services in the DR Congo and Somalia; reporting on violations of human rights in DR Congo. In some cases they have even prepared the groundwork for the establishment of an

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14 Ibid.
international human rights tribunal. 19

2.1 The Problem of Definition

Despite its prominence, peacekeeping still lacks a proper definition. The word peacekeeping does not appear even once in the UN Charter’s 111 articles. One might argue that the general absence of a formal Charter framework for all peacekeeping operations renders them flexible and thus adaptable to conditions of difficulty upon which they are deployed. But given that the UN functions on the basis of consent and impartiality, the lack of uniformity portends a great risk. Ironically, this is precisely the reason why the UN sponsored Intergovernmental Committee on Peacekeeping Operations, rejected the idea of putting a precise definition on the term. Doing so, they argued, would impose “a straitjacket on a concept whose flexibility made it the most pragmatic instrument at the disposal of the world organisation.” 20 But, such broad use of the term, implied by the lack of concrete legal definition has bred misconceptions and confusion among the players in any arena of conflict – a fact that has limited the debate as to the legal responsibility of a peacekeeping operation or what exactly it ought to accomplish. The misconception may somewhat be a product of deliberate policy machinations of the UN and its collaborators meant to relegate concerns as to the quality of UN engagements in conflict zones and the prospects of establishing a more permanent rapid response force away from the mainstream of international security debate. But, defining the role peacekeepers are expected to play is key to the elimination of false expectations and the determination of the overall success of any mission. 21

Despite the want of definition, a little inference can be drawn from Article 43 which enjoins member states to contribute to the maintenance of international peace and security by undertaking to make available to the Security Council their armed forces and other military resources. Although the formal recognition of peacekeeping as an instrument of international security came in 1965 with the establishment of the Special Committee on

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21 US Senator John McCain in reference to the Somali debacle lamented, “Neither the UN Secretary General, the Security Council, the General Assembly, nor for that matter, the Clinton administration could define the concept in the same way one day to another or from one country to another. To the Americans, peacemaking in Somalia meant feeding a starving people. To the UN Secretary General it meant war lord hunting.” See J. McCain, “The Proper United States Role in Peacemaking,” in D. Quin ed., Peace Support Operations and the US Military, Washington DC, National Defence University Press (1994), p. 97.
Peacekeeping Operations, \textsuperscript{22} still, there has been no clear definition. But the term has gained acceptance within diplomatic circles, international legal community and even within the UN itself as general reference to “the prevention, containment, moderation and termination of hostilities between or within states, through the medium of peaceful third party intervention organized and directed internationally using a multinational force of soldiers, police and civilians to restore and maintain peace.”

Goulding has defined it as a military operation by and under the command of the UN carried out with the consent of parties concerned to help resolve the conflicts between them, but at “the expense collectively of member-states, and with military and other personnel and equipment provided voluntarily by them, acting impartially between parties and using force to the minimum extent necessary.”\textsuperscript{24}

Boutrous Ghali, in his famous treatise, \textit{Agenda for Peace}, defined thus:

“The deployment of a United Nations presence in the field, hitherto with the consent of all parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well. Peace keeping is a technique that expands the possibilities for both prevention of conflict and the making of peace.”\textsuperscript{25}

This characterisation extends the meaning to include, preventive diplomacy, peace-making and peace-building. The four correlative terms were coined out of the effort to surmise an understanding of the UN involvement in conflict situation as a composite undertaking with a myriad of objectives. Indeed, such an understanding emerged as early as 1961 when the idea of “preventive diplomacy” was used in reference to the peacekeeping operation launched in Congo. Then, Dag Hammarskjöld, the UN Secretary General articulated the UN role of “preventive diplomacy” as underpinned by several operative conditions. Firstly, there had to be consent from the state in whose territory the force was to be stationed. The implication was that the state on whose soil peacekeeping was being conducted could halt the activity whenever it pleased.\textsuperscript{26} Perhaps it is for this reason that the Security Council instituted a practice in 1973 of reviewing the mandate of peacekeeping missions every six months. Secondly, the idea of neutrality was made central to the activity of a peacekeeping. This requirement carried as much


\textsuperscript{25} B. Boutrous-Ghali, \textit{An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping}, New York, United Nations (1992), Para. 20.

\textsuperscript{26} The consent here, would relate to all activities to be carried out under the peacekeeping mandate. Diehl has argued that peacekeeping operations must recognise the sovereignty of states. See P. Diehl, \textit{International Peacekeeping} Baltimore, John Hopkins University Press (1993), p. 9.
significance during the cold war as it is today. The neutral image aided the task of creating peace by excluding UN personnel from direct involvement in the conflict. Lastly, the peacekeepers could not initiate the use of force. The UN forces were to rely on the blue flag and helmets, not on weapons, for protection.

These operative conditions have all been challenged in the current genre of peacekeeping engagements. For example, the idea of consent is defeated in situations such as Somalia where the state no longer exists, at least in the Weberian sense. When UN forces are called upon to enforce a chapter VII mandate, then obviously the use of force may be part and parcel of their mission. And as we shall see in this article, peacekeeping is evolving and its operations assuming roles that were never envisaged before. These changes, which are a reaction to the complexity of conflicts, indicate an enduring prominence of peacekeeping as a preferred method of dealing with threats to international peace and security, and confirms the agency of a more fully fledged debate on the future of peacekeeping in Africa.

2.2 A Brief History of UN Peacekeeping in Africa

The beginning of UN peacekeeping in the form that we know today was in 1956 when the United Nations Emergency Force (UNEF) was created in response to the deteriorating situation around the Suez Canal. The Suez crisis began when Nasser, the Egyptian President, nationalised the canal and Israel, Britain and France responded by invading and occupying some parts of Egypt. When the USSR condemned the British and France action and US supported its allies, a division was created within the UN Security Council that completely compromised its ability to find solution to the dispute. Thus, it referred the matter to the General Assembly which under the guidance and influence of the Secretary General, Dag Hammarskjöld, voted for the establishment of UNEF. It should be noted however that when the UN

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30 Situations in which Security Council could be deadlocked were foreseen much earlier. That is why the General Assembly voted in 1950 to retain residual powers under the less developed doctrine of “uniting for peace.” Under this doctrine, the UN General Assembly can meet within 24 hours to consider the matter and make recommendations, including the use of armed force, to members when necessary. The doctrine was used in the Suez crisis when the General Assembly at an emergency special session, a
Security Council referred the question to the General Assembly no reference was made at all to any article in the Charter. \(^{31}\) In the final report to the Security Council, the Secretary General affirmed that the operations would be required to conform to the principles of international law. These principles were understood to include the neutrality of the force, its adherence to the enabling resolution, possession only of those rights necessary to carry out its mission, and the requirement of cooperation of the parties to the conflict. \(^{32}\) Indeed, the Security Council in Resolution 1000 approved these principles to provide guidance in the implementation of the UNEF plan.

In Sub-Saharan Africa, the first peacekeeping operation was established in 1960 in the Congo. Like UNEF, the operations in Congo lacked any explicit reference to the Charter. The crisis in Congo had begun soon after its declaration of independence in 1960. \(^{33}\) The nationalist cause championed by the newly elected Prime Minister, Patrice Lumumba, was challenged by a secessionist movement led by Moishe Tshombe and backed by the Belgian corporate interests. \(^{34}\) The UN action in Congo was propelled by the geopolitical factors as well as the fledging ambitions of its then Secretary General, Dag Hammarskjöld. Imminent in the Congo was the capitulation of the western capitalist ideology of free trade on the face of an entrenched communist thinking espoused by the new African leaders, more especially, Lumumba. This made Dag Hammarskjöld worry about the future of the “sacred mission” that the western world had towards Africa. \(^{35}\) But, Hammarskjöld was also an ambitious man who sought a more assertive role for the UN in conflict situations brought about by the ideological polarity of world politics. \(^{36}\) Thus, when the leaders in Congo appealed for help from the UN to help restore peace in the country, the Security Council readily approved the establishment of United Nations Operations in the Congo (ONUC) mission with an initial mandate of supervising the complete withdrawal of the Belgian forces and to safeguard Congo’s sovereignty. Unfortunately, ONUC became a toothless bulldog in the political quagmire that ensued. Lumumba was murdered in cold blood by factions supported by the US to allow for the ascendancy of Mobutu and his western allied crooks; all these happening in the face of a UN force that had been detailed to maintain the status quo. \(^{37}\)

\(^{30}\) resolution was passed for the establishment of UNEF.

\(^{31}\) See UN Security Council Resolutions 998, 1000 and 1001 of 1956.


\(^{36}\) Some have argued that most of the Secretary General’s actions were influenced by Ralph M bunche, his American adviser. See L. De Witte *loc. cit.* in note 34.

After Congo, the UN was involved in Western New Guinea/West Papua (UNSF) and in Cyprus. There were thirteen missions in all in the period between 1949 and 1988. These missions bore the traditional hallmarks of a peacekeeping operation, which was to observe, monitor and report. UN’s involvement during this period had a veritable success considering the nature of conflicts and the political environment existing at the time. According to Roberts, the achievements of the UN during this period was “modest [but] real: they included the freezing although not the resolution of certain conflicts; some reduction of the risk or extent of competitive interventions by neighbours or major powers, and the isolation of some local conflicts from the east-west struggle, so that the local conflicts did not exacerbate the Cold War.”38 However, after 1988, the nature of conflicts began to change. With the demise of the Cold War, regions of volatility hitherto held together by the superpower standoff erupted, and hostilities within borders escalated into internal wars. In Africa where the immediate post-colonial governments had become autocratic, corrupt and violently opposed to human rights, the end of the Cold War signalled the beginning of a more open and vicious opposition to their rule.39 Indeed in the 1990’s many of such governments were either democratically overthrown or forced to adopt a more plural approach to political governance. This period witnessed an increased threat to peace, thus increasing as well, the demand for UN peacekeeping forces.40

Apart from an expanded need for peacekeepers, the nature of peacekeeping itself began to change. Peacekeeping adopted a complex and multi-dimensional approach to peace, mandated in some cases by the agreements or accords signed by the belligerent parties. And because it attained such a broad formulation, virtually all UN actions in conflict situations fell under the rubric of its peacekeeping function. In An Agenda for Peace, Boutrous Ghali even recommended the use of peace enforcement units especially in case where a ceasefire arrangement needed to be maintained. But this, he insisted, should be done in “clearly defined circumstances and with terms of reference specified in advance.”41 An example was the stationing of UNPROFOR forces in Macedonia in 1992 to discourage possible attacks against that former Yugoslavia Republic.42 In 1995, this force in Macedonia having achieved relative success, acquired an independent status and was named UNPREDEP.43 Its mission ended in 1999.

38 A. Roberts loc. cit. in note 4 at p. 229.
40 A total of 38 peacekeeping missions have been established since 1989 and by 2001, fifteen of them were still operative.
41 See B. Boutros-Ghali loc. cit. in note 55 Para. 44.
The expanded role that peacekeepers were assuming became evident in the UN Transition Assistance Group (UNTAG) programme in Namibia, which has been considered to be one of the most successful peacekeeping operation on African soil.\(^4^4\) Established in April 1989, UNTAG operations departed from the traditional peacekeeping script by undertaking peace building and transitional tasks such as demobilisation and reintegration of former combatants, resettlement of refugees and election monitoring.\(^4^5\) Cases of preventive deployment like the one set up in Central African Republic in 1998 to prevent conflict escalation were also a variation of the traditional principles of peacekeeping.\(^4^6\) The operation was ended promptly after elections and the formation of a new government in 2000.

Peacekeeping experiences after Namibia and Central African Republic have been similarly complex, but less successful. Scholars assessing the overall effectiveness and successes of missions in Angola, Somalia, Sierra Leone, Eritrea and even DR Congo have alluded to their rather dismal accomplishment. In Angola, Rwanda and Somalia, conflicts continued after the conclusion of peacekeeping operations. Somalia was a distinct case because the UN efforts were even aided by the direct involvement of US forces. The fact that the conflict continued after both the US and UN forces left, pointed to the not so rosy future for peacekeeping enterprise in the African soil. Overall, these missions have reinforced the cynical feeling that as far as Africa is concerned, the international efforts to create peace have only brought in minimal returns.

3. THE PROBLEMS OF PEACEKEEPING

A myriad of problems bedevil peacekeeping operations in Africa and lack of normative supervision is just one of them. In almost all cases, the UN peacekeeping force has been invariably small, have little resources in terms of major armaments, have restricted mandate and lack popular political support to engage in full scale war. The UN’s inability to meet its financial goals has been particularly debilitating for its peacekeeping programmes because it has resulted in massive reduction in resources needed for the reimbursements to governments supplying troops, payments of services rendered by commercial contractors and to meet the general operational costs.\(^4^7\) Coupled with structural


\(^{4^6}\) The United Nations Mission in the Central African Republic (MINURCA) was established under UN Security Council Resolution 1159 of 27 March 1998. Its mandate was initially to help maintain and enhance security around Bangui and monitor the disarmament process. But later, it became involved in presidential election monitoring and even destruction of weapons.

\(^{4^7}\) The UN budget for peacekeeping in Africa towards the end of the 1990’s was close to $ 1 billion. In 2000
inefficiencies, poor planning, inchoate mandate and logistical difficulties, peacekeeping in Africa has an enduring image of failure. Writing about the UN peacekeeping experience in Somalia, Mohammed Sahnoun has noted;

“The legacy of the cold war is being felt in the ineptitude of the UN structures and in the waste of human resources … the current system is not adapted to the post cold war international environment and routinely reacts to crisis through improvisation, this explains why there are so many delays and contradictions in the UN’s response to crisis, for instance incapacity to respond to the crisis in Somalia.” 48

On the structural inefficiency of the operation, he wrote;

“The existing UN structure are not at all adopted to the requirement of the new are, especially in apprehending the whole problem of conflict between and within states … The UN recruitment process does not necessarily respect the criteria of competence and experience … Even less regard is given to the criterion of commitment.”49

Invariably the problems of modern day peacekeeping are the same with any other problem that a multilateral force could face in any joint military undertaking. These may include lack of coordination, resentments, the blame game, tensions between the UN and national forces in the course of the intervention, and also, the enduring confusion within the military chain of command. But, to understand how these factors came about and why they affect the peacekeeping operations in Africa so tragically, it is appropriate to examine the issue of unilateralism and self-interest of big powers that often infect collective conflict management programmes with confusion as to render them incapable of achieving their mandate; the protection of peacekeepers under international law; the overall issue of UN reform which will most certainly inject new ways of thinking into the peacekeeping programme.

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47 the budget was projected to reach US $ 2.5 billion. For the period between July 1 and June 2002 alone it peaked US $ 2.74 billion, while July 2002 to June 2003, US $ 2.63 billion. See UN Department of Public Information, 2003.
49 Ibid.
3.1 Unilateralism and Self Interest

The period after 1998 has witnessed considerable restraint by powerful nations in their participation in UN peacekeeping activities. This reluctance emanates in part, from what has been an enduring dissonance on the ideological conception of the UN’s role as the sole arbiter of international disputes and the pursuits of “national interest.” Whereas by the spirit of the Charter, individual members pronounced a considerable session of authority to the UN, the demise of the cold war strangely bred some competition between the new world powers and the international body. And it is this competition that has greatly undermined the UN’s work in trouble spots in Africa. But the UN cannot be faulted in this regard. In fact, the successive UN leadership has constantly lamented their inability to function independently for fear of losing legitimacy in the eyes of the power wielders. On the other hand, recent military events in Afghanistan and Iraq demonstrate that powerful nations are frustrated by the UN approach to security and are delineating certain conflicts as demanding of their direct intervention. Such nations have pleaded and justified their actions on account of their “national interest.” Thus, the concept of “national interest” has become a benchmark for the legitimisation of unilateral military action abroad, irrespective of whether such action render an aberration to the multilateral approach that traditionally relied on consent and impartiality.

Trends are now emerging where powerful nations aggressively advocate for the contraction of regimes that protect the integrity and independence of smaller nations, and thus diminish the political, as well as the normative relevance of the UN in the pursuit of world peace. For this reason and others, peacekeeping is engendering the conception that it is motivated by self/national interest rather than the moral compulsion to do good.

As regards peacekeeping, especially in Africa’s trouble spots, the marked reduction or absence of forces from the permanent members of the UN Security Council is telling of their diminishing support of the multilateral approach to peace. In Sierra Leone for example, the bulk of the UN peacekeeping tasks were performed by developing countries. The US did not contribute even a single soldier to the UNAMSIL mission, while China had six, France had one, and United Kingdom had 22. In DR Congo, the figures were almost the same: the US had none, while China had 10 and

53 Neack has argued that the commitment to peacekeeping by industrialized nations is borne out of their desire to maintain the status quo. See L. Neack, “UN Peacekeeping: In the Interest of Community or Self?” 32 (2) Journal of Peace Research, (1995), p. 182.
54 Countries which contributed forces were Bangladesh, Ghana, Guinea, Kenya, Nepal, Nigeria, Pakistan, Ukraine and Zambia. See T. Neethling loc.cit. in note 3.
United Kingdom had six. The majority of forces in MONUC mission come from Uruguay, Morocco, Senegal, Ghana, Tunisia, Bolivia and South Africa. The figures above are troubling, not only because they indicate the apathy towards multilateralism, but because in all these areas the absentee nations maintained a reasonable military presence, though not within the control of the UN, allegedly to protect their nationals. For example, despite reluctance to participate in the UNAMSIL force, the United Kingdom despatched a strong military team of 550 marines complete with necessary hardware to Sierra Leone in May 2000.55 The same happened in Somalia, though in that case there was little collaboration but with a poor management strategy. Added to the presence of private security firms, which often find their way into rich mineral zones, the military situation in any theatre of conflict is often a convoluted one.56 That is why transnational networks of multinational corporations, profiteers and gun runners are able to peddle their trade and indeed prolong the war.

However, whenever powerful nations elect to participate in a joint peace mission, the commanders of their national armies are often reluctant to cede their command to the UN, especially when the mission has inherent military risks. This has on many occasions forced the UN to authorise individual nations to take a lead role in a conflict. This may happen despite the UN force being already on the ground. Usually, such moves may dilute the image of impartiality that the UN is supposed to project and may result in an organisational quagmire. The experiences in Rwanda in June 1994 and to some extent, the Syrian presence in Lebanon, are good examples. But crucially, such lack of coordination may result in loss of lives. In Somalia for example, the Italian contingent merely watched as Nigerian soldiers were being killed, apparently because they had instructions from their government not to intervene. And yet both groups were part of the UNISOM II force.57

3.2 Protection of Peacekeepers

Peacekeeping infers neutrality. Whether this should provide a benchmark for consigning special status to UN forces engaged in peacekeeping does raise an intricate legal issue. Under the Geneva Conventions, all parties operating in a theatre of war, UN soldiers included, are subject to the same law.58 The idea

55 Ibid at 54.
57 See K. Monnakgotla loc. cit. in note 29.
58 See Common article 2 of the Geneva Conventions (1949).
was to impose a common standard of conduct on all warring parties. Thus, the Convention does not offer any special remedies to UN personnel attacked while performing peace duties. There has been a mounting concern that UN peacekeepers should not be inhibited by the laws of war since their mission is to bring the war to an end anyway, and in any event their role was passive in nature. Legalists also argued that the UN was technically not a party to the Geneva Conventions. These concerns were never vitiated even by the fact that UN soldiers performing enforcement action under Chapter VII were actually engaging in combat.

When attacks on UN personnel increased in the late 1980s and early 1990s, the quest for creating a legal regime for their protection gathered momentum. In 1994, a series of deliberation within the UN culminated in the adoption of the Convention on the Safety of United Nations and Associated Personnel on 9 December 1994. The convention created a regime for the prosecution and extradition of persons who attacked personnel performing UN mandated duties. Article 2(1) of the convention defines UN mandated operations as operations established by the “competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control.” This covered peacekeeping operations as well as other peace related functions the UN may institute in situations of war. Excluded under its ambit were UN operations authorised by the Security Council under chapter VII which involved combat. Such operations were left to the regulations of the laws of war, by implication the Geneva conventions. The convention offered protection to all personnel whose activities were “in support of the fulfilment of the mandate of a United nations operation.” These include “United Nations personnel” and “associated personnel.” For international NGO operating in conflict zones, protection was only available if they had some contractual link with the UN.

Despite this convention, peacekeepers in Africa are still exposed to many risks. In the Sierra Leonean civil war, the RUF rebel faction of Foday Sankoh refused to acknowledge the role of UN peacekeepers. In May 2000, it captured and detained 500 UN peacekeepers and killed about four soldiers who were part of the Kenyan contingent. At the same time that the UN

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61 Ibid article 2(2).
Secretary General was pouring vitriol over the criminality of these actions, another Sierra Leone faction kidnapped 30 UN personnel. Eventually, the UN soldiers were released on negotiations spearheaded by Charles Taylor, the tyrant in Liberia, himself a war criminal. In March 1994, Pakistani soldiers who were part of the UNISOM II mission in Somalia were brutally killed by forces allied to General Aideed. On 25 February 2005, nine Bangladeshi peacekeepers, part of the UN peacekeeping mission in DR Congo known by its acronym MONUC, were killed by militias of the Front Nationaliste Integrationiste (FNI) in Ituri district. The conflict in Darfur is even posing greater challenges. Early last year, peacekeepers were attacked by Sudanese government forces while conveying food and fuel to their camps in Western Darfur. In July, peacekeepers were ambushed by rebels and seven of them were killed. Obviously the current regimes of international law are not affording peacekeepers the needed protection. It could be as well, that the complexity of the current genre of peacekeeping programmes, are making lives vulnerable. Both these factors indicate an urgent need for reform, not only of the peacekeeping programmes themselves, but of the UN system in general.

4. REFORMING THE UNITED NATIONS

When the curtain fell on the Soviet Union in the early 1990s, the then UN secretary General Boutros Boutrous-Gali’s indicated a new role for the UN that would comprise preventive diplomacy, peacekeeping and peace making. In his widely published book, Agenda for Peace, he observed that exclusive and absolute sovereignty had outlived its usefulness and tasked world leaders to “find the balance between the needs of good internal governance and the requirements of an even more interdependent world.” Embodied in this thinking was the view that with appropriate enhancement of capacity and minimal political encumbrance in the formulation and implementation of mandates, the UN Security Council could be an all powerful body capable of responding to every conflict urgently and decisively. This view carried the UN into Rwanda, Somalia and Bosnia, but with little returns. The Somali debacle already alluded to earlier, the capture and subsequent slaughter of over 7000 people in Srebrenica under the nose of UN peacekeepers, and the Rwandan
genocide, were damning experiences that evoked considerable criticism of the UN peacekeeping project.  

When Kofi Annan came on board, he was forced to retrace the steps and seek a new definition for the role of the UN in conflict resolution. He acknowledged that his organisation clearly lacked capacity to deal with all the problems that needed its attention. He advocated for reforms on peacekeeping and UN in general, as well as capacity enhancement programmes that would put more responsibility of regional and sub-regional security arrangements. The Security Council in its present form, he said, reflected more or less the geopolitical situation in 1945 and that it was still possible to have a small council but that which was “also representative and thus has also greater legitimacy.” His views on regionalisation were that “reinforcing the capacity of African countries to operate in peacekeeping missions,” remained a key priority, whether such activities were to be conducted under Security Council supervision, or on the direction of regional bodies themselves. So far, the twin issues of reform and regionalisation dominate the discourse on peacekeeping in Africa and are likely to shape the future of any normative growth in this field.

4.1 Peacekeeping and the Security Council Reform

For more than a decade now, the issue of reform has been at the forefront of the UN debate. With regard to peacekeeping, the debate envisages on the one hand, changes related to internal capacity building, which targets the composition of Security Council, and on the other, those related to logistical and operational aspects of the peacekeeping operations themselves, which may include mandate setting, rapid deployment and all other related matters. The demand for change have arisen against a backdrop of a diminishing trust between the member states and the UN as far as planning and implementation of peacekeeping programmes are concerned. Indeed, member states who contribute forces have demanded much more visibility and participation in the deliberations affecting their deployments. During the General Assembly debate on the 1997 Annual Security Council Report, some member countries made strong representations at the General Assembly, expressing a general concern for lack of progress in this regard. Canada’s representative complained that despite his country’s participation as a leader of the multinational force in

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68 See the report by an external panel commissioned by the secretary general and led by Ingvar Carlson of Sweden, on the UN role in Rwandan Genocide; Report of the Secretary General pursuant to General Assembly Resolution 53/35 (1998) – The Sebrenica Report loc. cit.in note 7.


70 T. Neethling loc. cit. in note 3 at 59.

Zaire, it was kept out of the council consultations with representatives of NGOs.\textsuperscript{72} Currently, the UN Security Council’s use of informal consultations has also evoked criticism from some nations who see it as a way of excluding a broad participation in its decision making processes. Also, the overwhelming influence of the five permanent members on the Security Council decisions, which has resulted in the perception of the UN as a mere mouthpiece of strong nations, has come to bear upon the debate.

Ahead of the millennium summit of 2000, Secretary General Kofi Annan, appointed a panel of nine experts led by Lakhadar Brahimi, the former foreign minister of Algeria, to look into the future of the UN peacekeeping. The panel submitted its report for consideration by member states at the millennium summit. The Report made recommendations that were in line with what most critics had already surmised. Ranging from the creation of enhanced analytical capacities to best understand conflicts, contingency planning by UN Security Council ahead of any mission, clear mandates, to rapid deployment and funding, the report shifted the burden from UN administration to the stakeholders to find new ways of collectively dealing with conflict situations. Its overall conclusion that “when the UN does send its forces to uphold the peace, they must be prepared to confront the lingering forces of war and violence with ability and determination to defeat them,” set a blue print for the reorganisation and strengthening of the peacekeeping programme. Unfortunately, not much was achieved by way of implementation other than the meagre readjustments of personnel at the Department of Peacekeeping Operations (DPKO) in New York. In the usual characteristic of the UN, the Brahimi report was shelved awaiting another crisis.

Despite the foregoing, the quest for reform continued to plague UN politics. In 2004, the Secretary General appointed yet another committee, this time to investigate the “threats, challenges and change” that would confront the UN in the future and to “make recommendations for strengthening the United Nations so that it can provide collective security for all in the twenty-first century.”\textsuperscript{73} The panel was chaired by Anand Panyarachun, former Prime Minister of Thailand, but with members drawn from United States, Russia, United Kingdom, Japan, China, France, Australia, Norway, India, Pakistan, Brazil, Uruguay, Egypt, Ghana and Tanzania. Its report, submitted in December 2004 dealt with issues spanning the spectrum of international security concerns: use of force and self-defence,\textsuperscript{74} peacekeeping and peace enforcement,\textsuperscript{75} terrorism and transnational organised crime,\textsuperscript{76} weapons of

\textsuperscript{72} Press Release, GA/9339 of 29 October 1997.
\textsuperscript{74} \textit{Ibid} 53-58.
\textsuperscript{75} \textit{Ibid} 58-60.
\textsuperscript{76} \textit{Ibid} 45-51.
mass destruction, poverty, diseases, and the environment. On Security Council reform, the panel recommended the enlargement of membership from fifteen to twenty four, the nature of their appointment and functions based on two models. Under the first model, six of the nine additional seats would be permanent, while the other three would add to the non permanent seats and thus raise their total to thirteen. The new permanent members would come from Europe (Germany), two from Asia-Pacific (Japan and India), one from the Americas (Brazil), and two from Africa (Nigeria and either Egypt or South Africa). None of the members would enjoy any veto rights. The second model would not alter the current arrangement except to create 8 new seats to be held on a four-year renewable term and distributed equally among the regions; one new seat of a non permanent nature, two-year non renewable seat and the rest of the eleven seats in this category to be distributed to Africa (4 seats), Asia-Pacific (3 seats), Americas (3 seats) and Europe (1 seat).

The rationale for reform of the UN Security Council is articulated as being a factor of greater “credibility, legitimacy and representation” which the organization now aspires. The panel treaded the thin line by attempting to balance the interests of those who contribute more to the activities of the Security Council and the overall questions of “representativeness” of the Council. This issue is not new to international politics and the UN in particular. With many nations from the developing world joining the UN in the later part of the last century, the pressure to make the world body more responsive to the problems of poorer nations has become a prescient feature in world politics, more or less defining frontiers of the debate on the future relationship between the stronger and more influential members of the UN and their weaker counterparts. With the spate of current conflicts depicting patterns of economic inequality disguised in ethnic and identity schisms, and the international politics paying homage to unsubstantiated theories such as clash of civilisations, it is unlikely that we shall see reforms in the manner suggested in the report, or any other manner, very soon. The world may need to overcome its economic and social differences first, and that seems very unlikely.

The other dimension that has become vital in conflict management is coordination, both external and internal. In all conflict situations there are many actors involved in activities related to peace-making, peacekeeping and peace-building. Invariably, such actors will rely on the UN to necessitate a medium for coordinated action. At the very minimum, coordination infers a joint system for the prioritisation of needs, planning of programme activities and the systemic allocation of resources. All actors must have a common

77 Ibid 38-45.
vision, agree to the division of labour depending on individual strengths and advantages, and perceive of the UN as capable of providing leadership. In an atmosphere of mistrust perpetuated by the apparent arrogance and unilateral military pursuits by powerful nations, it may not be possible not even in the distant future for the UN to assume such a role. Somalia has taught us that the purpose of peacekeeping is not usually fulfilled when members of the UN force are disjointed and unaccountable to each other and to the UN.

5. THE ROLE OF REGIONAL ORGANISATIONS

The new threats to international peace and security that emerged in the 1990s have widened the UN Security Council’s strategy in dealing with conflicts, especially as it claims the Charter mandate to intervene in internal conflicts without the encumbrance of sovereignty principles. The use of chapter VII in cases of humanitarian crises has in turn forced the UN to respond to the demands of complex conflict situations, stretching its ability, sometimes to unmanageable proportions. Such was the situation in Somalia, Sierra Leone and DR Congo, which as mentioned in the foregoing paragraphs, have made peacekeeping and the efforts of UN Security Council in this regard come under a barrage of criticism. Such criticism has had the effect of lessening the UN appetite in participating in peace efforts in Africa.  

Indeed, as Atwood has noted, “each time UN forces are successfully challenged or overwhelmed by those who oppose a peace mandate, serious damage is done to the United Nations. Each time the forces of anarchy triumph over global governance, it is more difficult the next time … to prevent conflict or preserve peace.” The current state of UN peace action in Africa has been summed up as follows: “the UN peacekeepers are either conspicuously absent from the region or, if present, have had their roles substantially marginalised.” Thus, while the role of the UN Security Council remains pivotal to the pursuit of international peace, a new wave of thinking is emerging that favours an approach that lends more latitude to regional organisations, ad hoc coalition of states and even individual states to undertake peacekeeping operations in their backyard. According to the UN Secretary General:

80 In 1993, there were over 70,000 UN peacekeeping personnel deployed around the world. This number dropped to about 43,000 in 2002. The expenditure drooped from US $ 4 billion to just around US $2.6 in the same period. See UN Department of Public Information, 2002.


83 The reasoning is seeping through all initiatives aimed at redeeming Africa’s deplorable economic state. The commission for Africa, which was formed through the efforts of the British Prime Minister Tony Blair, wrote in its report that the starting point for Africa’s redemption is in the recognition that continent “must drive its own development.” The commission warned that in absence of such home grown initiative, no amount of external help will be suffice to lift it out of the doldrums of poverty, disease and conflicts. See Our Common Interest: Report of the Commission for Africa, March 2005 (Available at http://www.reliefweb.int/library/documents/2005/cfa-afr-11mar.pdf).
“The United Nations does not have at this point in its history the institutional capacity to conduct military enforcement measures under chapter VII. Under present conditions, ad hoc member states coalition of the willing offer the most effective deterrent to aggression or to escalation or spread of an ongoing conflict. As in the past, a mandate from the Security Council authorizing such a course of action is essential if the enforcement operation is to have broad international support and legitimacy.”84

From 1996, the UN Security Council began to rely on regional security arrangements to take up peacekeeping in their regions in a rather unprecedented scale: the North Atlantic Treaty Organisation (NATO) took over peacekeeping tasks in Bosnia and Herzegovina, the Economic Community of West African States (ECOWAS) in West Africa and Commonwealth of Independent States (CIS) in the Caucasus. It should be noted however, that the regional peacekeeping initiatives were faced with the same problems that confronted the UN initiatives in the same period, thus reducing their chances of ever making an impact. But their greatest challenge emanated from the lack of universal legitimacy. Most internal conflicts within Africa have a regional dynamic that eliminates impartiality among neighbours. When the Nigerian led ECOMOG forces moved into Liberia and later, Sierra Leone, to help restore peace in the outbreak of civil wars in these countries, their participation received tacit approval from the UN despite some very revealing incidences of excessive authority on the part of its soldiers.85 However, when Zimbabwe, Rwanda, Uganda, Angola and Namibia sent their armies into DR Congo to fight for and against the puppet government of Laurent Désiré Kabila, and the whole Great Lakes region threatened to flare up in war, the UN led series of condemnation against these governments.86 The problem is that of legitimacy. In the latter case for example, the interveners aggravated rather than solved the problem, forcing the UN to increase its presence. There were some relative successes as well. In 1997, an inter-African force (MISAB) comprising of 800 soldiers from Burkina Faso, Chad, Gabon, Mali, Senegal and Togo were deployed in Central African Republic to monitor the implementation of the Bangui peace agreements. The UN Security Council had approved the operation under Resolution 1125 of August 1997. The force was given a chapter VII mandate which was to extend until 15 April 1998.

86 L. Juma loc. cit. in note 34.
In the current climate where developed nations have shown lack of interest in Africa conflicts, the burden of peacekeeping will fall on African nations themselves. Indeed, the AU, the new continental body that has inherited the problems of OAU, has indicated willingness to get more involved in conflict solving than in the past. In February 2003, AU established its first ever peacekeeping mission in Burundi (AMIB).\footnote{The deployment consisted of 1,600 troops from South Africa, 217 from Mozambique and about 1000 from Ethiopia.} According to the AU, the mission was to oversee the implementation of ceasefire agreements, support disarmament and demobilisation initiatives and the reintegration of combatants, ensure favourable conditions for the establishment of a UN peacekeeping mission, and contribute to political and economic stability in Burundi. AMIB’s mission has been hampered by funding problems. In May 2004 the UN took over its operations and established the United Nations Operations in Burundi (ONOB) mission.\footnote{UN Security Council Resolution 1545/2004 adopted on 21 May 2004.} The dismal performance in Burundi has not dampened the AU efforts. Towards the later half of 2004, the AU Peace and Security Council established another peacekeeping mission in Sudan (AMIS) to monitor a fragile ceasefire between the warring factions. AMIS had a meagre force of only 7000 but was instrumental in forging a peace deal in May of 2006. But its tenure could not be sustained due to lack of resources. In December 2007, AMIS was replaced by United Nations Mission in Sudan (UNAMID).\footnote{UN Security Council Res. 1564 of 2007.}

Much of the AU’s work today and in the future will be constrained by paucity of resources. With an annual budget of just about US $ 158 million (2004) of which only about 6% goes to the peace fund, the organisation cannot possibly institute and maintain its peacekeeping programmes. All UN peacekeeping missions in Africa have budgets far exceeding that of the AU. For example, the United Mission for the Referendum of Western Sahara (MINURSO) costs up to US $0.04 billion a year;\footnote{J. Cilliers, “UN Reform and Funding Peacekeeping in Africa,” 14 (2) African Security Review, (2005), p. 67.} United Mission in Sudan (UNMIS) has a projected budget of US $ 1 billion a year; the MONUC mission in DR Congo, US $ 746 million; United Nations Mission in Ethiopia & Eritrea (UNMEE), US $ 216 million a year.\footnote{Ibid.} Even the ONOB mission which the UN took over from AU has an annual budget of US $ 329.71 million a year. The AU has traditionally relied on donor funding, but with the general diminishing interest in Africa’s affairs, the continent will be forced to devise more innovative ways of covering the rising costs of its peace programmes. More importantly, it will need to develop broader and more cost effective programmes for conflict management that takes into account the unique circumstances of its peoples.
6. CONCLUSION

The general conclusion that the peacekeeping process has generally brought about minimum returns in terms of instigating peace and restoring order in regions afflicted by war, may not be entirely without cause. Undoubtedly, most peacekeeping operations have been patchy, ad hoc and sometimes contingent upon the interests of powerful states. But that apart, it should be realized that the circumstances of the world we live in today make demands on the military and resource capability of the UN more than was ever the case a few decades ago. Further, international peacekeeping is still the most available method of confronting Africa’s intractable conflicts that finds favour in the realm of international politics. That they often face challenges is a matter that speaks to the want of consensus amongst all the parties; poor timing; complexity of missions and their mandate; weaknesses in planning, including lack of proper balance and command of the multinational forces; poor vision on transitional arrangements from military to civilian authority; insufficient financing considering that some of these conflicts may continue for many years; and a host of other factors that have often been the subject of criticism of the UN process everywhere.\footnote{D. Bratt, “Explaining Peacekeeping Performance: The UN in Internal Conflicts,” 4(3) \textit{International Peacekeeping} (1997), pp. 45-70.} International peacekeeping is still an important process that Africans must be grateful for. Indeed the focus should be on how to improve its processes so that it becomes more viable and beneficial. This article has assisted in this endeavour by examining some of the problematic aspects of peacekeeping and the efforts being made to surmount them.
Some contemporary challenges facing family law in Botswana*

E.K. Quansah**

ABSTRACT

Family law in general and family relationships in particular are undergoing tremendous changes worldwide due to societal changes in the basic assumptions underlying these concepts. Inevitably, such changed perceptions are bound to influence attitudes towards family relations in Botswana in the context of the so-called global village. This paper addresses some of the challenges posed by this phenomenon to family law in Botswana and argues that there are aspects of Botswana family law which need to be reappraised in order to bring them in conformity with new social realities of today. The paper concludes with a plea that the courts and the legislature should endeavour to carry the people with them in this attempt to fashion a socially responsive legal dispensation for family relations in Botswana.

1. INTRODUCTION

The family, an institution of great antiquity, is regarded as the basis of every society, from the primitive to the most complicated. Consequently, the law has always taken a keen interest in the relationships between family members. The concept of “family” may encompass the so-called nuclear family which consists solely of a married man and woman and their offspring and also the extended family which includes, in addition to the married couple and their children, the spouses of those children and other family relations. In this

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2 See for example, the Marriage Act, 2000 (An Act making provisions for the solemnisation and registration of marriages, including customary marriages); Married Persons Property Act 1970 (An Act regulating aspects of property of married persons); Deserted Wives and Children Protection Act 1962 (An Act providing for making orders for the maintenance of wives and children who have been deserted) and the Abolition of Marital Power Act 2004 (An Act providing, inter alia, for the abolition of the marital power and the unity of matrimonial domicile).

3 The contents of the nuclear and extended families may vary depending on whether one is looking at them from a typical African perspective or from the Eurocentric perspective. In the Ghanaian case of Ampomah and Others v. Budu [1989-90] 2 G.L.R. 291 (SC) at p. 293 for example, the Ghana Supreme Court described the customary family, which may be patrilineal or matrilineal, as follows: “In a patrilineal family a person’s immediate family consists of his father, his brothers and sisters being the children of his father, and the children of his brothers. His wider family consists of his immediate family and the immediate family of those who trace their ancestry through males from the common male ancestor. In a matrilineal family, a person’s immediate family consists of his mother, his brothers and sisters being the children of his mother and the children of his sisters; his wider family, consists of his immediate family, and the immediate families of all those who trace their ancestry through females from
paper, the term “family law” will be used to encompass the relationship between husband and wife, parents and children as well as other intimate personal relationships currently not recognised by law.

Western industrialised countries have, over recent years, experienced significant changes in the legal relationship between family members *inter se* and between the family and the State. These changes have affected the basic assumptions underlying marriage and the family. It has also been pointed out that whilst the family has remained fundamental to social organisation, the present generation is witnessing considerable relaxation in the grip which the marriage institution has held over family life. This is attributed to changes in public opinion which has come to place a high value on respect for individual fulfillment and free choice, on tolerance of diversity of styles in personal relationships and on concern for the well-being of all persons in society. Not surprisingly, in the context of the so-called global village, such changes in the perception of the family in the West will influence attitudes towards family relationships in African countries. This paper intends to examine some of the challenges posed by these changing perceptions of the family on family law in Botswana. It will try to place these challenges in the changing socio-economic circumstances as well as the constitutional framework of the country and hope they will serve as a catalyst for debate in an attempt to address them to reflect the contemporary reality.

2. **AN OVERVIEW OF THE CONTEMPORARY SITUATION OF FAMILY LAW IN BOTSWANA**

Family relationships can be formed either by marriage under the common law/statute or under the various customary laws. Family relationships formed
under either of these systems of law are recognised by the law. However, although some empirical evidence exists that there are various intimate social arrangements outside marriage, the law does not accord any recognition to them. As was succinctly put by Lord Devlin:

“A man and a woman who live together outside marriage are not prosecuted under the law but they are not protected by it. They are outside the law. This union is not recognised, no legal obligation will be enforced by the law.”

This English position is similar to that of Botswana common law and is aptly captured by Hahlo, who in describing the position in South Africa, a country with a similar common law as Botswana, said:

“… A man and woman who, for good reason or bad elect to live in concubinage rather than marry, make a deliberate choice and cannot complain if the consequences of marriage do not attach to their union. To use a well-worn cliché, they cannot ‘have their cake and eat it.’”

This stance is a reflection of the contemporary policy that the institution of marriage should be supported. Thus, the common law definition of marriage, for example, does not admit of marriage between couples other than those in heterosexual relationship. Rights of biological fathers in relation to their extra-marital children are generally not recognised as they have no inherent right of access or custody to such children. In a

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9 See for example, section 22 of the Marriage Act 2000 which affirms the validity of customary and religious marriages existing before the inception of the Act.


11 See The Enforcement of Morals, Oxford, OUP (1968) at p. 77. However, since 2004, the law has given some recognition to extra-marital relationship in England with the enactment of the Civil Partnership Act 2004.


13 See A. Molokomme, “Marriage, What Every Woman wants or a Declaration of ‘Civil Death’? Some Legal Aspects of the Status of Married Women in Botswana”, 4 PULA: Botswana Journal of African Studies (1984), at p. 74. Sometimes the law makes some slight concession to parties in intimate social arrangements. For example, section 2 of the Worker’s Compensation Act 1998, defines a “dependent” to include “a woman or man with whom the worker was at the time of the accident living as wife or husband.”

14 The common law definition is taken from the English case of Hyde v Hyde and Womansee (1866) L.R. 1 P & D 130 at p. 133 where this type of marriage is defined as “…the voluntary union for life of one man and one woman to the exclusion of all others” (emphasis added). This definition was approved in the South African cases of Seedat’s Executors v The Master 1917 A.D. 302 at p. 309 and Ismail v Ismail 1983 (1) S.A. 1006(A) at p. 1019.

15 See the Zimbabwean case of Douglas v Myers 1987 (1) S.A. 910 (ZH) at p. 914E approved in Mfundisi v Kabelo [2003] 2 B.L.R. 129 at p. 132.
divorce situation, a wife is under no obligation to provide for her husband and where the spouses are married out of community of property, they cannot be made to share property accumulated during the marriage. In the words of Scarman LJ in the English case of *Calderbank v Calderbank*, such spouses do not come to the judgment seat in matters of money and property upon the basis of complete equality. The courts have no discretion in adjusting the post-divorce property rights of the spouses.

The legislature’s record of enacting legislation to modernise aspects of family law which no longer reflect the contemporary reality has not been a good one. For example, although the subjugation of a married woman to the marital power of her husband in a marriage in community of property had attracted severe criticism over the years, it was only in 2004 that legislation was passed abolishing the husband’s exercise of the marital power in such marriages together with the husband’s acknowledgment as the head of the family. As a result of this inertia on the part of the legislature, can the Constitution be used as a vehicle to bring about a rethink in the way the law currently view family relationships? The Botswana Constitution, unlike that of some African countries, does not guarantee family life. However, section 3 provides that every person in Botswana is entitled to certain fundamental rights and freedoms of the individual. Amongst these is the right to the protection of the law. Section 15 (1) of the Constitution provides that no law shall make any provision that is discriminatory either of itself or in its effect. The expression “discriminatory” is defined in section 15 (3) as meaning:

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16 Under section 25(1) of the Matrimonial Causes Act 1973, in any action for divorce or nullity of marriage, the court has discretion to make such interim orders for the payment of alimony by the husband to the wife as it thinks just and equitable. Furthermore, under subsection (2) the court, if it thinks fit, may order various payments to be made by the husband as post-divorce maintenance of the wife.

17 Section 13 of the Matrimonial Causes Act 1973 under which the court is enjoined to determine the mutual property rights of the spouses on divorce has been construed narrowly as meaning “substantially the same as in any other proceedings where the ownership or possession of property is in issue.” See *Molomo v Molomo* [1979-80] B.L.R. 250 (HC). This in effect only allows the court to determine ownership of any property in dispute and to award such property to the spouse found to be the owner. See E.K. Quansah, *Introduction to Family Law in Botswana*, Gaborone, Pula Press (2006), pp. 124-125.


19 See note 17 supra.

20 See for example, Molokomme, “Marriage: What Every Woman Wants ...” *op. cit.* at p. 76 and “A Summary of Women’s Legal Status under Botswana Family law” in *Women and the Law in Botswana*, a report of proceedings of a seminar held at the University of Botswana, 3-5 July 1987 Emang Basadi/ Women’s Affairs Unit, Ministry of Home Affairs (on file with author).

21 See the Abolition of Marital Power Act 2004 which came into effect on 1 May 2005. There was a feeble legislative attempt in 1970 to ameliorate the effect of the marital power but this did not achieve the desired objective. See sections 3, 4 and 7 of the Married Persons Property Act 1970 and E.K. Quansah, “Abolition of Marital Power in Botswana: A New Dimension in Marital Relationship?” *1 University of Botswana Law Journal* (2005), pp. 6-7. The abolition of the marital power was not without criticism. See for example, the following newspaper comments: “Abolition of Marital Power Bill Liberates the already Liberated Women” in the *Botswana Gazette*, 16 February 2005 at p. 16 and “A Legal Coup Against Men” in the *Mmegi*, 10 December 2004 at p. 9.

22 For example, section 22 of the 1994 Malawian Constitution provides that the family is “the natural and fundamental group unit of society and is entitled to protection by society and the State.”. See also article 22 1992 Ghana Constitution, article 55 (2) Mozambique Constitution and art 14 (3) Namibian Constitution.

23 As amended by section 4 Constitution (Amendment) Act 2005.
“… affording different treatment to different persons, attributable wholly or mainly to their respective description by race, tribe, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description”.

In the landmark decision in *Attorney-General v Dow* the full bench of the Court of Appeal, the highest court in Botswana, held that in construing the Constitution a broad and generous approach should be adopted in the interpretation of its provisions; that all the relevant provisions bearing on the subject for interpretation be considered together as a whole in order to effect the objective of the Constitution; and where rights and freedoms were conferred on persons by the Constitution, derogation from such rights and freedoms should be narrowly or strictly construed. Dealing with the provisions of sections 3 and 15, the court held that the provisions of section 3 of the Constitution conferred on the individual the right to equal treatment of the law. That right was conferred irrespective of the person’s sex. The section was held to be the key or umbrella provision in Chapter II of the Constitution under which all rights and freedoms protected under that Chapter must be subsumed. The fact that discrimination was not mentioned in section 3 did not mean that discrimination, in the sense of unequal treatment, was not proscribed under that section. The definition in section 15 (3) on the other hand was expressly stated to be valid “in this section”. The right expressly conferred by section 3 could not be abridged by section 15 merely because the word “sex” was omitted from the definition of “discriminatory” in the section. A fundamental right conferred by the Constitution on an individual could not be circumscribed by a definition in another section. Consequently, section 15 which specifically mentions and deals with discrimination, therefore, does not confer an independent right standing on its own. The omission of the word “sex” from the definition of the word “discriminatory” was neither intentional nor made with the object of excluding sex-based discrimination. The words included in the definition were more by way of example than as an exclusive itemisation.

An opportunity to test the efficacy of the above dicta in Dow’s case to protect an accused’s right to freedom of conscience, expression, privacy,
The appellant was charged with committing indecent practices with another male contrary to section 167, as read with section 33 of the Penal Code and alternatively with committing an unnatural offence contrary to section 164 (c) of the Penal Code. Section 164 (c) states that:

“All persons who … permits a male to have carnal knowledge of him or her against the order of nature, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years”. 31

Section 167 is stated as follows:

“All male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit an act of gross indecency with him, or attempts to procure the commission of any male person with himself or with another male person, whether in public or private, is guilty of an offence.”32

The appellant alleged that the above provisions in the Code (a) discriminated against male persons on the ground of gender and offended against his rights of freedom of conscience, expression, privacy, assembly and association entrenched in section 3 of the Constitution and therefore contravened the section and, (b) hindered male persons in their enjoyment of their right to assemble freely and associate with other persons as contained in sections 13 and 15 of the Constitution by discriminating against males on the basis of their gender and thus contravened those sections. The court acknowledged that there was a need to interpret constitutional rights, where the circumstances warrant, in line with developments of similar rights in kindred democracies.33 It also declared its preparedness to guard jealously the fundamental rights enshrined in the Constitution but asserted that in doing so, the limitation in section 3 of the Constitution to the effect that the enjoyment

30 The section provides that where the Code does not specifically provide for punishment for an offence, a punishment of a maximum term of two years imprisonment or a fine or, both shall be imposed.
31 The section was amended by section 21 Penal Code (Amendment) Act 1998, by substituting the words “any other person” for the word “male” contained in the section. The accused was however charged under the section as existed prior to the 1998 amendment.
32 The section was amended by section 22 of the Penal Code (Amendment) Act 1998 by deleting the word “male” wherever it appeared in the section and inserting the words “or her” immediately after the word “him” and “or herself” immediately after the word “himself”.
33 Per Tebbutt JP at p. 77.
of such right should not prejudice the rights and freedoms of others or the public interest must be borne in mind. The court was of the opinion that the public interest must always be a factor in scrutinising legislation which is alleged to be unconstitutional especially where such legislation reflects public concern. It conceded that Parliament in passing legislation must inevitably take a moral position in tune with what it perceived to be the public mood fettered only by the confines of the Constitution. The court stated that no evidence had been put forward to demonstrate a change in the public attitude towards homosexuality necessitating its decriminalisation. Furthermore, the trend of public opinion showed a hardening of the contrary attitude. It therefore concluded that the time had not yet arrived to decriminalise homosexual practices among males even in private adding that at this stage homosexuals and lesbians have not been shown to represent a group or class requiring constitutional protection. Finally, it held that section 167 of the Penal Code as it stood when the appellant was charged under it was unconstitutional because it was aimed at male persons who committed acts of gross indecency with one another, whether in public or private. It did not proscribe similar acts between females. However, section 164 (c) was found not to be unconstitutional.

This decision has been criticised, inter alia, on the ground that it missed the opportunity to make an authoritative ruling on the nature, meaning and content of the freedom of association, of conscience, of expression and of assembly as set out in the Constitution. Furthermore, it is said that an opportunity was also missed to articulate whether these freedoms included sexual orientation even though not specifically mentioned in the Constitution. The net effect of the decision is to deny homosexuals and lesbians the right to equality on the dubious grounds of public opinion and national values. This decision makes it highly unlikely that “family” relationships formed by homosexuals and lesbians would any time soon be given legal recognition. Thus, the answer to the question posed earlier will seem to be that whilst there is the potential for using the Constitution to rethink and expand family relationships, there will have to be marked paradigm shifts both in legislative and judicial mindsets to make the desired progress. In the light of this scenario, a number of specific challenges facing family law will now be discussed.

34 At pp. 79-80.
35 There is no empirical evidence of the number of couples involved in this type of relationship in Botswana but newspaper reports suggest that there is some evidence of growing homosexual tendency among students at the University of Botswana. See UB Horizon of 2 September 2008 at p. 10.
36 The section was made gender neutral by section 22(a) and (b) of the Penal Code (Amendment) Act 1998.
37 See K.N. Bojosi, op. cit. at p. 481.
38 Ibid. at p. 481.
3. CHALLENGES FACING FAMILY LAW

3.1 Definition marriage

The classic definition of statutory marriage in Botswana continues to be that given by Lord Penzance in the English case of *Hyde v Hyde & Woodmansee* as, “… the voluntary union for life of one man and one woman, to the exclusion of all others.”\(^{39}\) This definition does not admit marriage between couples other than those practicing heterosexuality; neither does it admit marriage between couples, one of whom was born a biological male but who has since changed into a “woman”.\(^{40}\) Should this definition be expanded in order to accommodate non-heterosexual relationships? The answer to this question may not be simple given the attitude of the Court of Appeal in *Kanane*’s case. What one can assert categorically is that the prevailing public policy in Botswana is to support heterosexual relationships. This policy can find a justification in the following statement made by a former Deputy Attorney-General of Botswana, now a High Court judge:

“The Constitution of Botswana makes no reference to a right to, or protection from discrimination on the grounds of sexual orientation. Whilst our Court of Appeal, in the landmark decision of *Attorney-General of Botswana vs Unity Dow*, extended individual rights and fundamental freedoms to include a protection from, or freedom against, discrimination on the grounds of one’s sex (in the form of gender), this is quite different to – and a far cry from – the recognition or endorsement of a right to sexual orientation other than that of the well-established and conventional heterosexual relationship between men and women … in keeping with the mores and thinking of the greater number of people, any sexual orientation/propensity/predilection/proclivity\(^{41}\) other than the conventional has been categorised/classified as deviant; and under certain circumstances can attract criminal liability.”\(^{42}\)


This quasi-official position presents an insurmountable hurdle to any change of the current definition of marriage. In the context of constitutional human rights protection however, there are two competing views on the question as to whether the definition of marriage should embrace non-heterosexual couples. Firstly, there is the growing recognition that international human rights are indivisible and universal. On the first view, in extending the definition of conventional marriage to embrace same-sex couples, it can be argued that this is recognition of the reality that all human beings share a common characteristic, namely, their sexuality.

However, on the second view, it can equally be argued that in extending the definition to cover other relationships it is incumbent on the relevant authority to recognise that culture and gender inform society’s understanding of sexual orientation. It is in this latter context that the current attitude towards non-heterosexual sexual preference must be viewed.

In the neighbouring jurisdiction of South Africa, the conventional definition of marriage was challenged as unconstitutional in the case of Fourie and Another v. Minister of Home Affairs. The appellants who were in a same-sex relationship argued that in terms of the common law’s definition of marriage, they could not marry as such a process were understood to be reserved for couples of the opposite sex. They raised no challenge to the Marriage Act 1961 under which Act such marriages were contracted. Instead, they asked the court to grant them relief by invoking its jurisdiction to develop the common law in accordance with the Constitution. The Supreme Court of Appeal held that the Constitution’s equality guarantee, which expressly prohibits discrimination on the ground of sexual orientation, together with several major decisions of the Constitutional and other Courts since the...
inception of the 1996 Constitution, meant that the Constitution required the development of the common law definition of marriage to embrace same-sex couples. According to the court, family life as contemplated by the Constitution can be constituted in different ways and legal conceptions of the family and what constitutes family life should change as social practices and traditions change. The court was unanimous that the previous common law definition of marriage, which excluded same-sex unions, constituted unfair and unjustifiable discrimination under the Constitution.\textsuperscript{48} The court made a declaratory order, \textit{inter alia}, to the effect that in terms of sections 8 (3), 39 (2) and 173 of the Constitution, the common law concept of marriage should be developed to embrace same-sex partners. It thus redefined marriage as; “marriage is the union of two persons to the exclusion of all others for life.”\textsuperscript{49}

Can this definition of marriage gain currency in Botswana? On the available evidence, the answer will be no. It should be noted that there is no provision in the Botswana Constitution that obliges the courts to develop the common law in accordance with the Constitution, an obligation which is imposed on South African courts and which was utilized to decide \textit{Fourie}’s case. As seen from the decision in \textit{Kanane}’s case, the Botswana courts deferred any changes in the common law to the legislature and the court of public opinion. It would seem that the growing number of different lifestyles which are being recognised in other countries will not be accommodated in the definition of marriage in Botswana until there is legislative intervention which is highly unlikely in view of the general attitude towards gays and lesbians.\textsuperscript{50} Besides, the gay and lesbian community is currently too small to exert any effective pressure for legislative change.\textsuperscript{51} They are too timid to come out of the closet, not to talk about coming outdoors.

3.2 Extension of the concept of marriage to other relationships

Traditionally, it was very unusual for couples to start living together before marriage.\textsuperscript{52} However, as mentioned earlier, there is some empirical evidence

\textsuperscript{48} This ruling was anticipated by June Sinclair when she wrote that denial of the right of homosexuals to marry invites constitutional attack on the ground that the rule insisting on heterosexual marriage amounts to unfair discrimination on the ground of sexual orientation in terms of section 8 (2) of the interim Constitution 1993. See J. Sinclair (assisted by J. Heaton \textit{The Law of Marriage}, Vol. I, Kenwyn, Juta & Co (1996) at p. 299.

\textsuperscript{49} See the Civil Union Act 17 of 2006. For a background to the enactment of the Act and some problems arising therefrom, see J. Sinclair, “A New Definition of Marriage: Gay and Lesbian couples may Marry” in \textit{The International Survey of Family Law} (B. Atkin ed.) Bristol, Family Law (2008), at p. 397.


\textsuperscript{51} See note 34 supra.

\textsuperscript{52} See S. Roberts, \textit{Tswana Family Law}, London, Sweet & Maxwell (1972), pp. 37-38 where, describing the situation under \textit{Kgatla} customary law, he said that such associations had no place in the traditional system
that many Batswana live together without having gone through any official ceremony recognised by law.\textsuperscript{53} As far back as 1987, The Parliamentary Law Reform Committee highlighted the situation as follows:

“The Committee observed that throughout the country there are a number of relations which have the semblance of a marriage but lacked the legal ingredients of any marriage either under the Customary Marriage Law or the Marriage Act. In the event of a breakdown of such a relationship a question always arises as to the rights of the parties to property acquired during such associations. It is the Committee’s view that such associations should be looked at purely from an economic angle and that distribution should be according to contribution, i.e. the courts should weigh and evaluate the contributions directly or indirectly made by the parties in order to effect an equitable distribution.”\textsuperscript{54}

This reality, usually referred to as “cohabitation”,\textsuperscript{55} has not been adequately dealt with either by legislation or by the courts. As far as the law is concerned, cohabitees “come to the court clad only in their common law rights which for many or most of all the ladies concerned is a state of semi-nudity.”\textsuperscript{56} The common law does not give such parties any rights \textit{inter se}. There is neither a reciprocal duty of support nor a right to an equitable distribution of accumulated property when the relationship comes to an end.\textsuperscript{57} There is also the new phenomenon of same-sex couples living together in some sort of permanent relationship. In the former situation, in the few cases that have come before the courts, the aggrieved party of this type of relationship has had to prove the existence of a universal partnership,\textsuperscript{58} expressed or implied from the particular facts of the case, in order to be awarded a share in the property acquired during the subsistence of the relationship. For example, in \textit{Mbenge v Mbenge},\textsuperscript{59} the appellant sought an


\textsuperscript{54} See report of Parliamentary Law Reform Committee \textit{op. cit.} at p. 5 and note 10 supra.


\textsuperscript{56} Per Cumming-Bruce LJ in the English case of Davies \textit{v} Johnson [1978] 1 All E.R. 841 at p. 882.


\textsuperscript{58} This is a partnership formed by persons who agree to contribute all their individually owned property to the partnership as well as to devote all their skill, labour and services to the partnership. See the South African case of Isaacs \textit{v} Isaacs 1949 (1) S.A. 952 (C).

\textsuperscript{59} [1997] B.L.R. 142.
order for the equal division of all the property acquired by the parties while living together as husband and wife. The parties never married and throughout the period that the relationship lasted the appellant played her part in running the various commercial enterprises undertaken by the couple. She argued that all these activities were geared towards the maintenance of the parties and their children, and that by tacit agreement a universal partnership was created. Although the trial court rejected this argument, the Court of Appeal held that the equities of the situation required that the appellant be awarded 50% share of the respondent’s assets acquired by the joint efforts of the parties. In Bodutu v Motsamai,\(^60\) the plaintiff alleged that she and the defendant had accumulated assets while they were involved in a romantic relationship. The plaintiff sought an order that the properties jointly accumulated by the parties be valued and sold and that the proceeds should be shared equally between them. The court held that in order for the plaintiff to succeed, she had to show that there was a partnership between her and the defendant either with regard to the properties she alleged were jointly accumulated or that by virtue of her cohabitation with the defendant there was a universal partnership during which the parties accumulated the properties referred to. On the evidence adduced by the plaintiff, the court held that it could be inferred that a tacit partnership arose from their relationship and that they had jointly accumulated the property.

The lesson that can be drawn from these cases is that in order for a party living in a relationship outside marriage to be able to claim a share of any property accumulated during the relationship, he/she will need to prove the existence of some kind of partnership, expressed or implied. Very often however, parties in these relationships seldom enter into any such agreement with the result that when the relationship breaks down the recovery of property jointly acquired becomes problematic. In order to prove the existence of the partnership, the party alleging it, had to adduce evidence that each of the parties brought something into the partnership, whether it be money, labour or skill; that the business or enterprise should be carried out for the joint benefit of both parties; and that the object of the business or enterprise was to make profit.\(^61\) Sadly many a party will not be able to adduce the requisite evidence to establish a partnership and consequently, the court will be powerless to help them.\(^62\)

\(^60\) [2006] 2 B.L.R. 252.

\(^61\) See Bodutu v Motsamai op. cit. at pp. 256-257 approving dicta from the South African case of Isaacs v Isaacs op. cit at p. 956. See also the South African case of Muhlmann v Muhlmann 1981 (4) S.A. 632 (T).

\(^62\) In Citadel (Pty) Ltd & Another v Roodt (Misca 230/2000), the respondent who had cohabited with the second plaintiff for 20 months applied for a declaration of universal partnership and division of property/damages for unjust enrichment. It was held that the respondent had no existing recognised proprietary interest in any property accumulated during the relationship; there was no express or tacit agreement of partnership between the parties; her right to occupation of the property was by virtue of an invitation of the second plaintiff, as a boyfriend, which relationship had been terminated. Consequently, she had no right to occupy the property in question.
There have been significant developments in comparable jurisdictions to bridge the gap currently existing between marriage and other intimate relationships.\(^{63}\) There is currently in a number of countries, a wide variety of relationships: marriages (hetero- or homosexual), registered partnerships, and other living arrangements. In South Africa, for example, the Civil Union Act 2006 allows both same-and opposite-sex partners to solemnise and register a civil union either by way of marriage or by way of a civil partnership.\(^{64}\) The Act further provides that a civil marriage officer is not compelled to solemnise a civil union between persons of the same sex if the officer objects on the grounds of conscience, religion or belief to solemnising such union.\(^{65}\) Significantly, the Act provides that the legal consequences of a civil union are the same as those of a marriage celebrated under the Marriage Act.\(^{66}\) Thus, gay and lesbians as well as heterosexual couples may “marry” under the 2006 Act and be treated in the eyes of the law in the same way as heterosexual couples married under the Marriage Act.\(^{67}\)

Is there a need for some legislation at least to protect heterosexual cohabitees in Botswana? On the empirical evidence available there will seem to be such a need. As the Parliamentary Law Reform Committee suggested in 1987, such relationships should be looked at purely from an economic point of view. But what will be the criteria for such recognition? It is submitted that the law should be prepared to recognise a couple as a “family” if the relationship has some “appropriate degree of permanence and stability”,\(^{68}\) particularly where the couple have children. It is further submitted that in determining whether the relationship meets this criterion, the law should recognise a relationship which has existed for a minimum of five years or some other minimum period depending on the outcome of public debate on the issue. Such recognition will be a public acknowledgment of the fact that such “families” are performing an important social function, namely, rearing

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\(^{63}\) See for example, the South African Civil Union Act 2006, the English Civil Partnership Act 2004 and the Swedish Cohabitees Act 2003.

\(^{64}\) See section 1.

\(^{65}\) Apparently, this was a concession to the strong opposition to the Act mounted by a coalition of religious groups. See www.marriagealliancesa.com; www.sacla.za.net It has been reported that since the inception of the Act, several same-sex couples wishing to marry have faced difficulties in finding a non-objecting marriage officer to officiate at their marriage or civil partnership. See Sinclair, “A New Definition of Marriage…” op. cit. at p. 403.

\(^{66}\) See section 13 (1).

\(^{67}\) Act 25 of 1961. Similarly, the English Civil Partnership Act 2004 gives same-sex couples rights and responsibilities identical to civil marriage. Civil Partners are entitled to the same property rights as married opposite-sex couples, the same exemption as married couples on inheritance tax, social security and pension benefits, and also the ability to get parental responsibility for a partner's children, as well as responsibility for reasonable maintenance of one's partner and their children, tenancy rights, full life insurance recognition, next-of-kin rights in hospitals, and others. There is a formal process for dissolving partnerships akin to divorce.

\(^{68}\) See the English case of *Dyson Holdings v Fox* [1976] Q.B. 503. In that case a man and a woman had been living together for some 20 years, holding themselves out as husband and wife. It would seem that in Botswana customary courts treat a woman who has cohabited with a man, since deceased, for more than five years as a wife for inheritance purposes. See *Ditshwanelo: The Botswana Centre for Human Rights/Women’s NGO coalition’s pamphlet Know Your Law (In heritance Rights)* at p. 10.
children. Of course, there will be arguments for and against such recognition but the main thrust of this suggestion is to put the issue into the public domain for an informed debate in order to come to a conclusion that reflects the social reality of present-day Botswana.

As for recognition of same-sex couples in a permanent relationship, the decision in Kanane’s case puts paid, for the foreseeable future, to any such recognition unless there is legislative intervention. The decision is indicative of prevailing thinking on same-sex relationship and it is highly unlikely that recognition would be given to such relationships in the near future. But should recognition be given to such relationship in principle? In answering the question, it can be argued that there are certain standards of behaviour or moral principles which society requires its members to observe and a breach of them is regarded as an affront to society as a whole. Lord Devlin called such standards “public morality.” Any deviation from this morality, he argues, threatens society’s existence and therefore the judicial process is duty-bound to protect society. By a skilled application of moral principles to legal rules, the judicial process distils a moral content out of legal order. He further argues that conduct that arouses “intolerance, indignation and disgust” in society needs to be suppressed by the legal order. The extent of the moral judgment is to be ascertained by our judges. This is the attitude displayed by the Court of Appeal in Kanane’s case. This argument can be countered by the view that there is no solidarity of morality but rather that society is permissive, that is, there is not one but several tolerated moral codes. The proposition that homosexuality is a threat to society cannot stand up to critical examination. These moral arguments notwithstanding, if the issue is viewed from the perspective of human rights, then a case may be made for such extension. For the continuing discrimination against both gays and lesbians lies in the message it conveys, namely that, viewed as individuals or in their same-sex relationships, they do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This denies to gays and lesbians that which is foundational to the Constitution and the concepts of equality and dignity, namely that all

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70 One of the major arguments based on public policy and usually used to justify non-recognition of cohabitation, is that living together undermines the sanctity and stability of the marriage institution. If the consequeneces of marriage and cohabitation become the same, marriage will wither away. See M.L. Melton, op. cit. at p. 516. On the other hand, it may be argued that victims of the breakdown of cohabitation, usually women, deserve protection and the current lack of such protection is unjust and unfair as it leaves the weak and vulnerable in a precarious position. Cf. the position taken by M.D. Freeman & C.M. Lyon, Cohabitation without Marriage, London, Gower (1983), pp. 161-163 who rejects the protectionist approach.

71 See The Enforcement of Morals, op. cit.

72 See the dictum of Gubbay CJ in the Zimbabwean case of Banana v The State [2000] 4 LRC 621 (ZSC) at p. 645 where he opined that although majority of heterosexuals may find sodomy unacceptable, that should not be reason enough to criminalize it in today’s pluralistic society.

persons have the same inherent worth and dignity, whatever their other differences may be.\(^7^4\)

### 3.3 Determination of Matrimonial Property on Divorce

Section 13 of the Matrimonial Causes Act 1973 states:

“Any court which tries an action for divorce or for judicial separation under this Act shall also have jurisdiction to make an order-

(a) determining the mutual property rights of the husband and the wife…”

Unlike the English Divorce Reform Act 1969, upon which the Act was modelled,\(^7^5\) no guidelines are provided to guide the court in the determination of the mutual property rights. The courts are therefore left not only to interpret the extent of this power but also to decide what constitutes “matrimonial property” for this purpose. In the leading case of *Molomo v Molomo*,\(^7^6\) Hannah J. expressed the following view:

“The powers of the court under section 13 [Matrimonial Causes Act 1973] are substantially the same as in any other proceedings where the ownership or possession of property is in issue. The discretion is no wider and no narrower than the ordinary discretion of the court in such cases... There is nothing in section 13 which indicates an intention by the legislature to confer a wide and almost unfettered discretion on the court to divide matrimonial assets between spouses. The wording is in stark contrast to section 24 of the English Act which not only specifies the various powers but in the following section sets out the criteria to be applied in exercising the power.”\(^7^7\)

(Emphasis added)

This interpretation of section 13 of the Matrimonial Causes Act 1973

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\(^7^4\) See the dictum of Cameron JA in the South African case of *Fourie and Another v. Minister of Home Affairs* op. cit para. 13.

\(^7^5\) See the memorandum accompanying the Matrimonial Causes Bill 1972, which makes this reliance on the English statute clear. See also C.M.G. Himsworth “Effects of matrimonial causes legislation in Botswana” 18 *Journal of African Law* (1974), at p. 174.

\(^7^6\) [1979-80] B.L.R. 250.

\(^7^7\) At p. 251. Section 24 of the English Act empowers the court to make various property adjustment orders on the grant of divorce. Section 25(2) sets out specific matters to be considered on application for provision for a spouse. These include, *inter alia*, the income and financial resources of the parties; their financial needs; their standard of living; their age; the duration of the marriage and their conduct. The section was subsequently amended by the Matrimonial and Family Proceedings Act 1984 and the Family Law Act 1996. The latter Act gave effect to the principle that financial arrangements be made before the dissolution of the marriage. See *Harris v Manahan* [1997] 1 F.L.R. 205.
has never been challenged and has been followed in subsequent cases. What then is the “ordinary discretion of the court” referred to in the dictum? Such discretion will usually be exercised where a claimant avers and proves that he/she has acquired a share in property owned by someone else. The court will then exercise a discretion to give a share of that property to the claimant according to his/her contribution in the acquisition or maintenance of the property and the intention of the parties, expressed or implied, at the time of acquisition. As succinctly put in the English case of Pettitt v Pettitt:

“The rights of the parties [to a marriage] must be judged on the general principles applicable in any court of law when considering questions of title, and though the parties are husband and wife these questions of title must be decided by the principles of law applicable to the settlement of claims between those not so related, while making full allowances in view of the relationship.”

The exercise of the power conferred by the section, as interpreted by the courts, will make a bigger impact when the determination of property rights concern spouses married out of community of property. This is so because marriage under this matrimonial property regime does not affect the proprietary rights of the spouses. Consequently, the general rule is that on divorce each spouse takes his or her property. That being the case, the crucial question will be to adopt that posed in the English case of Pettitt v Pettitt; “Whose is this?” and not “To whom shall this be given?” The only task of the court is to ascertain the rights of the parties. It has no power to vary established proprietary rights.

The challenge facing family law in this regard is whether the present situation in which the courts have no discretion to vary established rights should continue. In a marriage out of community of property, the economically weaker spouse, usually the wife, stands at a distinct disadvantage in that if during the marriage she had devoted her time in non-economic activities such as looking after the family and doing the domestic chores which allowed the husband to be free to realise his full potential, she will be denied a share in any property acquired by the husband during the marriage unless she is able to prove a financial contribution of some sort to

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78 See for example, Moisakamo v Moisakamo (2) [1981] B.L.R. 126 at pp 147-148 per Hayfron-Benjamin CJ and Rabantheng v Rabantheng [1988] B.L.R. 260 at p. 262 per Hallchurch J.

79 See for example the English case of Bernard v Joseph [1982] Ch. 391 at pp. 402 and 404 per Griffiths LJ and at p. 398 per Lord Denning MR.


81 If the marriage is in community of property, not much discretion exists as the underlying principle is equality of distribution unless there is an order for forfeiture of benefits. See Molomo v Molomo op. cit. at pp. 252 and 257 and Molefe v Molefe [2004] 2 B.L.R. 80.


the acquisition of the said property of the husband. Thus, in *Rabantheng v Rabantheng* the court awarded the wife a third (P22, 667) of the value of the matrimonial home (P68, 000) which was in the name of the husband solely on the basis that she contributed P657 towards the mortgage repayments and P1, 601.01 towards the payments of rates on the house, the purchase price of which was P2, 813.78. The court completely ignored all her indirect contributions made during the subsistence of the marriage. It was fortuitous that she contributed financially to the acquisition of the matrimonial home otherwise she would have lost a share in the enhanced value of the matrimonial home.

Given the above scenario, there is a need for the court to be given a structured discretion based on a clear statutory policy as to the financial consequences of divorce. The policy must aim at enabling “the empty legal shell to be destroyed with the maximum fairness and the minimum bitterness, distress and humiliation.” It must be accompanied by guidelines, the premise of which should be “equality of contribution hence equality of distribution.” The guidelines may include the following in order of precedence:

(a) The basic assumption of equality of contributions made towards the welfare of the family;
(b) Such contributions, directly or indirectly, financial or otherwise, should be taken into account;
(c) The welfare of the children of the marriage;
(d) The conduct of the parties in relation to each other and to the marriage especially where this is “obvious and gross”;

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85 See p. 290 of the report.
86 These sentiments were said to be the aim of a good divorce law. See the English Law Commission’s Report: *Reform of the Grounds of Divorce – The Field of Choice*, Cmdn. 3123 (1966), para. 15.
87 See the English case of *White v White* [2000] 2 F.L.R. 981; [2001] A.C. 596 in which the House of Lords held that equality should be the yardstick for the distribution of property on divorce and that equality should be departed from only if and to the extent that there is good reason for doing so. However, this suggestion has been criticized as not providing a mechanism for ascertaining how the starting point for the division of assets should be assessed or what would be good reasons for deviating from equality of division. See M. Welstead, “Judicial reform or an increase in discretion-The decision in Miller v Miller, McFarlane v McFarlane” in *International Survey of Family Law* (B. Atkin ed.) Bristol, Family Law (2008) at p. 61. There seems also to be a move towards equality in South Africa. See *Childs v Childs* 2003 (3) SA 138 and *Bezuidenhout v Bezuidenhout* 2003 (6) SA 691. However, remarks by the Supreme Court of Appeal (SCA) when the latter case went on appeal seem to derogate from the principle of equality. See J. Heaton, “Striving for Substantive Gender Equality in Family Law: Selected Issues,” 21 *South African Journal on Human Rights* (2005), pp. 560-561. In *Kirkland v Kirkland* [2005] 3 All SA 353 (C), a High Court in the Cape Provincial Division held that the remarks by the SCA in *Bezuidenhout* were not a rejection of “the principle of equality as such” but rather that the principle of equality did not fit the facts of the case. It will seem therefore that there is room for the development of the principle of equality in that country.
(e) The achievement of a “clean break”, that is, a once-and-for-all financial settlement involving no continuing economic links between the parties, where appropriate and practicable; and

(f) Any other factor which in the opinion of the court the justice of the case warrants, for example, future post-divorce financial obligations of the ex-spouses.

For these to work in an equitable manner, there should be a statutory definition of what constitutes “matrimonial property” with particular reference to marriage out of community of property. Such a definition may include property acquired by one or other or both of the spouses with the intention of benefiting them and their children during their joint lives and used for the benefit of the whole family. This may include property of a capital nature as well as those of revenue producing nature. It is conceded that whatever definition is arrived at will not be satisfactory to all and sundry, but the legislature must take an informed stand and come up with a working definition to help the court to exercise the discretion which will be given to them.

The current absence of judicial discretion to determine and redistribute matrimonial property on divorce of spouses married out of community of property seriously undermines the realisation of the legitimate expectation of the spouses of cooperatively pulling their resources together for the betterment of themselves and their children, if any.

An incidental problem associated with the lack of discretion in post-divorce distribution of matrimonial property is the fact that the statutory provisions are weighted unduly in favour of the wife with regard to maintenance. Section 25(2) of the Matrimonial Causes Act 1973 provides as follows:

“On any decree for divorce or nullity of marriage, the court may, if it thinks fit, order-

89 In terms of marriage in community of property, it is settled that all the assets and liabilities of the spouses are merged in a joint estate in which both spouses, irrespective of the value of their financial contributions, hold equal shares. See H. R. Hahlo, The South African Law of Husband and Wife, 5th ed., Cape Town, Juta (1985), pp. 157-158.

90 Ibid at p. 836.

91 In South Africa, for example, there is some uncertainty as to the meaning of “matrimonial property”. Sinclair (Assisted by Heaton), The Law of Marriage, op. cit. at p. 373 submit that the term refers to the joint estate where the spouses are married in community of property, and to the spouses’ separate estates where they are married out of community of property. However, Joubert, Law of South Africa Vol. 16 “Marriage” Durban, Butterworths (1992) argues that, in a marriage out of community of property, only property acquired during the marriage by the joint efforts or contributions of the spouses would fall within the meaning of “matrimonial property”. In marriage in community of property all the properties of the spouses will fall within the term.

(a) that the husband shall to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortune, if any, to the ability of her husband and the conduct of the parties, the court may deem reasonable; and

(b) that the husband should pay to the wife, during their joint lives, such periodical sum for the maintenance and support of the wife as the court may think reasonable, and any such order may either be in addition to or instead of an order made under subsection ) …”

It is patently clear from these provisions that the post-divorce financial support is to be given only to the wife. Thus, whilst the law recognises a reciprocal duty of support during the marriage\(^93\) such support is replaced by a unilateral support to the ex-wife to the exclusion of the ex-husband. The underlying rational of the subsection may be gleaned from the following contribution by the then Attorney-General during the third reading of the bill in Parliament:

“\[In the case of a woman, this Bill says that a woman shall not support a man, only a man shall support a woman and that is in fact, the whole principle throughout this Bill ... I think it is fair to say that in our law in this country we have tended to feel that it is the women who are to be supported not for them to support the men...we do not as a nation, expect a husband ever to ask support, financial support from his wife. He is the main partner who is the bread winner. If you are not capable of winning bread, you should not marry in order to be subsidised by your wife’s family.\]”\(^94\)

Does this sentiment reflect contemporary thinking of post-divorce maintenance? In the absence of empirical evidence, one would seriously doubt the veracity of the sentiments expressed in 1972 as a reflection of Botswana society at that time not to talk about them representing contemporary thinking in 2009. If anything at all, the sentiments reveal the patriarchal nature of Botswana society in the form of treating women as the weaker sex. Besides, the underlying assumption that the parties remained bound to provide for each other even in divorce seems to be inconsistent with the rationale behind the concept of irretrievable break down of the marriage. If the marriage is over, the financial obligations attached to it should also be terminated. If there is a need for such financial provision, which in some cases

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93 See *Louw v Ogilvie* [2000] 1 B.L.R. 355 (HC) at p. 360 where South African case law on the point was approved by the court.

94 See the Report of the Select Committee on the Matrimonial Causes Bill 1972 *Hansard* at pp. 22-23 and p. 92.
there will be, then as far as possible, this should be terminated as soon as reasonably practicable. Section 25(2) of the Matrimonial Causes Act should be amended to be gender-neutral in order for the court to utilise them to do justice to the parties within the particular and peculiar circumstances of each case. For some strange reason, there is dearth of case law on the subsection. This may perhaps be due to the influence of customary law in terms of which wives, upon divorce, are assumed to rely on their family group for maintenance. It may also be attributable to the fact that in most divorce situations the parties usually enter into a settlement agreement in which matters of property division and maintenance, especially for the children of the marriage, if any, are agreed upon. It may also be the case that a majority of husbands are not particularly wealthy enough to make an order under the subsection practically worthwhile. Whatever the underlying reasons may be for the non-utilisation of the section, this is a strong pointer to the need for its reappraisal to serve the contemporary needs of spouses in a divorce situation.

3.4 Rights of Biological Fathers with Regard to Children Born out of Wedlock

At common law, the father of a child born out of wedlock does not acquire parental authority over the child. Consequently, he cannot acquire any of the incidents of parental authority and as such has no prima facie right of access to the child. However, despite this lack of access to the child, the law requires him to maintain the child. The unfairness of this situation prompted a South African court to hold that the courts should recognise an automatic right of access and that access should only be denied if it is not in the best interest of the child. Incidentally, section 6 of the Customary Law Act 1969 provides that: “Notwithstanding anything to the contrary in this Act, any case relating to the custody of children the welfare of the children shall be the paramount consideration irrespective of which law or principle is applied.” (Emphasis added).
view in South Africa to the effect that such a father has no inherent right of access or custody to such a child but he, in the same way as other third parties, has a right to claim and will be granted these if he can satisfy the court that it is in the best interest of the child. After reviewing the South African cases, the court said:

“The predominant approach, shared by all the cases, seems to be that the illegitimacy of the child is not the compelling reason for denying access by its father. Rather it is the interest of the child which must predominate. In my view, the mere fact that a person is the natural father of his illegitimate child creates sufficiently close kindredship such as should make it highly desirable that the father be granted access to the child to enable a bond of affinity to develop.”

In the light of this view and after having considered the position in South African case law, the court granted access to the father. This position has recently been affirmed by the Court of Appeal in *Letsile Macheme v Dumisani Ndlovu* where Lord Coulsfield, delivering the unanimous decision of the court, held that, “It should therefore now be regarded as settled law in this country that the primary standard to be applied in all questions of guardianship of or access to children, whether their parents are married or unmarried, is that of the best interests of the child”.

In the light of these decisions, can it be said that the rights of such fathers have been enhanced? There is no clear answer because the premise for the grant of access is predicated on the father’s ability to satisfy the court, on the preponderance of evidence, that it is in the best interest of the child that such access should be granted. If he fails, access will be denied. There is an initial presumption that there is no such access until the contrary is proved. Would the situation be further enhanced if right of access is predicated on constitutional precepts? In *Mfundisi’s* case there was an indication that a constitutional point was raised but in view of the conclusion reached by the court it became unnecessary to rule on the point. It is not clear from the report of the case what the constitutional point was but if one were to take a cue from the case law of South Africa and speculate that the point was to do with the discriminatory nature of the lack of access, one will say that an

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102 Ibid. at pp. 133-134.
103 CACLB 035/08 (30 January 2009) unreported.
104 Ibid at p. 6 of the transcript.
105 Op. Cit. at p. 137 where Chatikobo J said: “The conclusion I have come to on the question of the applicant’s right of access to the minor child makes it unnecessary to deal with the constitutional point raised by Mr Boko in argument.” In the course of discussing the law in Dumisani Ndlovu v Letsile Macheme at first instance, Dingake J. was sympathetic to the view that access should be regarded as right of the child rather than of the parent but this view was apparently not endorsed by the Court of Appeal. See CACLB 035/08 (30 January 2009) unreported at p. 4 of the transcript.
opportunity was missed to test the constitutionality of the common law rule. The common law rule was subjected to scrutiny in the South African case of Fraser v Children’s Court, Pretoria North. In that case, section 18(4)(d) of the Child Care Act 1983 was challenged on the ground that it was inconsistent with the then Interim Constitution of 1993 insofar as it requires a Children’s Court to obtain the consent of both parents of a legitimate child before it may issue an adoption order with regard to that child but dispenses with the need to obtain a father’s consent for the adoption of an illegitimate child. The Court held that the said section read with section 27 of the Act was inconsistent with the right to equality as provided for by section 8 of the Interim Constitution. The court observed that the invasion of the equality provision was unreasonable and unjustified in an open and democratic society based on freedom and equality. Furthermore, it constituted unfair discrimination on the grounds of gender and marital status, which is also prohibited by the equality provision of the Constitution. The section as it stood, discriminated on the ground of gender because it required the mother’s consent always while the consent of the father was never required. It also discriminated on the ground of marital status in that it treated married and unmarried fathers differently by making marriage between the parents of a child the determining factor in respect of consent to the child’s adoption.

Could a similar challenge in Mfundisi’s case have been successfully? Although there is no specific equality provision in the Botswana Constitution, the Court of Appeal in Attorney-General v Dow held that section 3 of the Constitution conferred on the individual the right to equal treatment of the law. The right is conferred irrespective of a person’s sex. Consequently, an attack on the common law principle that a father of a child born out of wedlock has no inherent right of access to such a child may have been successful on the ground that it infringes section 3 of the Constitution. Similarly, an attack on the possible ground that the common law rule discriminates on the basis of marital status may have been successful because the Court of Appeal in Dow’s case held that the possible grounds on which discrimination was prohibited by the Constitution under section 15(3) were

106 1997 (2) SA 261 (CC).
107 See section 4(2) (d) of Botswana’s Adoption of Children Act 1952 which has similar provisions. See also the proviso to section 15 of the Botswana Marriage Act 2000 with regard to consent to marriage of minors.
108 This section deemed customary marriages to be valid marriages for the purposes of adoption consequently; the consent of the fathers of children born from these marriages were required for their adoption. Section 10 of the Child Care Amendment Act 1996 has since repealed section 27 of the Child Care Act.
109 Now section 9 of the 1996 Constitution.
110 As a result of this decision, the Adoption Matters Amendment Act 1998 amended section 18 (4) (d) of the Child Care Act 1983 to require the consent of both parents of a child born wedlock if paternity has been acknowledged and the father’s identity and whereabouts are known.
112 See note 26 supra.
not exhaustive.\textsuperscript{113} It is hoped that when another opportunity comes before the courts, counsel will raise and argue the issue of the unconstitutionality of the common law rule and that the trial court will be bold enough to declare it unconstitutional.

4. CONCLUSION

Like the biblical Sabbath, the family was made for man and not man for the family. Consequently, the family must be fashioned to meet the ever changing needs of society. This paper has highlighted some of the challenges facing contemporary family law in the light of world-wide changing perceptions of the structure and function of the family within society. Assumptions which hitherto were taken for granted are being challenged in the context of universally accepted human rights. These rights have assumed tremendous importance in what was hitherto regarded as the private context of family relationships. The extent to which constitutional human rights provisions will impact upon the existing rules governing family relationship is a question which must be debated in Botswana. How far this process will be taken depends partly on the vigilance and proactive activities of concerned groups within the country and judicial activism or self-restraint in the realm of constitutional interpretation.\textsuperscript{114}

Application of constitutional precepts to the challenges discussed above will definitely affect the very core of family organisation in Botswana. If the South African redefinition of marriage, for example, is adopted, it will fundamentally change the established perception of a great majority of Batswana of what constitutes family relationship.\textsuperscript{115} How this will impact on Botswana society is for now a matter of speculation but one will urge the initiation of a debate to ascertain the public view on the issues discussed above as well as other aspects of family law in need of modernisation. Whilst one would agree that public opinion should not be the fundamental determinant of social change and that it should not generally influence the way a constitution is interpreted,\textsuperscript{116} it is submitted that in the context of

\textsuperscript{113} See note 28 supra.


\textsuperscript{115} Cf. the view of Farlam JA in the South African case of Fourie & Anor. v Minister of Home Affairs op. cit. at para 117 where he expressed the view that in contemporary circumstances of South Africa, the extension of the common law definition of marriage to same-sex couples cannot be regarded as involving a fundamental change in the traditional concept of marriage. See however, the views expressed to the contrary by Lord Nicholls in the English case of Bellinger v. Bellinger [2003] 2 A.C. 467 (HL) at para. 48.

\textsuperscript{116} See dictum of Gubbay CJ in the Zimbabwean case of Banana v The State [2000] 4 L.R.C 621 (ZSC) at p. 645. Compare this dictum with the view expressed by Tebbutt JP in Kanane’s case op. cit at p. 79 where he opined that “while the courts can perhaps not be dictated to by public opinion, the courts would be loath to fly in the face of public opinion, especially if expressed through legislation passed by those elected by the public to represent them in the legislature.”
family relationships however, the courts and the legislature should endeavour to carry the people with them in their attempt to fashion a socially responsive legal dispensation for family relationships. Otherwise, there is a great danger that they will leave a majority of people behind.\textsuperscript{117} If this occurs, the moral legitimacy of the resultant decisions and laws will be severely undermined. Botswana family law needs to be reappraised and adapted to reflect the contemporary reality. It is one’s hope that this paper will provoke a debate to achieve a socially responsive family law in Botswana.

\textsuperscript{117} Tafa \textit{op. cit} at p. 128 asserts that “Constitutional orders and/or legal regimes (including their amendment) have, particularly in this Republic, by and large been grounded in the changing and/or evolving mores and attitudes of our people.”
From the organisation of African Unity to the African Union: rethinking the framework for inter-state cooperation in Africa in the era of globalisation*

T. Maluwa**

ABSTRACT

The adoption of the Constitutive Act of the African Union marked a historic moment in institution-building and the continuing “move to institutions” in Africa. The African Union can be understood, at least, at two levels: first, as a manifestation of Africa’s collective response to the twin-challenges of globalism/globalisation and regionalism/regional integration; secondly, as an expression of a resurgent commitment to the ideology of Pan-Africanism and the enduring quest for deeper African unity.

This essay examines the politico-legal context behind the move from the Organisation of African Unity to the African Union. It argues that the establishment of the African Union is not merely the most recent attempt at continental institutional reform and institution-building, but that it also represents a unique constitutional moment which has provided African states with the opportunity for fashioning a new body of normative principles to guide their interaction and cooperation. While offering no comprehensive examination of all the core provisions of the Constitutive Act, particular attention has been paid to some key principles. Chief among these is Article 4(h), relating to the right of intervention, which potentially constitutes both a significant and controversial African contribution to the mapping of new international law. Overall, it is argued that the new organisation represents a radical departure from the political, legal, and institutional framework of its predecessor, and that it is founded on a range of new normative principles reflecting a changed attitude and a new approach among African states to the management of their common interests and challenges. The essay concludes by suggesting that the move to the new institution and the adoption of new normative principles will only have qualitative meaning when AU member states move beyond the mere exhortation and expression of lofty principles and ensure their effective incorporation in praxis.

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1. INTRODUCTION

It is generally agreed that international organisations – inter-governmental entities established by treaty usually comprising of permanent secretariats, plenary assemblies involving all member states, and executive organs with more limited participation – are a twentieth century phenomenon. The emergence of international organisations at the beginning of the last century has been the subject of much scholarly writing. The general consensus among scholars is that the precursors to the modern international organisation are to be found mainly in the private and public international administrative unions which appeared in Europe in the second half of the nineteenth century. As most of these commentators have noted, the establishment of these organisations as permanent agencies dealing with non-political technical international issues was necessitated by the increasing complexity and interaction of technical, economic, social and cultural activities at the international level. To borrow from and paraphrase Alvarez, the history of these early organisations can be described as the story of how Euro-American lawyers that dominated the field of international law at this time sought to transcend the chaos of war by “moving to institutions.” Moreover, other writers have noted that this phenomenon was spurred by the passion of disparate individuals, separated by nationality, juridical philosophy and competing political ideologies and schools of thought, who nevertheless shared a messianic, quasi-religious and coherent “internationalist sensibility” that sought to institutionalise multilateral diplomacy to promote civilisation and progress.

Africa was not part of this turn-of-the-century “move to institutions,” for the obvious reason that the emergence of this phenomenon occurred

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2 See A.E. Boak, “Greek Interstate Associations and the League of Nations”, 15 AJIL (1921) 375. Boak discusses the nascent League of Nations, the first truly international organisation in the modern history of humankind, against the classical experience of the Greek leagues. But as Boak and other commentators have pointed out, the modern international organization has little in common with the earlier forms of institutionalised cooperation, including those in the ancient world. See also C. Archer, International Organizations, 3rd ed., London, Routledge (2001), p. 5; Alvarez, ibid., p. 324.


4 Kirgis, ibid.

5 Alvarez, note 1 supra, p. 324.

shortly after another phenomenon, more dehumanising than civilising: the European colonisation of African peoples and territories. Thus, with the exception of four states which had either never been colonised by European powers (Ethiopia and Liberia) or had by this time become formally independent (Egypt) or were regarded as autonomous dominions within the (British) colonial empire (South Africa), the colonised African territories were not represented in the League of Nations, the first truly international organisation in the history of humankind. Africa’s participation in the “move to institutions” had to wait for the establishment of the United Nations (UN) in 1945, and the emergence of the erstwhile colonies into independent states in the early and mid-1960s. The rise of independent African states from the ashes of colonialism was accompanied by two developments.

The first was the more or less automatic admission of these new states to UN membership. The second development related to the establishment of a regional organisation whose membership was open to all independent sovereign African states as a forum for the pursuit of common objectives, including the promotion of the unity and solidarity of African states, the defence of their sovereignty, territorial integrity and independence, and the eradication of all forms of colonialism from the continent. The creation of the Organisation of African Unity (OAU) by thirty-two

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7 Ethiopia (also previously known as Abyssinia) was the only pre-colonial indigenous African state not to have been colonised by any European power in the wake of the so-called “Scramble for Africa” that followed the Berlin Conference of 1884-1885. Italy briefly occupied it in 1935-1936 as part of Benito Mussolini’s unsuccessful and short-lived attempt to create an Italian “empire”; see, generally, R. Ruggeri and D. Nicolle, *The Italian Invasion of Abyssinia 1935-1936*, Oxford, Osprey Pub. (1997). Liberia was created as an independent state for the settlement of freed American slaves in 1847; in fact, the Republic of Liberia emerged out of a confederation of a number of American outposts established on the West African coast for black American emigrants, mostly transported there by the American Colonization Society from the early nineteenth century. For general historical accounts of the founding of the Liberian state, see C.H. Huberich, *The Political and Legislative History of Liberia*, Vol. 1, New York, Central Book Co. (1947); A.J. Beyan, *The American Colonisation Society and the Creation of the Liberian State: A Historical Perspective, 1822-1900*, Lanham, New York, University Press of America (1991).

8 Some commentators point to South Africa’s admission to the League of Nations in 1919 as the effective date of its independence from the United Kingdom, along with the other dominions (Australia, Canada, Irish Free State and New Zealand) and India; see, for example, L.M. Friedlander, “The Admission of States to the League of Nations”, *BYIL* (1928) 84, p. 85; John Dugard, on the other hand, argues that South Africa attained full international status at the moment it acquired the capacity to enter into relations with other states and that capacity was recognised by the colonial power, Great Britain, and confirmed by the Imperial Conference in 1926; see J. Dugard, *International Law: A South African Perspective*, Kenwyn, Juta & Co. Ltd. (1994), p. 62; for a similar view, see J. Crawford, *The Creation of States in International Law*, Oxford, OUP (1979), pp. 238-246.

9 The League of Nations was established at the end of the First World War. Its immediate source was a proposal introduced at the Paris Peace Conference in 1919. The League, whose objective was “to promote international cooperation and to achieve international peace and security”, remained predominantly a European organisation, with a maximum membership of 59 states.

10 The same four African members of the League of Nations – Egypt, Ethiopia, Liberia and South Africa – were also the only African states among the original members of the United Nations at its creation in 1945. It took ten years before another African country, Libya, joined the new organisation, followed in quick succession by Morocco, Sudan and Tunisia (1956); Ghana (1957) and Guinea (1958). The remaining colonies acceded to UN membership as they gained independent statehood from 1960 onwards. Eritrea was the last African country to become a member in 1993.

independent African states on 25 May, 1963 in Addis Ababa, Ethiopia, was undertaken within the context of Article 53 of the UN Charter, which allows for such regional arrangements and agencies. It can thus be said that if African states were not present at the genesis of the “move to institutions” at the beginning of the twentieth century, by mid-century a significant number of them had emerged and were able not only to join the UN – which was then barely two decades old – but to found their own regional organisation, the OAU. Since then, Africa has gone farther in its “move to institutions”: first, by establishing a number of sub-regional bodies whose collective membership encompasses all the continent’s countries; second, through the more recent creation of a new continental organisation superseding the OAU.

The aim of this essay is to contribute to the debate over the transformation of the institutional framework for African inter-state cooperation and coordination from the OAU to its successor, the African Union (AU). It seeks to chart and analyse the transition from the former body to the latter, and to explore some of the cardinal issues that motivated this transformation. In examining this transition from the old to the new organisation, it will be instructive to contrast this experience with another phenomenon that some scholars have observed since the end of the Cold War: namely, the degree to which “traditional” international organisations have adapted to deeply changing political and factual circumstances without formally amending their own constitutional structures or functions. As Burci has noted, these organisations “have relied on the general and flexible nature of their constitutive instruments and on political processes to assume roles that could have hardly been foreseeable at the moment of their establishment”.

One of the pertinent questions that must be addressed here is: why did the OAU member states opt to establish a new entity altogether to replace an organisation that had served the continent well for over three and half decades instead of merely reforming it, through appropriate amendments to the Charter, to enable it to meet the new challenges? It may briefly be noted that, in fact, the OAU Assembly initiated a process to review the Charter in 1979, when it established the Charter Review Committee. The committee was charged with the task of recommending necessary amendments to the organisation’s founding instrument in the light of the developments and experiences that the organisation had witnessed in the decade and a half since its inception. However, the proposed review did not proceed as had been

12 These sub-regional bodies include are the various Regional Economic Communities (RECs) characterised as the “building blocks” of the African Economic Community established in 1991. See note 49 infra.
14 The Charter Review Committee was established by the Assembly by decision AHG/Dec.111 (XVI) at its sixteenth ordinary session held in Monrovia, Liberia, from 17 to 20 July 1979. The committee (initially composed of fourteen members, later expanded to twenty-eight but subsequently reduced to fifteen) held its first session in Mogadishu, Somalia, from 7 to 12 April 1980. It met six times between 1980 and 1996, when it held its last session in Addis Ababa from 9 to 15 May 1996.
envisaged. In the seventeen years of its existence the OAU Charter Review Committee met only a few times and did not adopt any concrete proposals for amendment or reform for consideration by the OAU policy organs. The transition from the OAU to the AU that was to occur a little more than two decades later thus followed a different trajectory: a radical rupture with the old legal and institutional order established by the OAU Charter and the creation of a new order under the Constitutive Act of the AU (“the Constitutive Act”), rather than merely an amendment of the structure and functions of the former organisation. After almost four decades of its existence, it was felt that the OAU needed to be wholly replaced by a new organisation charged with a new mission and objectives and endowed with enhanced powers and functions.

In brief, this discussion aims to explore the cardinal aspects of, and motivating factors behind, the transition from the OAU to the AU. I intend to assess the legal and political significance of the Constitutive Act, and the political and contextual dynamics behind the transition from the old to the new. I shall also offer some broad reflections on the significance of the AU for the project of African integration, and Africa’s continuing “move to institutions.”

2. THE ORGANISATION OF AFRICAN UNITY: A BRIEF EXCURSUS

The story of the OAU has been amply told elsewhere and needs no repeating here. As is well known, the OAU was born out of the struggle for decolonisation and the pan-Africanist movement. Pan-Africanism, as a project aimed at forging closer unity between African states as well as between African peoples within the continent and in the African diaspora, has a long history. The history of pan-Africanism is a subject that has attracted considerable interest and one that has been examined by many other writers elsewhere. It has been noted that pan-Africanism was not simply a moment bringing people of African origin together, but that it was an ideology that has left a strong

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16 In this discussion, I have partly drawn from some of my earlier work, in particular “Re-imagining African Unity: Some Preliminary Observations on the Constitutive Act of the African Union”, 9 AYIL (2002) 3.
17 See Z. Cervenka, The Unfinished Quest for Unity: Africa and the OAU, London, Friedmann (1977); see also works by Addona and Amate, note 11 supra.
19 See, for example, the works cited in notes 11, 17 and 18 supra. See also, A. Ajala, Pan-Africanism: Evolution, Progress and Prospects, New York, St. Martin’s Press (1973), passim.
imprint on African political thinking and sensitivities, and covering cultural, political and economic dimensions. I will not attempt to repeat this narrative in this discussion, save to reiterate that the establishment of the OAU in 1963 represented the crystallisation, in institutional terms, of this movement, at least as far as the quest for African continental unity was concerned.

One major task that pan-Africanism set for itself – reflected in the OAU Charter – was the complete liberation of the continent from colonialism, racism and apartheid. Indeed, it was this task that gave rise to the need for unity: the sense of a shared responsibility by the newly independent thirty-odd African states and a shared history of suffering from the combined experience of the transatlantic slave trade and colonial subjugation, oppression and exploitation. While there was general agreement among these states on the need for African unity, the form and nature of that unity were, however, sources of serious disagreements. Some favoured deep and immediate political union with a unitary continent-wide government, while others advocated a loose association of states; yet another group preferred an approach that emphasized regional unity as a first step towards continental unity. These differences in approach reflected tensions between those who espoused a radical or revolutionary path to African unity, on the one hand, and those that favoured cautious and pragmatic, or even slow, evolutionary processes, on the other.

In the event, the organization that emerged from the Addis Ababa conference was a loose association of sovereign African states, a compromise between what have been described as the two modernist concepts of international organisation: that of the management-oriented, functionalist and progressive international organisation charged with the management of common problems; and that of an international organisation as the classical agora, a public realm in which international issues can be debated and, perhaps, decided. The former is usually an organisation invested with certain limited executive power and enjoying a measure of supranational authority, a good example being the European Union; the latter is essentially a platform or forum where states can meet, exchange ideas, and discuss their common future, not necessarily with a view to solving problems. With its emphasis on the related principles of sovereign equality of the member states, respect for the sovereignty, territorial integrity and independence of states and non-interference in the internal affairs of states, the OAU was clearly intended to be a loose organisation for voluntary cooperation between sovereign states, with no supra-national authority. As such, the OAU fell squarely within the

20 Mkandawire, note 18 supra, p. 1.
21 These groups were known, respectively, as the “Casablanca Group,” led by Egypt, Ghana and Guinea, the “Monrovia Group,” led by Liberia and Nigeria, and the “Brazzaville Group” led by Congo and Tanzania.
typology of international organisations described in most of the traditional scholarly work in the field of international organisations: namely, international organisations as entities pursuing “common or converging national interests of member states”; or entities whose primary purpose is to resolve cross-border issues that cannot otherwise be addressed domestically.

The OAU’s greatest achievement lay in its role in spearheading the liberation and decolonisation of the continent, the struggle against apartheid and racist minority rule in Southern Africa, forging a common socioeconomic agenda, and in affirming a common African identity. Yet, as many scholars and commentators have stated over the years, the OAU had a mixed, if not altogether poor, record in respect of its other declared objectives. It failed to achieve much in advancing real socio-economic development of the continent or in deepening the unity and integration of African peoples. Its record in resolving the vicious circles of poverty, conflict and human rights violations was generally dismal. As Mkandawire has noted:

“The political unification and economic integration of the continent have thus far failed, at least when judged against the dreams of the key figures of the Pan-African movement, the documents and plans prepared by Pan-African conferences, and the declarations and rhetoric of African leadership. It has failed when judged against the well-articulated, widely shared understanding of the needs of the continent. It has failed when judged against the emotive force of pan-Africanism in the African discourse.”

These failures have been compounded by other, largely external, factors. By the beginning of the last decade of the twentieth century, developments in other regions of the world, especially the end of the Cold War, the collapse of the Soviet Union and the relentless advance of globalisation and global capitalism had begun to impact upon the African continent in ways that had not been anticipated. For many among the members of the OAU itself, the organisation had become moribund and irrelevant, in the face of the changed circumstances of the world. As the Interim Chairperson of the Commission of the AU was to observe later:

\[\text{See Archer, note 2 supra, pp. 50 et seq. for a brief but insightful classification and discussion of typologies of international organisations based on a categorisation of their aims and objectives.}\]
\[\text{The major achievements of the OAU have been recognised and enumerated in a somewhat self-congratulatory declaration adopted by the first ordinary session of the Assembly of Heads of State and Government of the African Union on 10 July, 2002, ASS/AU/Decl.2 (I): the Durban Declaration in Tribute to the Organisation of African Unity and on the Launching of the African Union.}\]
“The world had changed, the continent had changed but the organizational vehicle at the regional level remained pretty much the same, with prisms and methods that could not cope with emerging challenges. The commitment to change this situation fostered the birth of the African Union.”

This commitment to change must be understood within the context of two specific factors. First, the fact that the efforts to review the OAU Charter had not moved with the anticipated speed and effectiveness. As indicated above, between 1980 and 1996, when it was last convened, the OAU Charter Review Committee had met only six times.\textsuperscript{28} Inertia and an apparent lack of a sense of urgency on the part of the committee had driven some member states to scepticism about any chance of achieving a meaningful review of the Charter. Secondly, there was the phenomenon of globalisation, which gained more currency in the immediate post-Cold War years. This had begun to concentrate the collective minds of OAU member states on the need to reorient the objectives and activities of the OAU to enable it to meet the related challenges of globalisation and economic integration in Africa. This new mechanism is the AU.

3. ADOPTION OF THE CONSTITUTIVE ACT OF THE AFRICAN UNION

The Constitutive Act was adopted unanimously by the Assembly of Heads of State and Government of the OAU (“OAU Assembly”) meeting in its thirty-sixth ordinary session in Lomé, Togo, on 11 July 2000. Subsequently, at its fifth extraordinary session held in Sirte, Libya, on 2 March 2001, the Assembly “proudly” declared the establishment of the AU. The Constitutive Act entered into force on 26 May 2001, following its ratification by two-thirds of the member states of the OAU, as provided for in its Article 28.\textsuperscript{29} Upon its entry into force, the Constitutive Act abrogated and superseded the OAU Charter, in accordance with Article 33(1). However, in terms of the same provision, the Charter, and thereby the OAU, remained operational for a transitional period of one year, following a decision adopted to that effect by the Assembly at its thirty-seventh ordinary session in Lusaka, Zambia, on 10 July 2001.\textsuperscript{30} Thus, the thirty-eighth ordinary session of the Assembly held in Durban, South Africa, on 8 July 2002, was the last summit of the OAU. This summit marked the demise of the OAU after 39 years of existence, and was immediately

\textsuperscript{28} See note 14 supra.
\textsuperscript{29} All the former fifty-three OAU member states are parties to the Constitutive Act and thus AU member states. This leaves Morocco as the only African state that is not a member of the AU.
followed at the same venue by the inaugural session of the new organization, held from 9 to 10 July 2002.

The adoption of the Constitutive Act marked a significant milestone in the history of the OAU. In adopting a new treaty intended to supersede the OAU Charter, and replace the OAU with a new organization, it also marked the end of the tepid OAU Charter review process. As was indicated above, the efforts to revise the OAU Charter never came to successful fruition. There was never a strong urge or enthusiasm among the member states for any meaningful review of the Charter. This is not as such surprising: the history of the UN system, for example, shows consistently the reluctance of member states to open constitutions of international organisations to formal amendments (except, perhaps, for increasing the membership of executive bodies).  

Furthermore, the adoption of the Constitutive Act represented a critical moment in the long process of reconstructing and consolidating African unity and the historic quest for a politically integrated and unified Africa. At the same time, however, the adoption of the Constitutive Act gave rise to many questions, relating both to the substantive aspects of the proclaimed objectives of the AU, in particular the project of African integration, and to the modalities and processes for carrying them out. Some of these questions revolved around the following issues: first, the extent to which the AU would offer a substantive and qualitative difference from the institutional framework of the predecessor organisation, and whether it truly ushered in a new entity that was not merely a reincarnation of the OAU under another name; and, second, the extent to which the establishment of the AU represented an aspect of Africa’s collective response to the twin-challenges of globalisation and the new regionalism, as had been claimed by various African leaders. Other questions, addressed in some of the literature that has appeared to date on the subject, relate to the relevance of the Constitutive Act and the AU in confronting the equally important and urgent challenges of strengthening democracy, collective security and human rights in Africa.

I do not propose to examine all these questions here. As indicated above, the aims of this essay are more limited. To be sure, a fuller and wide-ranging discussion might address these and many other questions, for example those relating to the legal and broader normative significance of the Constitutive Act; the political and contextual dynamics behind this recent manifestation of institution-building in post-colonial Africa; and the historical

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31 Burci, note 13 supra, p. 438.
processes and the political and intellectual discourses underpinning the idea of African unity and integration, including the legitimising narrative of pan-Africanism, which provides a kind of ideological genealogy. Such a discussion might also investigate, for example, the various theoretical debates which have dominated social science and international relations discourses since the 1950s on the subject of regional integration, particularly in relation to the relevance of the experience of European integration for integration schemes in Africa and elsewhere in the world.33

These debates have a certain resonance with the process of institution-building in postcolonial Africa. In part, an engagement with these questions goes some way towards addressing the question: what is the nature of integration entailed in the idea of the AU? Indeed, what is the basic institutional premise of the new entity: is it a supranational institution or merely an intergovernmental organisation, as was the OAU which it replaced? And what is the relevance of the ongoing theoretical schism in European intellectual and political discourse – between neofunctionalism and intergovernmentalism34 – for identifying, describing and predicting the eventual outcome of the processes of economic and political integration in Africa? Can Africa draw any useful lessons from the European integration experience, especially in the light of the widespread assumption that the African Union is modelled on the European Union?

While this short discussion cannot pretend to present detailed accounts of these integration narratives or respond critically to the questions they raise, it is apt to point out, at least, that these narratives remind us that part of the challenge of explaining the recent developments relating to the establishment of the AU has to do with the problem of definition. There is a whole range of questions that require definitional clarity and elucidation. For example, is integration an economic or political phenomenon? If it is an economic phenomenon, what levels of interdependence need to be achieved among a group of national economies for them to be described as “integrated”? And does economic integration imply political integration? Or, conversely, does political integration create the space for economic integration to flourish? And what does the notion of political integration entail?35

33 See, generally, discussion in Ben Rosamond, Theories of European Integration, Basingstoke, Macmillan (2000), passim.
34 These are only two of the principal theoretical perspectives from which most discussions on European integration tend to proceed. Other perspectives include “federalism,” “functionalism,” “transactionalism” or “pluralism,” to name only a few. For a brief critique of these approaches, see Rosamond, ibid.
35 For a discussion of some of these questions in relation to European integration, see Rosamond, ibid.
3.1 Background to the adoption of the Constitutive Act: the historical and politico-legal context

The adoption of the Constitutive Act was preceded by a declaration adopted on 9 September 1999 by the fourth extraordinary session of the Assembly held in Sirte, Libya (“the Sirte Declaration”). The session had been convened at Libya’s request “[to] discuss ways and means of making the OAU effective so as to keep pace with the political and economic developments taking place in the world and the preparation required of Africa within the context of globalisation so as to preserve its social, economic and political potentials.” In fact, when it considered the Libyan request and invitation to host the extraordinary session at its thirty-fifth ordinary session in Algiers, Algeria, on 14 July 1999, the Assembly had viewed this objective as an aspect of Africa’s collective response to the phenomenon of globalisation. Not surprisingly, various speakers at the Algiers summit, and subsequently in Sirte, reiterated the need to reposition the OAU in the international scheme of things, reorient its objectives and put in its place a new mechanism in order to reinvigorate the project of African integration in response to the forces of globalisation. In brief, there was a perceived need for a new institutional framework for advancing this project.

36 EAHG/Decl. (IV). Full text available at <http://www.libya.un.org/speeches/sirte990909.pdf>. The relevant part of the declaration provides as follows:

“[8.] Having discussed frankly and extensively on how to proceed with the strengthening of the unity of our continent and its peoples, in the light of those proposals, and bearing in mind the current situation on the continent, we DECIDE TO:

(i) Establish an African Union, in conformity with the ultimate objectives of the Charter of our continental Organization and the provisions of the Treaty Establishing the African Economic Community.
(ii) Accelerate the process of implementing the Treaty Establishing the African Economic Community, in particular:
(a) Shorten the implementation periods of the Abuja Treaty.
(b) Ensure the speedy establishment of all the institutions provided for in the Abuja Treaty, such as the African Central Bank, the African Monetary Union, the African Court of Justice and, in particular, the Pan-African Parliament. We aim to establish that Parliament by the year 2000, to provide a common platform for our peoples and their grass-root organizations to be more involved in discussions and decision-making on the problems and challenges facing our continent.
(c) Strengthening and consolidating the Regional Economic Communities as the pillars for achieving the objectives of the African Economic Community and realizing the envisaged [Union].”


38 The first collective response by African countries to the changes taking place in the world following the collapse of the Berlin Wall in 1989 is encapsulated in the Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, adopted by the OAU Assembly of Heads of State and Government on 11 July 1990 at its twenty-sixth ordinary session in Addis Ababa, Ethiopia. The project for the continental economic integration of Africa was given a formal legal basis with the adoption of the Treaty Establishing the African Economic Community on 3 June 1991 in Abuja, Nigeria (hence more commonly referred to as the Abuja Treaty). The focal points for regional integration in Africa are the various Regional Economic Communities (RECs), some of which were established prior to the adoption of the treaty, which characterises them as the “building blocks” of the African Economic Community (Article 6). Similar descriptions of European integration as a response to the forces of globalization can be found in the copious literature on the European Union. In this context, one writer (see H. Wallace, “Politics and Policy in the European Union: the Challenge of Governance”, in H. Wallace and W. Wallace (Eds.), Policy-Making in the European Union, Oxford, OUP (1996), p. 16) has observed that: “European integration can be seen as a distinct west European effort to contain the consequences of globalisation. Rather than be forced to choose between the national polity for developing policies and the relative anarchy of the globe, west Europeans invented a form of regional governance
The idea of reviewing and reforming the political, legal and institutional bases of the OAU has a long history and is certainly not the brainchild of Colonel Muammar Ghaddafi, the Libyan leader alone, as is sometimes assumed in some quarters. Of course, in recent times, he has been one of the most passionate and vocal advocates of the need to deepen African integration and has tended to present himself as the brain behind the founding of the AU, a claim that most other African leaders no doubt find both pretentious and unacceptable. A number of explanations have been advanced in an attempt to understand Libya’s newly self-ascribed role as the accelerator of the engine for the transformation and reconstruction of African unity and as “the laboratory of the African Union.” These have included, for instance, attempts to locate these developments in the context of what is perceived as Ghaddafi’s hidden agenda for personal aggrandisement on the African continent. Yet, a more serious, and less cynical, reading of Ghaddafi’s proclaimed position, as articulated at the successive OAU summits in Algiers, Sirte and Lomé reveals a clear and well-pronounced commitment to the need to reinvigorate the quest for a more united and cohesive Africa. A recurrent theme in these pronouncements has been his critique of the post-colonial African State as an illegitimate product of the balkanisation policy of European colonialism. Along with other African leaders, Ghaddafi has questioned the viability of these States and their ability – indeed capacity – to survive and provide for the welfare of their people in a world dominated, both politically and economically, by Western hegemony and all-powerful multinational conglomerates. His preoccupation has thus been to challenge the legitimacy of the inherited colonial territorial divisions which have, in many cases, split peoples and communities that in previous times belonged to the same polities. Ghaddafi is not alone on this, as anyone familiar with some of the more critical African legal and historical scholarship would easily testify. In questioning the historical legitimacy and political logic of the

38 with polity-like features to extend the state and to broaden the boundary between themselves and the rest of the world.”

39 For a brief account of Libya’s original proposals for the African Union, see my discussion in work cited in note 16 supra, at p. 17.

40 See Jeune Afrique Economie, No. 314, 7 August – 3 September 2000, p. 59. See also, for example, The Observer, London, 4 March 2003, p. 22. There is no doubt that Gaddafi himself and his regime have not spared any effort in cultivating his image as the principal architect of the African Union, even while acknowledging the role of earlier African political leaders, such as Kwame Nkrumah, as the originators of the idea of the African Union; see text of interview with Ali Triki, Libya’s Minister of African Affairs and close confidante of Colonel Gaddafi, conducted during the Durban summit, available at <http://allafrica.com/stories/2000207240002.html>.

colonial balkanisation of Africa, one is in fact questioning the very legitimacy of the international law principle of *uti possidetis*, on which the protection of colonial boundaries in Africa has been based and which was given political sanctity in the well-known resolution adopted by the first ordinary session of the OAU in Cairo, Egypt, in July 1964.

The objective of creating a politically and territorially united Africa, first advocated in the early 1960s by Ghana’s first president, Kwame Nkrumah, necessarily challenges Africans to re-think the whole question of the inviolability of the boundaries inherited at independence by the post-colonial African States. In this sense, therefore, the adoption of the Constitutive Act is but an aspect of the historic quest for a united Africa, whose origins can be traced back to the pioneers of the Pan-Africanist movement in the pre-independence era: Marcus Garvey, George Padmore, Kwame Nkrumah, Nnamdi Azikiwe and Julius Nyerere, among others. To insist, as some commentators have done, on characterising this project as one individual country’s sole initiative or one particular leader’s obsession with personal aggrandisement, is to miss the historical context in which current debates about African unity and integration must be located. It is not insignificant that, notwithstanding their initial differences or misgivings over Ghaddafi’s advocacy of the matter, all the major regional powers in Africa, ranging from Egypt in North Africa, Nigeria in West Africa to South Africa in Southern Africa, to name only a few, have been equally emphatic in expressing their shared vision of a more united Africa, and for the AU.

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41 Sovereignty in Africa,” CODESRIA Bulletin Nos. 3 & 4 (1999), p. 4, esp. at p. 6 where he states, *inter alia*: “[It] is clear that the boundaries inherited from colonization were not defined by Africans themselves. But contrary to a common assumption, this does not necessarily mean that they were arbitrary. [Moreover], to state that current African boundaries are merely a product of colonial arbitrariness is to ignore their multiple geneses. In fact, their establishment ante-dated the Congress of Berlin, whose objective was to distribute sovereignty among the different powers engaged in dividing up the Continent”. For other views on this subject, see P. Nugent and A.J. Asiwadu (Eds.), *African Boundaries: Barriers, Conduits and Opportunities*, London, Pinter (1996), passim.

42 Resolution on Border Disputes Among African States: AHG/Res.16 (I), adopted on 21 July, 1964. The principle of *uti possidetis* was effectively characterised as a principle of regional international law in Africa by the International Court of Justice in the *Frontier Dispute (Burkina Faso v Mali)* Case; see ICJ Rep. 1986, p. 554.

43 The facile assumption that the African Union is the brainchild of President Ghaddafi is not limited to the popular media alone. Thus, in one of the few academic discussions to have appeared on the issue so far, Magliveras and Naldi observe that: “[The] Union, the brainchild of Libyan President Qaddafi, and modelled on the European Union, is the culmination of the OAU’s piecemeal process of political cooperation and economic integration”. See K. Magliveras and G. Naldi, *op. cit. note 32 supra*, p. 415. Yet, there is something contradictory in describing this development as both Ghaddafi’s brainchild and as part of the OAU’s process of political cooperation and economic integration. While it cannot be denied that Ghaddafi has given the idea its most recent impetus, the project of African political and economic union and integration has its roots in earlier historical antecedents and was explicitly envisaged in Article 6 of the Abuja Treaty. The idea of the African Union is not, as such, Ghaddafi’s singular invention.

44 Both Presidents Olusegun Obasanjo of Nigeria and Thabo Mbeki of South Africa, as well as Foreign Minister Amr Mousa of Egypt, standing in for President Hosni Mubarak, played critical roles in the debates and consultations which produced the compromise that formed the basis for the Sirté Declaration. Their respective support for the proposed Constitutive Act of the African Union in the Lomé summit was equally critical to securing its adoption after initial expressions of reservations by a number of delegations both at the ministerial and summit levels. However, Ghaddafi’s self-image as “the leader of Africa” cannot be ignored. Any recent visitor to Tripoli will testify to the adornment of various major points and
shared commitment to renewed African unity was evident in the speeches by some African leaders at the AU inaugural summit in Durban.

Moreover, as pointed out above, part of the political context within which the adoption of the Sirte Declaration and, subsequently, the Constitutive Act should be understood is the challenge posed by the phenomenon of globalisation, and Africa’s response to it. It has been observed that in the debate on the somewhat nebulous and controversial “new world order,” two seemingly incompatible concepts – globalisation and regionalisation – have gained a certain pre-eminence. As has been argued by various scholars, both globalisation and regionalisation are ambiguous concepts, which elicit different interpretations from different commentators, depending on what empirical phenomena are singled out for scrutiny, and what kind of theoretical framework is employed to interpret them. This is not the place to undertake a proper examination of these debates, save to observe that the two processes may be regarded as both antagonistic and complementary. Thus, regionalisation may at once be conceived as a subsystem submitted to the rationale of globalisation, or as a substitute to it, or as a building block for the reconstruction of a different global system. It is argued here that the project of establishing the AU is predicated on the last view: the thesis that the construction of a large integrated regional bloc is the only efficient response to the challenge of globalisation. This assumption was also evident in the call for the acceleration of the economic integration of the African continent made by the African political leaders at Sirte. But what was the background to this call?

The last two and half decades, and especially the period following the collapse of the Soviet Union, have witnessed something of a revival in regionalism in various regions of the world, including Africa. This period has seen an increase in African economic integration schemes and institutions, referred to as Regional Economic Communities (RECs), which are regarded as the “building blocks” of the African Economic Community (AEC), established in 1991. The older RECs, such as the Economic Community of

43 buildings in the city with murals and slogans displaying or proclaiming Ghaddafi’s various poses and roles as the “leader,” “guide” or “liberator” of the African continent and its people. The propagation of Ghaddafi’s self-image as the “spiritual leader” of the African Union continued to appear in some sections of the media right up to the inauguration of the African Union on 9 July 2002 and have continued since; see, for example, The Namibian, Windhoek, 10 July 2002, p. 1; see also The Observer, London, 4 March 2003, p. 22.
46 The Sirte Declaration called for the acceleration of the process of implementing the Abuja Treaty by, inter alia, shortening the implementation period of the Treaty Establishing the African Economic Community (also commonly referred to as the Abuja Treaty), adopted by OAU member states on 3 June, 1991; see Para. 8(ii) of the Sirte Declaration at note 36 supra.
47 The Abuja Treaty (ibid.) established the African Economic Community (AEC) as an integral part of the OAU (Article 98). The treaty, which entered into force on 12 May 1994, has not been abrogated by the
West African States (ECOWAS), the Southern African Development Community (SADC) and the Common Market for Eastern and Southern Africa (COMESA), have in recent years been joined by two new such regional organisations: the East African Community (EAC) and the Community of Sahel-Saharan States (more commonly known by the acronym CEN-SAD). All these were intended to be the basis on which the linear progression of African integration envisaged under Article 6 of the Abuja Treaty, from free trade areas to a continent-wide common market, would proceed. The ultimate goal of continent-wide integration was supposed to be achieved in stages, over a period not exceeding thirty-four years. The very first stage was to have focused on the strengthening of the existing RECs and the establishment of new ones in regions of Africa where they did not already exist. According to the proposed time-table, the RECs were expected to develop gradually and progressively into free-trade areas, customs unions and, through horizontal co-ordination and harmonisation, eventually evolve into a common market embracing the whole continent. The process originally envisaged under the Abuja Treaty brings into focus some aspects of the questions hinted at earlier, such as: is the end point of economic integration a customs union, a common market, or full economic and monetary union? What types and levels of common institutionalisation are associated with an integrated economic space? Does this economic integration imply political integration?

In any event, the OAU’s own approach to African integration did not faithfully follow the logic of the Abuja Treaty, nor has the process changed dramatically in the four years since the inception of the AU. As Mulat has aptly observed, “in practice, the path towards the African Economic Community is neither clear nor predictable, nor devoid of twists and turns.” Moreover, these RECs are neither progressing towards the goal of creating the AEC at the same pace, nor with the same procedures, processes or determination. The AEC’s own Economic and Social Commission candidly observed thus, a few years ago:

Constitutive Act. However, the Constitutive Act has precedence over any inconsistent or contrary provisions in the treaty (see Article 33(2)).

There are eight AU-recognised Regional Economic Communities: Arab Maghreb Union (AMU), Common Market for Eastern and Southern Africa (COMESA), Community of Sahel-Saharan States (CEN-SAD), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development (IGAD) and Southern African Development Community (SADC). It should be noted that the membership of these RECs does not necessarily and completely coincide with membership of the geographical regions into which OAU member states are divided: Central Africa, East Africa, North Africa, Southern Africa and West Africa. Furthermore, there is also a considerable degree of overlapping membership between the different organisations, with some countries belonging to as many as three different RECs, and some RECs drawing their membership from at least three different OAU geographical regions.


“[There is] no clear evidence that they have long-term continental integration in view, [although] trade liberalization is in the forefront and there seems to be an acceptance of the need for rationalization and programme harmonization [in most places].”

Mulat also argues that regionalisation in Africa has followed a rather complicated route and that trade issues and economic considerations alone do not appear to be the basis for it in every case. He concludes: “regionalism can complement and further facilitate the drive toward multilateralism and economic globalisation [and] perhaps the strongest justification yet for Africa’s RECs is to be found in the long-term possibilities they create for sustained growth and improved welfare.”

Although some aspects of these questions have been eloquently debated in the academic literature on regional integration in Africa, it is to be lamented that none of these questions were addressed as such in Sirte, nor has there been a serious engagement with these issues at the highest political level since. Beyond the broad platitudes about the need to enhance African political unity and integration, there has not been a deep discussion among political leaders in Africa on the idea of the AU, on the very meaning of the “union” entailed in this project and its economic, legal, and political implications for the continent. Some leaders regard it as the panacea for all of Africa’s economic and political problems, while yet others still view it as the thin end of the wedge towards the creation of a “United States of Africa.” That said, few of the African political leaders at that summit would have disagreed with Mulat’s analysis of the slow progress towards African economic integration. It was against this background, characterised by a lack of strategic clarity and

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51 Mulat, op. cit., p. 138.
52 On his part, Muammar Ghaddafı has never disguised his desire for the immediate establishment of a “United States of Africa,” modelled on that of the United States of America, with a unitary government and a continental army under a single command, along the lines first advocated by Ghanaian President Kwane Nkrumah in the early 1960s. These proposals were first elaborated in one of the documents that Libya circulated at the Sirte summit in 1999 (see note 16 supra, p. 17, n. 24). Although these proposals were initially emphatically rejected by other African leaders, Ghaddafı has doggedly persisted in making this call and has continued to present agenda items for discussion at subsequent AU summits aimed at securing, if not an immediate commitment from other African leaders, at least incremental steps towards the establishment of the “United States of Africa.” These proposals, which have been officially supported by some countries such as Senegal, have included, for example, the creation, within the AU structures, of positions of “ministers” in the areas of trade, transport, foreign affairs, defence, etc. and the re-designation of the position of Chairperson of the AU Commission as “prime minister.” In response, the AU Assembly of Heads of State and Government decided to set up a Committee of Seven Heads of State and Government to study these various proposals. The committee presented its initial report to the sixth ordinary session of the Assembly held in Khartoum, Sudan, from 23 to 24 January 2006. At that summit the Assembly consequently adopted a resolution in which, for the first time, it expressly “[reaffirms] that the ultimate goal of the African Union is the full political and economic integration of the continent leading to the United States of Africa.” See Decision on the Report of the Committee of Seven Heads of State and Government Chaired by the President of the Federal Republic of Nigeria: Assembly/AU/Dec.99 (VI). This was more recently reiterated by the Assembly at its eighth ordinary session held in Addis Ababa from 29 to 30 January 2007: see Assembly/AU/Dec.156(VIII), para. 2. At Ghaddafı’s urging, the Assembly also decided “to devote the 9th Ordinary Session of the Assembly in Accra, Ghana, in July 2007 to the ‘Grand Debate’ on the Union Government” (para. 3).
the slow pace of implementation of the Abuja Treaty programme, that the call was made in the Sirte Declaration to accelerate the project of African integration by short-cutting the tortuous path mapped out in the Abuja Treaty and establishing a new institution, the AU. The need for the harmonisation and strengthening of the RECs, the acceleration of the implementation of the Abuja Treaty and the creation of the AU turned precisely on the question of how to enhance Africa’s performance in the new global economy to ensure sustained growth and the improved welfare of its peoples.\(^{54}\)

3.2 From the old to the new: The transition to the African Union

The Sirte Declaration stated that the Constitutive Act was to be in conformity with the ultimate objectives of the OAU Charter and the provisions of the Abuja Treaty without, however, specifying the model or form the AU was to assume. So, a number of preliminary questions immediately presented themselves. What was intended by this declaration: the creation of a new institution to exist alongside the OAU and AEC, a fusion of the two with the new organisation or the replacement of the OAU only, while keeping the AEC intact? And, what was implied in the very choice of the designation “African Union”? Was it to be the equivalent of the European Union, for example, with its institutions and organs modelled on those of the latter? It cannot be denied that in the minds of most people, including some African political leaders, the AU is not only inspired by the European Union (EU), but the processes and outcome of African integration must also follow the logic and trajectory of European integration.\(^{55}\)

These questions were debated extensively during the two meetings of legal experts and parliamentarians held to examine two draft instruments prepared by the OAU General Secretariat, in Addis Ababa, Ethiopia (17 to 20 April 2000), and Tripoli, Libya (27 to 29 May 2000): a Draft Treaty Establishing the African Union and a Draft Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament.\(^{56}\)

The final draft legal text adopted by the second experts’ meeting in Tripoli was considered by a ministerial meeting which was convened immediately

\(^{54}\) See Sirte Declaration, note 36 supra.

\(^{55}\) Although most African political leaders have been at pains to insist that the African Union is not simply intended to be a carbon copy of the European Union, it cannot be denied that, in reality, the institutional make-up of the African Union (for example, the Commission, the Permanent Representatives’ Committee, the Court of Justice and the Pan-African Parliament) has been purposefully modelled on the latter’s institutions and organs. However, it should also be noted that, apart from the Permanent Representatives’ Committee, the other organs were already envisaged under the Abuja Treaty, as future organs of the African Economic Community to be set up subsequently by separate protocols.

\(^{56}\) The General Secretariat had initially engaged a group of consultants to assist it in formulating the draft legal texts for both the African Union and the Pan-African Parliament. The original draft texts elaborated by the consultants and the General Secretariat were amended quite drastically in the course of the subsequent deliberations of both the experts’ meetings and the ministerial meeting.
thereafter, also in Tripoli, from 31 May to 2 June 2000. The ministerial meeting adopted a draft Constitutive Act of the African Union which was subsequently formally submitted to the OAU Council of Ministers and to the thirty-sixth ordinary session of the OAU Assembly in Lomé, Togo, for further consideration and eventual adoption. The draft Constitutive Act submitted to the Assembly for consideration and adoption at the Lomé summit was essentially the outcome of these experts’ and ministerial meetings, with very few textual changes.\(^5^7\) Most of the critical issues relating to the objectives, principles, institutional structure, powers and functions of the principal organs of the new body had largely been settled in the earlier ministerial deliberations in Tripoli and Lomé. Consequently, there was very little debate at the summit itself. Unsurprisingly, the Constitutive Act was adopted by the Assembly on 11 July 2000 much sooner than most observers and advocates of the project of the AU had expected. Moreover, even the isolated dissenting voices heard in Sirte only eleven months earlier hardly resurfaced in Lomé.\(^5^8\)

In fact, by the time the fifth extraordinary summit of the OAU Assembly was convened, again in Sirte, on 1-2 March 2001, to launch the AU, a dramatic change had occurred in the disposition of all OAU members to the proposed AU. By the close of the summit, all the fifty-three member states had signed the Constitutive Act. The last few countries to do so actually signed it in the course of the summit itself.\(^5^9\) Thus, even those countries that had earlier categorically opposed the idea of establishing the AU, such as Kenya, or had expressed grave reservations and caution, for example Botswana and Uganda, had now come on board. The conversion of President Jerry Rawlings of Ghana and President Yoweri Museveni of Uganda to the project of the AU was probably the most notable: having opposed Ghaddafi’s proposal and lectured their peers about the dangers of ill thought-out and rushed economic and political integration in Africa at the Sirte summit, they both turned out to be among the most ardent advocates of the proposed AU in Lomé. What had changed?

The most generous explanation would be that continuing debates, consultation and reflection between the September 1999 and July 2000 on the proposal for the establishment of this new institution had led to a change of mind among most of the political leaders. But, in truth, there was very little discussion, both within the rarefied circles of the political elites, governments and ruling regimes or in public discourses generally, in almost all these

\(^5^8\) The Constitutive Act was immediately signed by twenty-six of the fifty-three OAU member states on the day of its adoption. Within nine months, all the remaining states would become signatories to it.
\(^5^9\) Angola, Botswana, Cameroon, Congo, Democratic Republic of Congo, Eritrea, Guinea, Kenya, Mauritania, Swaziland and Uganda.
countries. Indeed, one criticism that has repeatedly been made by commentators is that despite the inclusion of the principle on the “participation of African peoples in the activities of the Union” in the Constitutive Act so as to make the new institution truly “a community of peoples,” the African citizenry was hardly involved in the process of conceptualizing and establishing the AU. Any debates and discussions, such as they were, could only have occurred among the political leaders themselves, and often there was no visible evidence of this. What cannot be denied is that during this period Ghaddafì spared no effort in deploying his diplomatic and other resources to persuade some of the key leaders that were perceived as being either lukewarm or hostile to the proposal to come on board. At least one public manifestation of the inducements that Libya was prepared to offer was the decision it took at the Sirte summit in 1999 to pay off the arrears for the assessed budget contributions owed by a number of OAU member states. Whether these inducements contributed to the decisions by these states, or at least their leaders, to support of the proposed AU remains a matter for conjecture and speculation.

As was stated above, the fifth extraordinary summit was convened with a view to formally launching the AU. In terms of Article 28, the entry into force of the Constitutive Act required the deposit of instruments of ratification by two-thirds of the OAU member states (that is, thirty-six countries), but by the time the summit was opened, only twenty-two instruments of ratification had been deposited with the General Secretariat. However, this did not prevent the Assembly, following a highly spirited debate, from deciding to “proudly declare the establishment of the African Union,” whilst recognising that the actual entry into force of the Constitutive Act, and thus the legal birth of the new organisation, would only be achieved subsequently once the necessary ratifications had been secured. In adopting this decision, the African leaders intended to do two things: first, to send out a political message, that the establishment of the AU was an irreversible fact which was unanimously supported by all the members of the OAU; second, to reiterate the need to respect the legal requirements for the entry into force of the Constitutive Act, and thus the formal legal birth of the AU, as provided for in Article 28.

The fifth extraordinary session of the OAU Assembly had been expected to mark the formal transition from the OAU to the AU. The symbolism of celebrating this transition from the old order to the new order at

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60 See Article 4(c) of the Constitutive Act.
61 The decision to hold this extraordinary summit resulted from an impromptu invitation that Ghaddafì extended to the OAU Assembly at the closing ceremony of the Lomé summit, following the signing of the Constitutive Act. Once the dates had been fixed and agreed upon following consultations with all the member states, the summit had to go ahead notwithstanding the fact that the required number of ratifications for the entry into force of the Constitutive Act had not yet been secured.
the same venue where the decision to establish the AU was adopted could not be more obvious, and this must have been the motivation behind Ghaddafi’s prompt invitation extended at the close of the Lomé summit. But the apparent distinction implied in the decision adopted on 2 March 2001 between the “political” birth of the AU and its “legal” birth, to follow only subsequently, was problematic. An analogy was made with the creation of the OAU itself back in 1963: although the OAU Charter was adopted on 25 May 1963, it only entered into force on 13 September 1963, after the required number of ratifications had been achieved, in accordance with Article XXV of the Charter. Yet, it was assumed by the founding members, and it has always been accepted, that 25 May 1963 marked the birth of the OAU, and the date is celebrated as such. Indeed, it has been pointed out that the OAU started operating as an organization, with an interim secretariat, immediately following the adoption of the Charter, and before its entry into force. As I have argued elsewhere, the analogy does not seem to be appropriate in the case of the Sirte decision, given the different political contexts, circumstances and exigencies surrounding the establishment of the two institutions. In any case, I argue that even if it is accepted that the “political” birth – as opposed to the “legal” birth – of the AU needed to be located at a particular juncture, the analogous date should have been 11 July 2000, when the Constitutive Act was adopted in Lomé.

4. THE AFRICAN UNION AS SUCCESSOR TO THE ORGANISATION OF AFRICAN UNITY

The Constitutive Act of the AU has replaced the Charter of the defunct OAU. Unsurprisingly, the AU is, in common parlance, referred to as the “successor” to the OAU, much in the same manner as the United Nations (UN) is sometimes described as the “successor” to the League of Nations. This is so despite the fact that neither the UN Charter nor the Constitutive Act expressly characterises the organisations they establish as successors to the former organisations, respectively. The question whether, from the legal point of view, the AU is a successor to the OAU nevertheless merits some attention and comment.

For obvious reasons, including the relative novelty of international organisations as separate and independent entities on the international plane, as compared to states, the question of succession between international organisations has not received as much attention as that of succession of states. The question may arise, for example, when there is a change in the

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62 See note 16 supra, p. 23.
63 For an early discussion of this subject, see H. Chiu, “Succession in International Organisations,” 14 ICLQ (1965) 83. For a more recent and extensive study, see Patrick R. Myers, Succession Between International Organizations, New York, Kegan Paul, (1993).
constitutional structure of an organisation or a change that affects its very existence. Such changes may, in turn, result from any number of events, the most common being integration and dissolution. Integration involves a situation whereby an international organisation loses its original identity by merging or integrating with another to form a new organisation. Dissolution, which is more common than integration, occurs when an international organisation is dissolved or liquidated and a new organisation is created by treaty for identical or similar purposes. In the latter case, the dissolved organisation loses its international personality, and the new organisation—though composed of largely or wholly the same members and serving identical or similar objectives and functions—acquires its own international personality from the date of entry into force of its constituent instrument. At the same time, however, it is precisely in circumstances where the membership of the two organisations is to a large extent the same that, as a matter of convenience or necessity, the question of succession will usually arise. The question may arise in relation to the transfer or devolution of the functions and powers, rights and duties, or assets and liabilities of the former organisation to or upon the new one. Sometimes the rights and duties of the employees or staff of the defunct organisation may also be at issue.

The case of the League of Nations and the UN provides an instructive illustration. The League, established on 10 January 1920, ceased to exist as of 19 April 1946, following the adoption of a resolution to that effect by the final session of its Assembly, “except for the sole purpose of the liquidation of its affairs.” Meanwhile, the UN had come into being on 24 October 1945, when the Charter entered into force. Since, as indicated earlier, the UN Charter does not state that the organisation is a successor to the League, the generally held view is that, from a strict constructionist perspective, there is no direct succession between the League and the UN and that the classical definition of “succession of international persons” does not come into play here. Nevertheless, the issue of succession between the two organisations arose on a number of occasions in various contexts following the entry into force of the Charter. Some UN organs have essentially concluded that, in practice, there has been a transfer of certain functions and powers from the League to the UN. Thus, for example, in its advisory opinion in the International Status of South West Africa case, the International Court of Justice held that since the Council of the League had disappeared with the

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64 See discussion and illustrative examples of the various circumstances under which a succession in international organisations may take place in Chiu, ibid., pp. 84-92.
65 Ibid.; see also, generally, Myers, note 63, supra.
dissolution of the organisation, its supervisory functions under the League of Nations Mandates system “were to be exercised by the new international organisation created by the Charter.” Similarly, the International Law Commission has expressed the view that the functions of depositary conferred upon the League by parties to treaties had been transferred to the UN by means of concurrent resolutions of the two bodies, without additional formal action by the parties. These opinions point to the fact that, in practice if not in law, the status of the UN as a successor to the League in respect of certain matters cannot be assailed, despite the absence of any formal or express stipulation to that effect in the Charter. Not surprisingly, it has been argued by some commentators that the legal basis for such succession, the forms succession between the two organisations has taken, and the effects of succession on functions, treaties, property, funds and personnel, among other things, can be better understood through an examination of international practice and court decisions bearing on the issue, rather than the UN Charter which says nothing about the matter.

In any event, it is apt to note that even where there is no direct and deliberate succession between international organisations, procedures involving a combination of methods may yet be put in place to govern the transfer of rights, duties, functions, et cetera, from one to the other. These may include formal agreements between the predecessor and successor organisations relating to a transfer of specific functions, implied understandings of transfer of functions, or parallel resolutions effecting such transfer adopted by the competent organs of the respective organisations.

As already indicated, Article 33(1) of the Constitutive Act, which abrogates the OAU Charter, does not state expressis verbis that the AU is the successor to the former organisation. However, it makes provision for the continued application of the Charter, and thereby the continued existence of the OAU, for “a transitional period of one year or such further period as may be decided by the Assembly for the purpose of enabling the OAU/AEC to undertake the necessary measures regarding the devolution of its assets and liabilities to the African Union and all matters relating thereto.” In accordance with this provision, the OAU Assembly of Heads of State and Government, meeting in its thirty-seventh ordinary session in Lusaka, Zambia, from 9 to 11 June 2009.

69 Ibid., p. 136.
71 See, for example, Myers, note 63 supra, pp. 16-18; passim.
72 For example, the transfer between the League of Nations and the UN was effected, inter alia, by a number of agreements: the first was signed on 19 July, 1946 (1 U.N.T.S. 109), followed by another signed on 31 July, 1946 (1 U.N.T.S. p. 119) and two protocols signed on 1 August, 1946 (1 U.N.T.S. pp. 131, 135).
73 Thus, the transfer of several matters concerning the operation of the secretariat between the League of Nations and the United Nations was effected by a series of resolutions adopted by the final session of the Assembly of the League of Nations and the UN General Assembly. See Chiu, note 63 supra, p. 96.
July 2001, decided on a one year transitional period, effective from 11 July 2001. But what is notable here is that Article 33 only provides for the devolution of assets and liabilities, and says nothing about the devolution of the functions and powers of the OAU to the AU, or agreements entered into by the OAU, or the transfer or incorporation into the AU of the various bodies established under the OAU. These bodies included those established by decisions of the policy organs of the OAU over the years, such as the scientific and technical offices and programmes and the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution, established by a decision of the twenty-ninth ordinary session of the Assembly of Heads of State and Government of the OAU held in Cairo, Egypt, from 28 to 30 June 1993, and the treaty bodies established under specific treaties, namely the African Commission on Human and Peoples’ Rights, and the African Committee of Experts on the Rights and Welfare of the Child, neither of which is specifically mentioned in the Constitutive Act. Following the adoption of the Constitutive Act, some questions arose with respect to the status of these offices and bodies and their relationship with the AU. Did the AU impliedly, or automatically, assume responsibility for the supervisory functions and authority of the OAU over them? If so, did that suggest automatic succession? Indeed, while the theory of automatic succession may be invoked in respect of succession of states under certain circumstances, can it ever be applicable to succession between international organisations? Other questions concerned the status of bilateral treaties concluded between the OAU and other entities, including member states. These treaties include the Headquarters Agreement with Ethiopia and various agreements with some countries hosting OAU technical and scientific offices as well as representational and regional offices, and several cooperation agreements with other international entities. There was also the issue of the contractual

74 See Decision AHG/Dec.160 (XXXVII), para. 15.
75 The major OAU technical and scientific offices were located in Lagos, Nairobi and Yaoundé. Although they operated semi-autonomously, they fell under the administrative authority of the OAU General Secretariat in Addis Ababa. They are now under the administrative authority of the Commission of the AU.
76 See AHG/Decl.3 (XXIX): Declaration on the Establishment, within the OAU, of a Mechanism for Conflict Prevention, Management and Resolution, adopted on 30 June, 1993.
78 Agreement between the Imperial Ethiopian Government and the Organisation of African Unity regarding the Headquarters of the Organisation of African Unity, signed on 6 July 1965. The Agreement has never been revised or superseded and continues to be applicable between the Ethiopia and the African Union on the basis that the latter has succeeded the OAU as a party to the treaty and to the rights and obligations arising thereunder.
79 An example of such agreements is the one signed in August 2000 between Malawi and the Organisation of African Unity regarding the hosting the OAU Southern African Regional Office in that country (which has since become the AU Southern African Regional Office).
80 The OAU concluded a number of cooperation agreements with a wide range of international organisations, including the United Nations, UN Specialised Agencies or related organisations (e.g. the UNHCR, UNICEF, WHO, ILO, WIPO) and various other entities (e.g. the International Committee of the Red Cross, Asian-African Legal Consultative Organisation, the Organisation of Islamic Conference, the Organisation Internationale de la Francophonie and the Organisation for International Migration). On its
status of the employees of the defunct organisation. Did all, or any, of these treaties and agreements survive the demise of the OAU and, if so, have they devolved upon the AU?

The question of the succession of the AU to the OAU has been handled through two mechanisms: in the first place, the inclusion, as we have seen, in the Constitutive Act of a provision on devolution of assets and liabilities of the OAU/AEC; secondly, the adoption of “parallel” resolutions by the two organisations relating to certain aspects of the transfer of functions, powers, liabilities and assets and the incorporation into the AU of organs or bodies that had been previously established under the OAU but are not specifically stipulated as organs of the AU in the Constitutive Act itself. First, at the thirty-seventh ordinary session of the OAU, the Assembly of Heads of State and Government adopted the Lusaka Summit Decision on the Implementation of the Sirte Decision on the African Union on 11 July 2001. Among other things, the decision incorporated the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution as one of the organs of the AU in accordance with Article 5(2) of the Constitutive Act. It also authorised the OAU Secretary-General to undertake the necessary measures for the devolution of assets and liabilities of the OAU to the AU in accordance with Article 33(1) of the Constitutive Act. More significantly, the decision authorised the OAU Secretary-General to “review and, where appropriate, seek the amendment of OAU agreements with other parties, including the Headquarters and Host Agreements.”

Secondly, at its first ordinary session (the inaugural summit), the AU Assembly decided, inter alia, that:


A subsequent decision adopted by the AU Assembly at the Maputo summit the following year confirmed various earlier recommendations adopted by the Executive Council of the AU on the structure and conditions of service of the staff of the AU Commission, previously the staff of the OAU.

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81 AHG/Dec.160 (XXXVII).
82 Ibid., para. 8. Article 5(2) provides for the establishment of “other organs” of the AU by the Assembly.
83 Ibid., para. 12(ii). As noted above, the neither the Ethiopia-OAU Headquarters Agreement nor any of the various host agreements have been formally amended pursuant to this decision, but they all continue to be applicable to the AU.
General Secretariat. The practical effect of this decision was to re-confirm en masse the status of these staff as employees of the AU without the formality of requiring each individual to apply for re-employment with the new organisation.

The questions that arise following the dissolution of an international organisation are clearly different from those which arise in the context of state succession. There is no general rule of international law that obliges a successor organisation to assume the rights, duties and functions of the predecessor organisation. However, it remains true, as Chiu observed some 40 years ago, and more recent authorities have confirmed, that as a matter of convenience or necessity, successor organisations have in practice assumed some rights, duties and functions of their predecessor organisations, but that the succession to any of these has always been a voluntary act of the successor organisation. Where the creators and members of the new organisation are exactly the same as those of the predecessor organisation, such succession has, in practice, been taken for granted, even where the constituent instrument of the new entity is silent on the matter. This is certainly the case regarding the succession between the OAU and the AU.

A related issue that calls for a brief comment is the status of the AEC following the demise of the OAU. The Constitutive Act does not expressly state that the AEC is also to be replaced, nor does it abrogate the Abuja Treaty. On the contrary, Article 33(2) of the Constitutive Act provides that the Act shall take precedence over and supersede any inconsistent or contrary provisions of the Abuja Treaty, thus suggesting that the treaty continues to be operational to the extent that it is consistent with the Constitutive Act. At the same time, however, it should be recalled that the AEC was established under the Abuja Treaty as an integral part of the OAU, with the same secretariat. Moreover, the Abuja Treaty itself and the Protocols adopted under it formed an integral part of the OAU Charter. On the face of it, this could be interpreted to mean that the demise of the OAU implied also the abrogation of the AEC. But such a position would necessarily have entailed an inherent contradiction, as it would have negated the implication in Article 33(2) that the Abuja Treaty continues to be operational to the extent that it is not inconsistent with the Constitutive Act. It would have led to the absurd conclusion that the Constitutive Act envisages the demise of both the OAU and the AEC while recognising the continued existence of the Abuja Treaty, whose sole raison d’être is the establishment of the AEC. The better conclusion to be drawn from this is that the AEC continues to exist as an integral part of the AU, much as it did under the OAU.

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86 See Chiu, note 63 supra, p. 120. See also, generally, work by Myers cited in the same note.
87 Article 98.
88 Article 99.
This conclusion also seems reasonable in view of the fact that the RECs that were previously recognised by the OAU as the building blocs of the AEC under the Abuja Treaty continue to be so recognised by the AU. The continued recognition of the RECs as building blocs of the AEC presupposes the continued existence of the latter as an integral part of the AU. The current status of the RECs within the AU is also based on the Lusaka Summit Decision, referred to earlier, by which the OAU Assembly, *inter alia*:

“(i) [Recalls] the Protocol on Relations between the African Economic Community and the Regional Economic Communities;
(ii) [Reaffirms] the status of the Regional Economic Communities as building blocs of the African Union and the need for their close involvement in the formation and implementation of all the programmes of the Union;”

In the light of this decision, the Protocol on Relations between the AEC and the Regional Economic Communities adopted by the OAU Assembly on 25 February 1998 has continued in existence despite the demise of the OAU and is accepted as having devolved upon the AU. The Protocol was signed by the OAU, on the one hand, and the then recognized RECs, with the exception of Arab Maghreb Union (UMA), on the other hand, in October 1999. Subsequently, it has been signed by the Community of Sahel-Saharan States (CEN-SAD) and, much more recently, by the East African Community (EAC), following its accreditation by the AU Assembly as a REC.

Of course, the reality is that the AEC had never existed and functioned as a separate organisation from the OAU. Even the procedural practice of requiring the policy organs of the OAU to “transform” themselves into the policy organs of the AEC before adopting decisions relating specifically to the AEC represented nothing more than a flawed legal fiction. For the fact of the matter is that, on such occasions, even an OAU member state which had never signed nor acceded to the Abuja Treaty and was,

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89 See Decision AHG/Dec.160 (XXXVII), para. 8(b).
90 For the full list of the recognised RECs, see note 49 *supra*.
91 COMESA, ECCAS, ECOWAS, IGAD and SADC signed the protocol in October 1999. Due to problems among some of its members, in particular the political tension between Algeria and Morocco over the Western Sahara dispute, UMA has remained effectively dormant for over two decades. At the time of writing, recent attempts to make it operational again do not appear to have succeeded yet.
92 CEN-SAD signed it following its recognition as a REC by the OAU Assembly at the Lomé Summit in July 2000.
93 The EAC was granted accreditation as one of the RECs by a decision of the AU Assembly adopted at its fourth ordinary session in Abuja, Nigeria, on 31 January 2005; see Assembly/AU/Dec.58 (IV). Most recently, a meeting of African ministers responsible for integration has recommended that as part of the process of rationalizing the RECs, the Assembly of the AU should halt the recognition of new RECs, thus limiting the number of RECs to the eight recognized so far. See Declaration of the First Conference of African Ministers for Integration, Ouagadougou, Burkina Faso, 30-31 March 2006: COMAI/DECL. (I).
therefore, arguably not a member of the AEC (Eritrea), or those that had signed the treaty but not ratified it, such as Djibouti, Equatorial Guinea, Gabon, Madagascar, Mauritania and Swaziland, were allowed to participate in those decision-making processes without any regard being paid to the procedural and legal irregularity of their positions. This was also the case when the inaugural session of the AU Assembly “transformed” itself into a session of the Assembly of the AEC for the purposes of adopting an AEC decision.94

5. NEW NORMATIVE PRINCIPLES FOR NEW CHALLENGES

The Constitutive Act is a sketchy instrument, consisting of a preamble and thirty-three dispositive articles. In this part, I offer a few observations on some broad institutional and normative issues and their implications for the transition from the OAU to the AU.

The Constitutive Act enumerates a rather expansive list of 14 objectives and principles that go well beyond those enshrined in the OAU Charter. To begin with, it may be noted that the objectives of the AU go beyond the rather limited objectives that are to be found in Article II of the OAU Charter. The objectives, or purposes, stipulated in the OAU Charter were limited to the following: the promotion and achievement of the unity and solidarity of African States; the coordination and intensification of cooperation and efforts to achieve a better life for African peoples; the defence of the sovereignty, territorial integrity and independence of African States; the eradication of colonialism; and the promotion of international cooperation within the context of the UN Charter and the Universal Declaration of Human Rights. To these, the Constitutive Act adds new ones for the new organisation, for example: the acceleration of the political and socio-economic integration of the continent; the promotion and defence of African common positions on issues of common interest; the promotion of peace, security and stability of the continent; the promotion of democratic principles and institutions, popular participation and good governance; the promotion and protection of human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant instruments; the promotion of sustainable development at the economic, social and cultural levels; and the advancement of research in all fields, in particular science and technology, and the eradication of preventable diseases and the promotion of good health on the continent. Also included among the new objectives are the establishment of the necessary conditions for the

continent to play its rightful role in the global economy and in international negotiations, and the coordination and harmonisation of policies between the various African RECs. The last-mentioned objective is viewed as a necessary condition for the “gradual attainment of the objectives of the Union.”

But of more significance, perhaps, is that Article 4 incorporates new, radically expanded principles with potentially far-reaching implications. These may be roughly classified into two categories. The first category consists of principles that are now more or less generally recognised in international law, for example, the prohibition of the use of force among member states; peaceful coexistence among member states and their right to live in peace and security; and respect for democratic principles, human rights and the rule of law, and good governance. The second category of principles reflects the new thinking and approaches among African States on how to coordinate common responses to present-day political and socio-economic challenges: the principles of participation by African peoples in the activities of the organisation; the establishment of a common defence policy for the African continent; the right of the AU to intervene in member states under certain conditions where war crimes, genocide and crimes against humanity have been committed; the right of member states to request intervention from the AU in order to restore peace and security; the promotion of self-reliance; the promotion of gender equality; the promotion of social justice so as to ensure balanced economic development; and the condemnation and rejection of unconstitutional changes of government.

The question to ask, then, is: what is the added value in this long catalogue of principles of the AU? There can be no doubt that, within the African political and cultural context and experience, the inclusion of principles in such a constituent legal instrument relating to issues of gender equality, good governance, democratisation, humanitarian intervention, war crimes and crimes against humanity, social justice, rejection of unconstitutional changes of government, and so on, would have been unthinkable a decade or so earlier. In view of the high purchase placed upon the commitment to respect democracy, human rights, and the rule of law in African politics today, it is appropriate to make a few remarks on this.

In addition to its inclusion in the Constitutive Act, the commitment to democracy, respect for human rights and the rule of law is also one of the fundamental principles upon which the New Partnership for Africa’s Development (NEPAD), adopted in 2001 as an integral part of the AU, is based. Indeed, apropos the principle relating to respect for democracy, human rights, and the rule of law, and good governance, the AU has been hailed as joining an ever increasing number of regional organisations that have recently decided to incorporate “democracy clauses” in their constituent texts. Examples of such organisations include the Organisation of American States
(OAS),\textsuperscript{95} the Common Market of the South (Mercosur)\textsuperscript{96} and the European Union.\textsuperscript{97} These developments support what some scholars have characterised as an “emerging right to democratic governance,” as part of the modern lexicon of international human rights.\textsuperscript{98}

Another new principle that represents a radical shift from the OAU Charter, and linked to the commitment to democracy, the rule of law and good governance, is that relating to the condemnation of unconstitutional changes of government. This principle, enshrined in Article 4(p), is articulated again in Article 30 of the Constitutive Act, which provides for suspension of participation in the activities of the AU of any government of a member state that comes to power through unconstitutional means. This does not mean, as some commentators seem to suggest,\textsuperscript{99} that the AU should be expected to use force to reverse military \textit{coup d’etat} in member states, as ECOWAS did in Sierra Leone in 1998, but that governments coming to power through such means will no longer have a place at the African diplomatic table. This provision only strengthened and codified decisions previously adopted by the OAU policy organs, starting in 1997, to impose sanctions on governments that violated democratically established constitutional authority and to require such regimes to restore constitutional order speedily. On 30 May 1997 the OAU Council of Ministers adopted a decision, subsequently endorsed by the Assembly, to exclude the military regime that had come to power in Sierra Leone through a \textit{coup d’etat} only five days previously, from participating in the OAU ministerial and summit meetings taking place in Harare, Zimbabwe.\textsuperscript{100} To be sure, the adoption of this resolution was unprecedented; as an institution, the OAU had for the previous three and half decades not only avoided condemning and excluding governments that came to power unconstitutionally though military putsches, but on occasion, it permitted the leaders of such regimes to host OAU meetings and assume the rotating annual chairmanship of the organisation.\textsuperscript{101} A perverse and absolute adherence to the twin principles of sovereignty and non-interference in the domestic affairs of member states, regarded as sacred under the OAU Charter, prevented the


\textsuperscript{96} See Magliveras and Naldi, note 32 \textit{supra}.

\textsuperscript{97} The amendment effected by the Treaty of Amsterdam of 1997 to the Treaty of Rome (Art. 309) provides for suspension of certain membership rights of countries in persistent breach of the principles of democracy, human rights and the rule of law.

\textsuperscript{98} See, for example, T. Franck, “The Emerging Right to Democratic Governance”, 86 AJIL (1992) 46.


\textsuperscript{100} See CM/Rpt/LXVI. Subsequent decisions on non-participation of unconstitutional governments in OAU meetings were adopted in Algiers by the Council and the Assembly, respectively, in July 1999; see CM/Dec.483 (LXX) and AHG/Dec.141; and in Lomé, where the Assembly adopted the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, AHG/Dec.5 (XXXVI).

\textsuperscript{101} The most celebrated example was the decision to allow Idi Amin, the military dictator of Uganda and one of Africa’s most notorious human rights violators, to host the 1975 OAU summit in Kampala and thereby assume the chairmanship of the organisation.
organisation collectively, or member states individually, from condemning or excluding such regimes. In more recent times, this new principle has been invoked at various times to prevent governments that have come to power through unconstitutional means in the Central African Republic, Comoros, Ivory Coast, Guinea-Bissau and Niger from participating in the AU. The Harare decision was even invoked as justification for the exclusion from participation by the government of Marc Ramalovanana in Madagascar in the last summit of the OAU and the inaugural summit of the AU because of the alleged constitutional irregularity of the manner in which it assumed power following the disputed presidential election results in that country.102

I have argued elsewhere that the real test of the commitment of African states to these new, apparently radical, principles lies in their responses to the continuing instances of actual disregard for democracy and violations of human rights that continue to characterise the political behaviour of some of their leaders, including those who may have come to power through the democratic process. I have also argued that the commitment to democracy will, in part, be measured by the extent to and sincerity with which they abide by the Declaration Governing Democratic Elections in Africa (Declaration on Democratic Elections), adopted by the last ordinary session of the OAU Assembly in Durban.103 The declaration sets out, inter alia, the agreed principles of democratic elections, the responsibilities of member states, and the rights and obligations under which democratic elections are conducted.104 Although, as a declaration, it lacks mandatory binding authority unlike, say, the decisions of the Assembly,105 its legal significance cannot be discounted since it was intended both to provide a guiding framework and harmonise viewpoints among the member states, and to complement the earlier OAU decisions on unconstitutional changes of government mentioned above. The declaration has recently been complemented by the adoption of the African Charter on Democracy, Elections and Governance (Charter on Democracy).106 However, only conformity with the principles set out in the Constitutive Act, the Declaration on Democratic Elections and the Charter on Democracy, when it enters into force, in the actual practice of member states would justify the claim that the AU has joined the concert of regional

102 See the decision adopted by the AU Assembly at its inaugural summit on 10 July 2002: ASS/AU/Dec.7 (I). At the time, Madagascar had not yet ratified the Constitutive Act and was thus technically not yet a member of the new organisation and, consequently, not bound by its decisions or the obligations entailed in membership of the new body. The decision to exclude it from participating in the inaugural session was, therefore, legally superfluous. On the other hand, there were a number of countries that participated in the inaugural session even though they had not yet ratified the Constitutive Act.


104 See AHG/Decl.I (XXXVIII).

105 See Rule 33 of the Rules of Procedure of the Assembly for the differences between regulations, decisions, directives, recommendations, declarations, etc.

106 Adopted by AU Assembly at its eighth ordinary session held in Addis Ababa on 29-30 January, 2007; see Assembly/AU/Dec.147(VIII).
organisations that have incorporated “democracy clauses” in their constituent texts.

Arguably, the most radical of the new principles enshrined in the Constitutive Act is to be found in Article 4(h), which provides for:

“[the] right of the African Union to intervene in a Member State, pursuant to a decision of the Assembly, in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.”

This provision has proved to be at once the most laudable and the most controversial. While some commentators welcome it as evidence of Africa’s contribution to the process of “mapping new international law”, its critics view this provision as a dangerous development that challenges current notions of humanitarian intervention. Moreover, some critics argue that this provision quite possibly threatens the supremacy of the UN Security Council to determine and authorise the appropriate action to deal with such situations. A brief comment on Article 4(h) would be in order here.

The original proposal for this text included the right of the AU to intervene to deal with situations of “a serious threat to legitimate order” to restore peace and stability to Member States, as well as situations resulting from “external aggression” and “unrest.” These proposals occasioned some spirited debate in the ministerial deliberations both in Tripoli and Lomé when the draft Constitutive Act was discussed. Although some delegations implicitly raised the problem of reconciling such a provision with the requirement of prior authorisation by the UN Security Council of enforcement action by regional organisations or arrangements under Article 53 of the UN Charter, the issue as such was not addressed in these debates. Furthermore, the suggestion that there should be provision for a right to intervene to deal with situations of a serious threat to legitimate order and to restore peace and stability to Member States was rejected by some countries as both premature and dangerous, in the absence of an agreed mechanism within the context of the AU for assessing whether and to what extent such a threat existed and

107 The original proposals were contained in two documents entitled, respectively, “Draft of the Establishment of the Union of African States”, and “Draft of the Establishment of a State of the United States of Africa”, prepared by Libya and circulated to a number of selected OAU Member States at the extraordinary summit which adopted the Sirte Declaration on 9 September, 1999 in Sirte, Libya. The documents were never formally submitted to the OAU General Secretariat for official circulation. Although the Draft Sirte Declaration that Libya subsequently submitted to the extraordinary summit was significantly different from either of the two documents, the proposal for a provision on the right of the proposed African Union (or United States of Africa) to intervene in situations of “a serious threat to legitimate order to restore peace and stability to member States” was retained in all these documents and was repeatedly brought up by Libya in its interventions at the subsequent OAU meetings in Tripoli and Lomé. Copies on file with the writer.

108 The delegation of Egypt was particularly forceful in expressing reservations on the original formulation and succeeded in blocking its incorporation, as drafted, in the Constitutive Act.
what constituted legitimate order. There was also the issue of the compatibility of the use of force by regional bodies with the UN Charter and general international law. As a compromise, the formulation currently found in Article 4(h) was retained when the Constitutive Act was adopted.

The Constitutive Act has already been amended. In fact, it was amended within barely two years of its adoption. The amendments are encapsulated in a composite instrument, the Protocol on Amendments to the Constitutive Act of the African Union, which was adopted by the AU Assembly in two stages. First, at the Assembly’s first extraordinary session on 3 February 2003 and, secondly, at its second ordinary session on 11 July 2003. 109 Article 4 of the Protocol amends Article 4(h) of the Constitutive Act to read as follows:

“[the] right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council;”

This amendment has already attracted some critical attention as setting out to change the law of humanitarian intervention and the scope of the right of intervention in international law. It is a fine example of how African States are seeking to either map new boundaries of international law or to reinterpret existing rules. For how can this provision be reconciled with the current understanding of the limits and scope of the right of intervention? The amendment has provoked other questions, for example: what constitutes a serious threat to legitimate order? What are the criteria for judging the legitimacy of any given order? And how does this new ground for intervention relate to the grounds currently provided for in Article 4(h), namely war crimes, genocide and crimes against humanity? 110 A related question concerns the consistency of this new provision with the treaty regimes and practices established by some of the African sub-regional organisations, in particular ECOWAS and SADC, in respect of the right of humanitarian intervention.

This is not the place to discuss all these criticisms in any meaningful detail. 111 In any case, the establishment of the Peace and Security Council of

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111 See note 109 supra for an extended examination of this issue.
the AU now provides a clearly defined mechanism for determining situations representing a serious threat to legitimate order and the steps necessary to restore peace and stability to the Member States, in close cooperation with the UN Security Council.112

The Protocol on Amendments is not yet in force. At the time of this writing, it has been signed by thirty-seven states,113 and ratified by twelve.114 Yet, the implications of the amendment to Article 4(h) of the Constitutive Act for the right of intervention are potentially far-reaching. There can be no doubt that, in this specific respect, Africa has taken a path that sets out to map a new boundary for the rules of international law that circumscribe the right of intervention. The scope of this new rule, and how it can be reconciled with the regulation of the right of intervention within the context of the UN Charter and general international law, remains to be clarified.115

In seeking to clarify the new rule in the proposed amendment, it would be well to reflect on the motivating factors behind it. Beyond the alleged desire of AU members to placate the transient desires of one of the organisation’s most vocal members, Libya, which was particularly forceful in pushing for this amendment, there remains an inescapable fact: the terrible conflicts of the past decade in, for example, the Democratic Republic of Congo, Liberia, Rwanda, Sierra Leone and Somalia have reignited the need for Africans to “move beyond the sexy clichés and genuinely take it upon themselves to proffer African solutions for African problems,” as one commentator puts it.116

One way in which African States can do this is by continually engaging with the international legal system and seeking to reform international law to ensure that it fully addresses their concerns. This is an area in which the AU can provide a useful forum and mechanism for

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112 See Article 7(r) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union. On cooperation with the UN Security Council, see Article 17(1) and (3).
115 One of the issues that need clarification concerns the claim that Article 4(h) of the Constitutive Act, by not mentioning prior UN Security Council authorisation, has further eroded the authority of the Security Council to determine and authorise the use of force and institutionalises the growing tendency to deviate from the strict text of Article 53 of the UN Charter. A possible answer to this charge could be along the lines that the use of force that is not based on Chapter VII of the UN Charter may still be a legitimate alternative to UN Security Council decision making, if it is employed by a regional body that involves all the parties affected by the decision. See Agora discussion by C. Stahn, “Enforcement of the Collective Will After Iraq”, 97 AJIL (2003), pp. 813-814, where he argues that such a line of argument may, in particular, serve to validate the intervention system of the African Union. I share this view.
engagement and change, as did the OAU. In a sense, the preoccupation of the African States with the need to regulate the right of intervention within the Constitutive Act, and on their own terms, signifies not only a desire to map new boundaries of international law but also to wrest the use of the right of intervention from the conventional “civilising mission” within which it is framed under current international law. This thinking accords well with the AU’s approach to the question of empowering and privileging the African family of nations to take its destiny in its own hands and seek home-grown solutions to the continent’s problems. Yet expression of lofty principle is one thing, effective implementation quite another.

At the time of this writing, the AU has demonstrated either a reluctance or an indifference to invoke its right of humanitarian intervention in accordance with Article 4(h) of the Constitutive Act in what some commentators, including former UN Secretary-General Kofi Annan, see as an unfolding genocide in the Darfur region of Sudan or, at any rate, grave violations of human rights. Moreover, given this context, most human rights advocates and observers, in Africa and elsewhere, were surprised by the decision to allow the government of Sudan to host the sixth ordinary session of the AU Assembly of Heads of State and Government, which took place in Khartoum on 23-24 January 2006; and they were even more surprised when the Assembly adopted a decision to guaranteeing the chairmanship of the AU in 2007 to the Sudanese head of state. Coming on top of the earlier failure by the AU to take a clear position on the contested human rights situation in Zimbabwe, these developments do not inspire confidence in the commitment and ability of the AU to live up to the promises of a new culture that places respect for democracy, human rights and the rule of law and good governance enshrined in the Constitutive Act. They also compel the following questions: does the AU truly represent a qualitative change and transition from the old to the new? Is the AU indeed ready to go beyond lip service and apply the new normative framework provided by the Constitutive Act and other related legal instruments to face the current and future challenges facing the continent?

In order to appreciate fully the extent to which the normative framework of Constitutive Act differs from that of the OAU Charter, it is also instructive to note the principles which have not been replicated from the older text. Four cardinal principles are implicated here.

First, the principle of respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence,

118 This decision was reversed at the eighth ordinary session held in Addis Ababa, from 29 to 30 January 2007 when the AU Assembly unanimously appointed Ghana to chair the organisation in 2007 “in honour of the 50th Anniversary of Ghana’s independence and in recognition of the country’s contribution to Africa’s unity and independence”. See Assembly/AU/Dec.150 (VIII), para. 1.
enunciated in the Charter, has now been subsumed into the principle relating
to the respect of borders existing on achievement of independence (Article
4(b) of the Constitutive Act). This is the well known principle of *uti possidetis*, already referred to above.\(^{119}\) The principle has been praised as a
manifestation of a pragmatic approach to the problem of the arbitrary colonial
balkanisation of Africa and of the general denial of the legitimacy of intra-
African post-colonial boundary claims and wars. At the same time, it has also
been criticised as a principle that legitimises, so to speak, the structural
illegitimacy of the African State. As has already been noted, some
commentators have argued that the sanctification of the inherited colonial
boundaries in Africa is partly to blame for the failure of the post-colonial
African States to reconfigure themselves in order to attract the widespread
adherence of their constituent sub-State groups, and hence for the emergence
of ethnic conflicts within some of these States between antagonistic ethnic
communities forcibly bunched together due to the exigencies of colonial
boundary-making, or attempts by some dissatisfied ethnic groups to secede
from the post-colonial State.\(^{120}\) The fact that African countries have re-
affirmed this principle in the Constitutive Act is itself an indication that,
whatever may be the ultimate dream of a politically united or unified
continent, for now the AU is viewed as an organisation of *independent* and
*sovereign* States that will continue to exist within their respective inherited
colonial boundaries. There is no provision in the Constitutive Act that
suggests any cession or surrender of sovereignty to the AU by its members.
Clearly, the AU is predicated on intergovernmentalism, and is not conceived
as a neofunctionalist supranational institution. This is far removed from the
notion of a federal, or even a confederal, State which the proponents of the
United States of Africa might have wished for. In this sense, it does not
represent a radical departure from the institutional framework of the OAU.

Second, the principle provided for in Article III(6) of the OAU
Charter, relating to the absolute dedication to the total emancipation of the
African territories which are still dependent, makes no appearance in the
Constitutive Act. When the OAU was first established, only thirty-two
African countries enjoyed independent statehood, and the struggle against
colonialism was regarded as one of the fundamental objectives of the newly
established organisation. Indeed, this struggle lay at the root of the Pan-
Africanist project which led to the establishment of the OAU.

Finally, the seventh principle in Article III of the OAU Charter,
which relates to the policy of non-alignment with regard to all blocs, also
reflects the political realities of the Cold War era in which the organisation

\(^{119}\) See note 42 *supra*.
\(^{120}\) See Okafor, note 41 *supra*, p. 511. See also same author’s *Re-Defining Legitimate Statehood: International Law and State Fragmentation in Africa*, The Hague, Martinus Nijhoff (2000).
was born. In today’s world, in which the old divisions into two opposing power blocs between the communist East and the capitalist West have largely disappeared, or become politically irrelevant, the policy of non-alignment no longer carries any resonance. Its inclusion in the Constitutive Act would have been an historical anachronism.

6. SOME CONCLUDING OBSERVATIONS

I would conclude this essay by reverting to two of the questions posed at the outset of the discussion: to what extent was the adoption of the Constitutive Act a manifestation of the desire of African States and peoples to create a new institutional framework representing a substantive departure from the OAU? And to that extent does it represent a distinct African effort to address the challenge of globalisation, in the manner in which similar claims have been made for the EU?  

It is apt to recall that in his report to what had been expected to be the last ordinary session of the OAU Assembly in Lusaka in July 2001, the OAU Secretary General made the pertinent observation that:

“[It] is important to point out that when African leaders decided to establish the African Union when they adopted the Sirte Declaration and, subsequently, the Constitutive Act, they did not aim at establishing an organization which was going to be a continuation of the OAU by another name.”

The AU is supposed to represent a new political, legal and institutional order for Africa, and not an instance of merely pouring old wines into new bottles. As such, it holds out a lot of promise for the citizens of Africa as providing a new framework within which to pursue the decades-old project of deepening their unity and cohesion in the economic, political and social spheres. It cannot be denied that the establishment of the AU, based on the shared vision encapsulated in the objectives and principles contained in the Constitutive Act, provides a new beginning for Africa. But, as with all such new beginnings, the proof of the pudding is in the eating: unless African States exhibit the political will and commitment to implement these objectives and principles faithfully, the advent of the AU could yet turn out to be a false dawn for Africa. Much has been made of the fact that the recent impetus towards the AU was in large measure propelled by Muammar Ghaddafi’s single-minded advocacy. Yet, as I have argued here, it would be a mistake to ignore the historical antecedents and context in which the AU has been

121 See Wallace, op. cit., note 38 supra.
established. These antecedents and context point towards an idea that has a longer history and is widely shared by most Africans: that of forming a stronger and more cohesive institution to enable them to confront the challenges of the twenty-first century. This explains why, despite the initial misgivings, cynicism and outright hostility in some quarters, and despite the deplorable lack of grassroots involvement in the initial debates, the idea of the AU now appears to have been positively embraced by both the political leadership and common citizenry in almost all countries.

The Constitutive Act is hardly the charter for the politically integrated Africa that some African political leaders or commentators have made it out to be, or may have wished for. Moreover, the Constitutive Act is not a programme of action, in the sense that the Abuja Treaty is, but simply an organizational framework which is intended to provide the parameters for the future political integration of the continent, a long term objective that has recently been formally reaffirmed by African political leaders. A global reading of the text suggests that the emphasis in the Constitutive Act is on economic integration and coordination of the socio-economic agenda of the continent. But, even this is predicated on a gradualist approach requiring certain levels of institutionalisation. The accelerated implementation of the stages of integration envisaged under the Abuja Treaty may, in practical terms, not advance the African integration project in the way that the most ardent advocates of the AU generally assume, and cannot certainly be regarded as a sure-footed strategy in Africa’s efforts to contain the consequences of globalization, notwithstanding the rhetorical claims of some African political leaders. The AU is not, of course, a panacea for all of Africa’s economic and political problems. Yet, the gradualist approach of consolidating economic integration, as a way of firming up the foundation for subsequent political integration, is both the most rational and realistic way of achieving the desired long-term comprehensive integration of the African continent. Such integration would have the lasting merit of being based on the voluntary and democratic choices of states, supported by the citizenry, and not one imposed by unaccountable bureaucratic and political elites. Experience from other regions of the world, especially Europe, has amply demonstrated that regional integration is a long and complex process. This experience is instructive, and Africa would ignore it at its own peril.

The project of reconstructing and consolidating African unity has not yet resulted in the political union of the continent. However, the establishment of the AU to replace the OAU represents a modest, but important, advance in the long-standing efforts to establish an integrated African economic and political space. Only time will tell whether the legal and institutional framework established under the Constitutive Act provides the African

123 See note 53 supra.
continent and its people with a durable foundation for enhanced political cooperation and economic integration. Despite its acknowledged failures, the OAU, over a period of almost four decades, provided Africans with a framework for the coordination of their shared political objectives, at least as regards some of the cardinal and overarching concerns of the past decades: decolonisation, the fight against apartheid and racist minority rule, and as a vehicle for forging a common socio-economic agenda. It also made an admirable contribution to post-colonial institution-building and international law-making. But the problems that Africa continues to face today, for example deepening poverty and economic decline, HIV-AIDS and other pandemic diseases, the challenges of globalization and continued threats to peace and security and the full enjoyment of human rights by all, require new approaches, strategies and institutional frameworks. African states must empower the AU to make it a credible institution to enable them to confront these enduring problems effectively. Unless this happens, the AU will, indeed, amount to nothing more than a continuation of the OAU by another name. The transition to a new dawn and a new chapter in the long quest for closer African unity, and the project of African integration, will thus have ended in failure.

Namibian land: Law, land reform, and the restructuring of post-apartheid Namibia

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ABSTRACT

This paper addresses the current land policy and land reform programme in Namibia, raises some relevant issues, and proposes some alternative and workable options. The current land policies and land reform programmes in Namibia are based on a pedigree of land tenure systems and consequential titles that claim their legitimacy from the constructs of colonial racist administrations that illegally dispossessed the indigenous people of Namibia of their ancestral rights to their land and, in the construction of new land tenure and land rights, deprived them of comprehensive titles to their land. This whole process of land acquisition, through expropriation based on genocidal wars of dispossession and bogus land treaties, raises questions relating to the legitimacy of this pedigree of titles traced to a porous Grundnorm.

For purposes of legal continuity and political expediency, the framers of the Namibian independence Constitution condescended to recognise the pre-existing land titles. If the Namibian Independence Constitution is accepted and recognised as the Grundnorm that confers legitimacy on the pre-existing rights, then this approach, as described earlier, glosses over certain fundamental questions relating to the validity of current titles and the policy of the Government relating to the right of the people of Namibia to their ancestral land. The paper concludes that the right to property is a juridical right but without a vigorous land reform programme, these property rights, like in other jurisdictions in Africa with similar colonial history, will remain a farce.

1. INTRODUCTION – THE LAND PROBLEM IN SOUTHERN AFRICA

At the turn of the twenty-first century “land reform” has become a dominant political issue in southern Africa. The post Apartheid legacy of racism and inequality in Namibia has many manifestations, but the vast expanses of white owned farms are among the most visible reminders. Violent land seizures in

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Zimbabwe highlighted a political problem with parallels in both Namibia and South Africa, with a message in the sub-text: if deliberate legal measures are not taken to achieve land reform, the people will inevitably use force to “take back” the lands that were stolen from them during the colonial era.1 As a legal issue, land reform is among the most challenging possibilities of the law: it requires a major transformation of property rights in impoverished and racist agrarian societies through peaceful, legal means.2 As a historical issue, the justification for land reform is rooted in past injustices – colonial era land loss.

Land reform has many meanings, in different contexts, but in each of these Southern African contexts it means “the redistribution of property rights or rights in land for the benefit of the landless, tenants, or farm labourers.”3 There is no need to include race in this definition, but all involved know from the racist and colonial history of the region that white farms are to be somehow acquired and redistributed to blacks: the “race issue” dominates all other issues in the post-apartheid era as a distinct “racial geography” divided southern Africa into “white” and “black” areas.4 By definition, the land reform process transforms existing political and economic relations by creating wealth for people with nothing and politically empowering classes of people who have been poor and landless.5 White farmers who have held disproportionate political and economic power lose much, most, or even all of their power to blacks, including their former farm labourers.6 And, beyond lofty images of power and economics, land reform will enable black peasant farmers to have the chance to grow enough food to feed their families: a simple strategy of poverty alleviation in societies where children go hungry.7

This is especially important in southern Africa because of the recent legacy of colonialism, apartheid, poverty and war, continuing through the


early years of the 1990s in South Africa, but only ending in 1990 in Namibia, and 1980 in Zimbabwe. The histories of these nations are clearly interrelated. South Africa governed Namibia from 1915 to 1990, nearly incorporating it into the apartheid-era State. Zimbabwe was founded by Cecil Rhodes, who had been Governor of Cape Colony and was South Africa’s richest businessman, and, as Rhodesia, operated as one of Britain’s most “colonial” of colonial societies, with its own system of apartheid. Because of a moderate climate, and great economic opportunity, all three countries drew white settlers who invested heavily in agriculture. A permanent white settler population distinguishes these countries from other countries in Sub-Saharan Africa.

Namibia is a vast country occupied by only about 1.8 million people. Eight hundred thousand of these people are concentrated in northern Namibia in Ovamboland, a former homeland that occupies less than 3% of the land area. Over 300,000, perhaps up to 400,000, crowd into greater Windhoek, leaving only about a half million people occupying the rest of the country. The country has one of the most unequal economic structures in the world. Whites, about 7% of the population, may control 70% of the economy. Nearly half of Namibia’s blacks live at the subsistence level in rural poverty on an income of $200 (US) per capita a year or less. But the most poverty-stricken people in Namibia live on their traditional communal lands that, as overcrowded as these lands are, are still home.

One of the Government’s land reform strategies is the resettlement of previously disadvantaged Namibians and since 1990, the Government has

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11 Almost all white farmers fled Angola and Mozambique at independence. Only Kenya was settled by whites to the extent that Zimbabwe and Namibia were – and most white farmers also fled Kenya at independence. E.W. Soja, The Geography of Modernization in Kenya Syracuse, Syracuse University Press (1968), pp. 48-54.
14 E. Peyroux, “Urban Growth and Housing Policies in Windhoek: the Gradual Change of a Post-Apartheid Town,” in Ingolf Diener and Olivier Grafe, Contemporary Namibia, pp. 287-306. In 1991, one year after independence, Windhoek had a population of about 200,000. The end of apartheid coincided with much black movement to Windhoek, the only major city in Namibia, and by 2001 it is estimated to have doubled in size, to about 400,000 with most of the population living in newly established black housing developments but many in squatter camps. There is considerable movement between Windhoek and the communal areas, especially among children and young people, as children are sent away to schools and young people search for work.
redistributed some four million hectares of freehold or commercial land to these Namibians. The two principal acquisition methods are State acquisition through the Ministry of Lands and Resettlement and the Affirmative Action Loan Scheme through which formerly disadvantaged black Namibians are assisted by the State to buy freehold farms. But, as stated in a Government report on law reform, it is felt by many that the process is progressing too slowly. In a recent debate on land reform in Parliament, both Government and Opposition members of Parliament bemoaned the slow progress of land reform. In his contribution, Prime Minister Nahas Angula is reported to have said: “It is a travesty of justice that one family can own vast tracks of land in Namibia while many rural people are squeezed into small patches of land”. He added that many white farmers declare themselves bankrupt so that their farms could be auctioned off, and farms are also auctioned off when their owners die, thereby driving prices up.

2. THE GENESIS OF THE SKEWED LAND POLICIES IN NAMIBIA.

2.1 Colonial expropriation of indigenous lands

Land rights in modern societies are a juridical construct: land rights are defined in law. The “land title” is the legal document that serves as a representation of that land for all legal purposes: it can be sold, mortgaged, left to one’s heirs, or given away. Under apartheid, as under the German regime, only whites could hold “land titles”, thus only whites had a “legal” right to their land. Blacks held land, but under customary law, not under legal title. This regime is called “legal dualism” but it is not “dual”, because black land rights were/are not backed by land titles.

The “stolen lands” issue, although worldwide it refers to the process of colonial occupation of indigenous lands, in Namibia derives more narrowly from the Herero/Nama War, one of the most violent of colonial wars. The colonial history of Namibia is complex and still, from the standpoint of the black people who live there, largely unwritten. The Herero War has been the subject of a number of books, with scholars drawn to the unique character of

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18 Ibid p.ix.
German colonial violence. While a number of meanings can be drawn from the war, the central outcome in terms of land law is clear: Germany terminated by conquest all Herero land rights in South West Africa, leaving the Herero with no land at all. Herero lands were then “sold” by colonial authorities to settlers – 90% of them German – on favourable terms, with long-term loans subsidised by the colonial Government. These farms are now the heart of Namibian agriculture, occupying a wide swath from Omaruru to Gobabis and the Botswana border, the entire country to the west, north, and east of Windhoek. Further south, most Nama lands were also taken, although the Nama were left with reserves.

This violent dispossession followed a short colonial history. The Ovaherero were occupants of the high plains of central Namibia. A Bantu tribe, they had moved south into this region from Angola, arriving about 1750. A series of wars with the Nama, who live to the south, occurred in the mid-nineteenth century, destabilising the entire region. Germany first arrived in South West Africa in 1884, using the dubious private land claims of a businessman, Adolf Luderitz, as the legal basis for establishing a protectorate over a vast desert hinterland, the first German colony in Africa.

The Herero were not involved in these coastal land treaties, but on 29 December 1884 Chief Kamaherero, at Omaruru, entered into a treaty of protection with Great Britain, then engaged in a diplomatic dispute with Germany over what is now Namibia. Great Britain soon abandoned the contest, withdrawing to the Cape Colony and leaving the native people of South West Africa, with or without treaties of protection, to the Germans. Different chiefs may well have had different strategies to deal with colonial authority and the Germans were beginning to implement a “divide and rule” strategy. It is also unclear what the Herero believed these “treaties of protection” meant. Such agreements did not, on their face, cede land or sovereignty. Rather, the Germans agreed to “protect” Herero interests from rival tribes.

In 1895 colonial troops intervened in Okahandja on behalf of Chief

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26 Ibid, pp. 66-83.

Samuel Maharero in a Herero succession dispute. This military action cemented an alliance between the Germans and Maharero that lasted for nine years. During this time, Maharero “sold” vast tracts of Herero lands under various kinds of arrangements, some more “legal” than others. For example, traders took vast quantities of land in exchange for trade goods, including liquor. They, in turn, sold the land to farmers at huge profits. Other Herero land was deserted as a rinderpest epidemic killed most of their cattle. Many lands were simply taken with no regard for legality — we have no idea how it was alienated from black ownership. Much closer attention needs to be paid by historians to the colonial land records.

In a 1922 Memorandum on Treaties between the Late Government and Various Native Tribes in South West Africa, a colonial official bluntly (but confidentially) stated:

> I would like to mention here that in law there was no confiscation of the Khauash (sic) Hottentots property, and their Treaties with the late Government of the 9th March, 1894 and 4th February, 1885, are still valid. In fact the late Government confiscated their property, and omitted however to give this confiscation the force of law as prescribed in the Imperial Ordinance of the 26th December 1905. The German Government in 1913 and 1914 was well aware of this mistake; as, however, nobody had yet found it out, it kept silence. Should the Khauas Hottentots come forward to-day and ask for the return of their former territory, of which a lot has been sold and is still advertised for sale, it would mean the return of one-quarter of the District of Gobabis...

If this treaty is still in force, it may invalidate numerous land titles in this district.

Some black lands were lost through the actions, even duplicity, of their own chiefs, who seemingly “sold” land to whites. It is not clear what the parties understood such transactions to mean. There was no history or law of land sales in Herero or Nama society at that time, and it is unclear how these legal transactions were translated into German. By 1902, the Herero only retained about 46,000 cattle of an estimated 100,000 head held ten years before. In contrast, 1,051 German farmers and traders held 44,500 head. The number of settlers increased from 1,774 in 1895 to 4,640 in 1903. Of 83.5 million hectares of land in the colony, 31.4 million remained in African

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hands although these figures include much land that belonged to Nama and other tribes. In an infamous Proclamation, issued on October 2, 1904, the German General, von Trotha, ordered all Herero men killed, and all their lands and cattle seized. After reading the Proclamation to a group of Herero prisoners, he proceeded to hang thirty men then, after handing out printed copies of the document in the Herero language, drove the women and children out into the Kalahari Desert.

The details of the Herero War are well known and are not in serious dispute. Historian Jan-Bart Gewald, constructs a convincing account that the war was used as a pretext by the Germans to annihilate the Herero. But, accepting any account, it was a war over land. At least some Herero, offended by increasing German movement onto Herero lands, and subjected to demeaning and inhuman treatment by colonists and traders, rose in revolt. Once the revolt was under way, the Germans refused all attempts for a negotiated resolution. This was not the only colonial war in Namibia: there were a series of such wars. The Nama, in fact, took advantage of the Herero War, attacking the Germans from the south, and carrying on a guerrilla war for several years after the Herero were defeated.

But tribes in the north did not directly experience this war, nor this violent dispossession of their lands. This reality structures the land reform process in Namibia: most blacks have lost no land to colonisation, therefore the demand for “land reform” is not equally felt in all segments of the black population. The Government has rejected any model of “restitution of ancestral lands” in the land reform process. Thus, unlike South Africa where the land reform process includes a form of restitution for blacks dispossessed

30 W. Werner, *No One Will Become Rich*, op. cit., pp. 43-44. These data represent cataclysmic social change: there were virtually no German farmers before the early 1890s. It took scarcely the decade of the 1890s for German herds to grow larger than Herero herds.  
31 Quoted in Jan-Bart Gewald, *Herero Heroes*, op. cit., pp. 172-173. Gewald has dismissed the view that Von Trotha’s proclamation has been interpreted “out of context,” concluding that the proclamation meant what it threatened, a policy of genocide. The fact that it was printed in the Herero language and distributed to women and children about to be driven out into the desert (so they could widely distribute it) demonstrates that it was well planned.  
32 Like much of German history, there is a right wing “revisionist” interpretation of the Herero War that denies that genocide occurred. “Researcher into the Waterberg Tragedy of 1904 Presents a New Radical Version,” *Windhoek Observer*, 21July (2001), p. 2 (summarizing an uncited University of Hamburg (Germany) masters thesis claiming that (1) fewer Herero were killed in the Herero War than modern scholars claim and (2) that these deaths were not due to actions of the German army but to starvation). A point-by-point rebuttal was published a few weeks later. J. Silvester, W. Hillebrecht, and C. Erichsen, “Waterberg Tragedy of 1904 Triggers Hot Debate,” *Windhoek Observer*, 4 August 2001, p. 4. The major accounts of the Herero War (see footnote 26) agree on the essential details of the deaths of over 60,000 Herero people.  
since 1913, land reform in Namibia is not based on restitution of particular lands to aggrieved parties. The purpose is to promote national unity, but a model of restitution of ancestral lands would advantage the people of central Namibia who were dispossessed of their lands over the Ovambo and Kavango to the north, who were not, so there is a political advantage to this position.38

2.2 Classification of Land in Namibia

In the early era of colonial expansion, as indicated above, protection treaties and rights of conquest were the most prominent tools of land expropriation and alienation. After 1915, however, land alienation by Europeans and the introduction of new property rights were implemented in a more systematic manner by legislation, resulting in the classification of land which can legitimately be regarded as the genesis of the imbalances in land distribution and ownership in present-day Namibia.

The legal mechanism that was used by the colonial powers in South-West Africa was legislation that was primarily geared at dividing the land on the basis of the settler-native dichotomy. This was done by the initial declaration of the territory as Crown land, followed by the declaration of tribal and trust land or communal land over land originally belonging to the natives. Ownership of land in the area demarcated as Crown land vested in the colonial power, whilst part of the land was reserved for the occupation and use of the natives. Within the area of Crown land the received law of the settlers was applied. Customary law applied to areas reserved for the natives. In most cases, the reservation of land for the occupation and use of the natives did not imply the complete ownership of that land by that particular tribal group. Rather, the tribal group had rights of occupation and use, or rights of usufruct. The reversionary rights were vested in the colonial administration.

2.2.1 Creation of Crown land

The formal declaration of land inhabited or owned by the tribal groups as Crown land was effected by a series of laws. The Transvaal Crown Land Disposal Ordinance of 1903 was the initial piece of legislation used for this purpose. This Ordinance was made applicable to South West Africa by virtue of the Crown Land Disposal Proclamation 13 of 1920. Firstly, the Ordinance proclaimed the territory as Crown land and, secondly, in terms of section 12,

38 S. Harring, op. cit. at p. 3.
39 S. K. Amoo op. cit. at p. 91.
certain areas of Crown land could be reserved “for the use and benefit of aboriginal natives.” The extension of Transvaal Ordinances was made lawful and possible by virtue of section 4(1) of the Treaty of Peace and South – West Africa Mandate Act 49 of 1919. The general effect of this Ordinance was to vest ownership of tribal land in the State or, to be more precise, the mandatory power, South Africa. In 1967, another piece of legislation, the Reservation of State Land for Natives Ordinance 35 of 1967, was passed with similar provisions reserving State land for the use and occupation of the natives.

The declaration of the territory as Crown land meant by necessary implication that the received law was to be used to determine property relations, but this did not rule out completely the application of the relevant customary law in areas where the land was substantially occupied by tribal groups. In this regard, mention should be made of section 4(3) of the Treaty of Peace and South-West Africa Mandate, which authorised the Governor-General “in respect of land contained in any such reserve to grant individual titles to any person lawfully occupying and entitled to such land.” The novelty of this provision was the introduction of the concept of private ownership to a community whose land tenure system was community-based. Property relations were to be determined by the received law, which allowed individual rights as opposed to the community-oriented land rights practiced by the indigenous people.

2.2.2 Reserves and trusts

The classification of land in South-West Africa after the declaration of Crown land was determined according to identifiable tribes grouped under native reserves and tribal trust areas. The Native Administration Proclamation 11 of 1922, issued by the Governor-General, the official representative of the King of Great Britain on whose behalf South Africa administered the mandate, empowered the administration to establish native reserves. In 1928, the Native Administration Proclamation 15 of 1928, inter alia, gave the administrator the power to define tribal areas. Government Notice 122 under the Native Administration Proclamation indicates that as early as the end of 1923 about 14 native reserves had been established. The creation of the native reserves, therefore, cut the ties that natives had to their ancestral land, adding another dimension to the classification of land in South-West Africa. The creation of the reserves along racial lines was meant, inter alia, to accommodate white settlers on the prime land and to push the indigenous people onto more marginal land. By 1946, surveyed farms in the

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41 During the conquest of Namibia by South African troops in 1915, the Union Government was precluded from alienating or allocating any land on a permanent basis. However, the granting of the mandate over Namibia to South Africa in 1919 enabled South Africa to intervene more decisively on land issues. Henceforth, only the Governor-General of the Union had the power to legislate in regard to the allocation of Crown Land.

42 The creation of the reserves along racial lines was meant, inter alia, to accommodate white settlers on the prime land and to push the indigenous people onto more marginal land. By 1946, surveyed farms in the
and utilisation in the reserves were regulated by the Native Reserve Regulation 68 of 1924. The Regulations vested ownership of the land in the Administration and further provided that, after the land had been set aside as a reserve, “it [could] not be alienated or used for any other purpose except with the consent of both Houses of the Union Parliament.”43 As pointed out by Adams and Werner, traditional leaders in the Police Zone had no powers of their own with regard to the allocation of land in reserves. The regulations did make provision for a communal land tenure system, but the allocation of land for residential and agricultural purposes could only be made by Reserve Superintendents.44

The next step in the process of depriving the indigenous people of their rights to their ancestral lands was the “conversion” of the reserves into trusts. By virtue of the Development Trust and Land Act 18 of 1936, the native reserves were to be placed under a trust, known as the Development Trust, and the administration of native affairs was transferred from the Administrator of South-West Africa to the responsible South African Minister. Under section 5(2) of this Act, all land placed under the Development Trust was declared the property of the State, to be administered by the State President of South Africa as trustee. In 1978, by virtue of section 2 of the Administration of the South African Bantu Trust in South-West Africa Proclamation AG 19 of that year, the trusteeship was transferred from the South African State President to the Administrator-General of South-West Africa.

2.2.3 Creation of areas for native nations

The next development in the land policy of the colonial administration was the creation of “areas for native nations.” This was effected by the Development of Self-Government for Native Nations in South-West Africa Act 54 of 1968. This Act gave the various pieces of land assembled in the Development Trust special status by transforming them into areas for “native nations.” Section 2 of the Act listed Damaraland, Hereroland, Kaokoland, Okavangoland, Eastern Caprivi, and Ovamboland as such areas. Section 2(g) empowered the State President of South Africa to “reserve and set apart such other land or area for the exclusive use and occupation by any native nation by proclamation.” This was, for example, done for Bushmanland in terms of the Bushman Nation Advisory Board Proclamation R208 of 2976. Section 2 of the Proclamation

43 Ibid. at p. 31.
44 Ibid.
recognised Bushmanland, as defined in GN 1196 of 1970, as an area “for members of the Bushman Nation.”

2.2.4 Creation of communal land

By virtue of various pieces of legislation, the areas that had been designated for native nations were declared communal land. Examples of such pieces of legislation were: the Representative Authority of the Caprivians Proclamation AG 29 of 1980; the Representative Authority of the Kavangos Proclamation AG 26 of 1980; and the Representative Authority of the Ovambos Proclamation AG 23 of 1980. The Development of Self-Government for Native Nations in South-West Africa Act was repealed by section 52 of the Representative Authorities Proclamation.

In 1981, by virtue of the provisions of the Representative Authorities Amendment Proclamation AG 4 of 1981, the Administrator-General was made trustee of the communal lands. More importantly section 48 (3) of this proclamation gave the executive authority of the representative authority – to the extent that it was authorised by an Ordinance of the legislative authority or any other law – the power to confer ownership, or any other right into or over, any portion of such communal land, thereby maintaining the alien concept of private individual ownership among the tribal communities. The Representative Authorities Proclamation, and those proclamations establishing representative authorities, were amended by the Representative Authority Powers Transfer Proclamation AG 8 of 1989, which dissolved the representative authorities and transferred the powers back to the Administrator-General. Article 147, read with Schedule 8 to the Namibian Constitution, repealed the remaining parts to the various representative authorities proclamations. However, as argued by Hinz:

“All those amendments and repeals, including the repeal by the Constitution … did not alter the status of the land, being communal land … This follows from the Interpretation of Laws Proclamation, 38 of 1920, which provides in section 11(2)(c) for the continuous legal validity of acts performed under the Act repealed. This appreciation for legal certainty also must apply to acts directly instituted by the repealed law itself.”

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45 See also Hinz (note 40 above), pp. 184-188.
46 Note that the executive authority of the representative authorities was established under the various Representative Authorities Proclamations.
47 Article 147 deals with repeal of laws, and repeals all laws set out in Schedule 8.
48 Schedule 8 is a list of repealed laws, mostly Representative Authority Proclamations.
49 Hinz (note 40 above) p. 185.
3. LAND TENURE AFTER INDEPENDENCE

3.1 State land

Article 100\(^{50}\) and Schedule 5(1)\(^{51}\) of the Constitution maintain the status of State (Crown) land; article 16(1) affirms the fundamental right to acquire, own and dispose of all forms of immovable and movable property (i.e. it maintains the status of private property); and by virtue of section 11(2)(c) of the Interpretation of Laws Proclamation 38 of 1920, article 102(5) of the Constitution and the generality of the provisions of the Communal Land Reform Act 5 of 2002, the status of communal land has also been maintained.\(^{52}\)

3.2 The communal lands

The Government’s proposals on communal land reform in the White Paper on Land Policy are the subject matter of the Communal Land Reform Act, 5 of 2002.\(^{53}\) The primary purpose of this Act is to make the process of land allocation and land administration fair and transparent, and to enhance security of tenure in the communal areas by giving statutory recognition to existing land rights and by creating new rights. The Act also seeks to introduce a certain degree of uniformity in land policy throughout the country by laying down new procedures regarding land allocation, utilisation and transfer or inheritance. It addresses, \textit{inter alia}, the issues of administration of communal land, titles to communal land, security of tenure and reiterates the position in the White Paper that the ownership of rural land is vested in the State. With regard to rights over communal land, whilst recognising the underlining principle that the ownership of communal lands is vested in the State, the Act creates two rights that may be allocated in respect of communal land: customary land rights and rights of leasehold.\(^{54}\) The Act thus reaffirms customary rights of usufruct\(^{55}\)

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\(^{50}\) Article 100 provides that “[l]and, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned.”

\(^{51}\) Schedule 5(1) provides that “[a]ll property of which the ownership or control immediately prior to the date of independence vested in the Government of the Territory of South-West Africa, or in any Representative Authority constituted in terms of the Representative Authorities Proclamation, 1980 (Proclamation AG 8 OF 1980), or in the Government of Rehoboth, or in Government or Authority immediately prior to the date of Independence, or which was held in trust for or on behalf of the Government of an independent Namibia, shall vest in or be under the control of the Government of Namibia.”

\(^{52}\) For further discussion on the recognition of titles over communal lands see (4.5.1 and 5.2) below.

\(^{53}\) The Communal Land Reform Act contains the proposed provisions on the question of ownership, types of titles, security of tenure, and administration of communal land. In addition to this, the Traditional Authorities Act 17 of 1995 and the Council of Traditional Leaders Act 19 of 1997 give certain jurisdiction over the allocation and administration of communal lands to the traditional authorities.

\(^{54}\) See section 19 of the Act.

\(^{55}\) Under section 21 the customary rights that may be allocated comprise a right to farming unit and a right to a residential unit. Section 20 vests the power to allocate or cancel any customary land right in the communal area of a traditional community in the Chiefs and Traditional Authorities.
NAMIBIAN LAND

granted to occupiers of communal land and seeks to confer on this tenure system statutory recognition. The Act does not go beyond the right of usufruct. It does, however, specify the duration of customary land rights and makes provision for their registration. Registration only constitutes publicity or proof of title. It does not confer on the holder any additional security, for example, to use the title as collateral. The Act also seeks to have one common position relating to the allocation of land to a surviving spouse in the event of the death of the holder of the right.

The other right created by the Act is the right of leasehold, or statutory leasehold. This right is meant to replace the existing Permission to Occupy (PTO), which is granted by the Ministry of Lands for the use of land for any specific purpose, especially for commercial undertakings. In terms of the Act, the power to grant leasehold rights is vested in the Communal Land Board rather than the Ministry of Lands. The right is granted for a statutory period of 99 years. If the right is granted for a period not exceeding 10 years it is invalid unless approved by the Minister. The grant of leasehold rights is subject to registration. If the land in respect of which the right of leasehold is granted is surveyed land (i.e. land which is shown on a diagram as defined in section 1 of the Land Survey Act 33 of 1993), and the lease is for a period of 10 years or more, the leasehold must be registered in accordance with the Deeds Registries Act 47 of 1937. These provisions therefore guarantee security of tenure, and could serve as a catalyst for the development of commercial activities in the communal areas.

The Act recognises the role of traditional authorities in communal land administration by vesting in the Chiefs and the traditional authorities the power to allocate communal land, subject to supervision by the Communal Land Boards. This provision should not be interpreted as a potential threat to the rights of traditional leaders under Article 102(5) of the Constitution, which provides for the establishment of a Council of Traditional Leaders by Act of Parliament “to advise the President on the control and utilisation of

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56 See Section 26.
57 See Section 25(1)(b).
58 Section 26 provides, inter alia, that upon the death of the holder of a customary land right, such right reverts to the Chief or Traditional Authority for re-allocation either to the surviving spouse of the deceased person, if such spouse consents to the allocation or in the absence of a surviving spouse to such child of the deceased person as the Chief or Traditional Authority determines to be entitled to the allocation of the right in accordance with customary law.
59 The traditional laws of the various tribal communities in Namibia relating to the rights of the surviving spouse to a communal land erstwhile occupied by a deceased spouse vary. The common position is contained in Section 26.
60 See sections 19(b) and 30(1).
61 The Communal Land Boards are created under section 2(1) of the Act.
62 See section 34.
63 See section 33(1).
64 See section 33(2).
65 See sections 2 and 3. The establishment of the Communal Land Boards will be a completely new development in the law relating to communal land in Namibia, though Botswana and other countries have similar Boards.
communal land.” Rather, the role of the Communal Land Boards must be seen as administrative and advisory.

3.3 The commercial farming sector

Land set aside for private ownership or freehold in the commercial sector is for the most part owned by whites. At the time of independence this constituted most of the commercially viable farming land, while the remainder of such land was held by the indigenous people in the communal areas.

The commercial farms, mostly in fact, ranches – about 6,000 in number, owned by about 4,200 whites (and now up to seven hundred blacks) – occupy the high plateau that extends in all directions from Windhoek, the centre of the country. This area is not tropical which meant that German farmers could settle there without worrying about dying of tropical diseases. This temperate “country” was “white man’s country”. The hotter and wetter land in the north, although better for agriculture, was left to blacks. In the German era, blacks were substantially left alone there outside of the “police zone”, a policed boundary line that still runs across the country, now remaining as the “red line,” a veterinary fence that keeps “African” cattle in the north, away from “European” cattle, segregating even the cows. The “police zone” kept Germans inside its boundary, under the protection of the colonial Government. The vast relocations of black people that characterised both South Africa and Zimbabwe and make land reform there so difficult, happened in central Namibia but the majority of blacks in the north still occupy their traditional lands.

As mentioned earlier, the German farms were first settled at the beginning of the 1890s, with a great increase in settlement after the Herero/Nama War of 1904-07, and then again after World War One, but extending into the 1950s and even, in a few cases into the 1960s. White land ownership in Namibia does not go back for “generations”; only 458 farms date back to four or five generations before 1904. In 1938 there were 3,305 farms, thus half of the farms in Namibia were taken up less than 70 years ago. Up to 20% of

66 Throughout this study, the “commercial farms”, predominantly white owned, are contrasted with “communal farms”, black occupied agricultural lands. While this juxtaposition is essentially accurate, since 1990 some of the “commercial farms” have become black owned. While exact data is unknowable because of secret ownership devices, it seems that as many as 700 of 6000 farms are black owned, or about 11%, but many of these may be leased back to their white owners. All “communal” farmers are black, but some are grazing white owned cattle, also through various (and concealed) ownership agreements.

67 R. Moorsom, Transforming a Wasted Land London, Catholic Institute for International Relations (1982), p. 30. It is not clear exactly how many farm units there are because of both inconsistencies in data collection, as well as the merger of some farms into others.


Namibia’s farms have changed hands since independence. Today these commercial farms cover 36.2 million hectares, or about 44% of the land in Namibia. These figures are slightly larger than those for “communal lands”, which cover about 33.5 million hectares or about 43% of the land. Communal land is held by over a million blacks. The Government owns the rest of the land, about 13%, held as national parks, the diamond district, and for other purposes.

As stated by the Prime Minister, Hage Geingob, in his opening address to the Land Conference on Land Reform in 1991:

“There are about 6292 farms. Out of these, 6123 farms are white-owned, and cover 95 per cent of the surface area of the commercial districts (34.4 million hectares). Within this ownership category the overwhelming majority of farms belong to individual white farmers, including non-Namibians. To be more specific, a total area of 2.7 million hectares (382 farms) belong to foreign absentee farmers, that is to say 0.9 million hectares belonging to citizens from Austria, France, Italy and Switzerland, while the bulk of 1.7 million hectares belong to South African residents. Similarly, there are individual Namibian farmers with more than two large farms, as against thousands of their landless fellow countrymen who live in squalid poverty.”

It was then clear that the imbalances in the distribution of land could not be redressed without Government intervention, a process to which the SWAPO Government has committed itself, as will be explained later, through its land reform strategies.

3.4 Land tenure in urban centres

3.4.1 Freehold titles

The historical classification of land in South-West Africa along racial lines led to the development of urban centres in the southern and central parts of the country in the areas designated as non-communal areas reserved principally for

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70 According to Government data, 759 farms were offered for sale to the Government, as required by Namibian law. This was up to 2001, about 13% of the farms in Namibia. W. Odendaal and S. Harring, One Day We Will All Be Equal: A Socio-legal Perspective on Namibian Land Reform and Resettlement Process Windhoek, Legal Assistance Centre (2002), p.76. Additional farms doubtlessly changed hands before the Agricultural Commercial Land Reform Act (1995) went into affect, and others have changed hands since 2001. Other farms have changed hands in private transactions that have not been reported.


white settlement. These urban centres maintained the dominance of white settlement through the pass law system, and through the reservation of property ownership to whites. Black settlement was only allowed as a source of labour. The black workforce lived in separate locations, which comprised less-developed formal settlements and undeveloped informal settlements.\(^{73}\) Black residents in the less-developed formal settlements who were able to satisfy the requirements for registration in terms of surveying and adequate planning were granted freehold titles to the properties. This form of tenure, however, constituted the exception rather than the rule. Occupants of settlements without adequate surveying and planning could not get their properties registered and therefore did not qualify for titles. Informal settlement did not attract any grant of security of tenure.

Article 16 of the Namibian independence Constitution guarantees everyone the right to private ownership of land. This provision means that black Namibians are now constitutionally entitled to own properties with freehold titles.\(^{74}\) Freehold titles over land in urban centres may be acquired either though alienation of land hitherto vested in local authorities under the Local Authorities Act 23 of 1992,\(^{75}\) or through private treaties between individuals.

### 3.4.2 The permission to occupy

Apart from the freehold title, the other form of the title granted to residents in the urban centres, was the Permission to Occupy (PTO). Before independence, this constituted the only form of title to land, other than rights under customary law, which was available to the indigenous population of Namibia, considering the prevailing political, social and economic constraints on the capacity of blacks to obtain freehold title.

The PTO was formally introduced into the territory by the Development Trust and Land Act 18 of 1936. It is a licence granted by the Act, which allows the licensee to occupy State land under conditions attached to the PTO certificate. There are two types of PTO: rural and urban. The former is issued by the Ministry of Lands and Resettlement, and the latter by the Ministry of Regional and Local Government and Housing and Rural Development. The urban PTOs are issued in respect of land that falls within

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\(^{73}\) I. Tvedten and M. Mupotola, “Urbanisation and Urban Policies in Namibia,” Discussion Paper 10, Social Sciences Division, University of Namibia (1995). See also S.F. Christensen & P.D. Hojgaard Report on Flexible Land Tenure System for Namibia (1997), p. 6. In the proposal for the introduction and development of a flexible land tenure system for Namibia, references are made to ‘formal’ and “informal” areas of settlement. The former is used to denote areas that are planned and surveyed. These areas are most often serviced with water, sewage removal, roads and electricity. The latter are areas where people have not settled according to prior planning.

\(^{74}\) See 4.3 below.

\(^{75}\) See section 3(3)(a), 3(5)(b) and 30(1)(t) of the Local Authorities Act 23 of 1992.
the “old settlement areas.” All other PTOs are designated rural.

Despite the existence of the PTO since 1936, it was the establishment of the Bantustans (or homelands) after the Odendaal Commission’s Report in 1964 that resulted in the proliferation of this form of tenure. The 1960s saw the growth of the capitals of the Bantustans or the communal areas of the northern regions of the territory as a response to the administrative and military needs of the colonial administration. Since these urban centres were situated in the Bantustans, it was a contradiction in terms for the colonial administration to grant freehold titles. To suit the apartheid design, the most appropriate title in the circumstances was the PTO. PTOs were granted mainly to residents who occupied Government houses in the formal areas and to private persons who developed plots in the formal areas. They were designed to provide the residents thereof with some security of tenure for the development of a surface structure, which could be in the form of a house or a shop. In accordance with the overall objective of apartheid, therefore, the PTOs satisfied the colonial administration’s need for a limited form of title for the indigenous population. As such, it is a leasehold sui generis. A PTO conveys no rights of ownership, but it does contain an option for the holder to obtain secured title to the land if, at any time during the currency of the PTO, such title becomes available. As indicated by Christensen and Hojgaard, a PTO provides a limited right to occupy an identified site for a limited period. In theory, it cannot be transferred or mortgaged. In practice, however, because PTOs are the only form of legally recognised titles in unproclaimed towns, they are “transferable” (by cancellation and reissue to the purchaser). In certain instances, PTOs have also been used as collateral. The inherent limitations of the PTOs have, however, created a lack of confidence in the system among the holders and the general public.

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76 The old settlement areas are the urban or urbanising areas where the colonial administration before independence carried out the surveying of some plots and in some cases provided water and electricity. These are also referred to as formal areas. If the PTO falls within such an area it is an urban one and will usually be located on one of the numbered surveyed plots.

77 In 1962, the South African Government appointed a Commission of Enquiry to make “recommendations on a comprehensive five-year plan for the accelerated development of the various non-white groups of South-West Africa.” This Commission was commonly known as the Odendaal Commission. The recommendations made by the Commission in its 1964 report had little to do with promoting the welfare of black Namibians. One infamous recommendation in the Report was that Namibia should be fragmented into a series of economically unviable self-governing homelands or Bantustans for Africans, which would of necessity, remain perpetually dependent on the “white” areas, and, through them, on South Africa. The Odendaal Plan was implemented by two pieces of legislation: the Development of Self-Government for Native Nations in South-West Africa Act 54 of 1968 and the South-West Africa Affairs Act 25 of 1969. The effect of the implementation of the Plan was to entrench both territorial apartheid in Namibia and the distribution of land along racial lines. See N.K. Duggal, Namibia: Perspectives for National Reconstruction and Development Lusaka, United Nations Institute for Namibia, (1986), pp. 37-41.


79 In a report prepared for the Social Sciences Division, University of Namibia, entitled A Summary Review of Urban Land Policy Issues and Options (1995), J.W. Howard states that the public’s perception of the PTO is that of a second rate form of title given to the black population by the previous regime whilst retaining the best title, freehold, for whites. He argues that if a revised form of PTO is to be accepted then
policy\textsuperscript{80} is thus to phase out PTOs in the urban areas as the full range of existing and projected tenure forms become available.\textsuperscript{81}

3.5 Land tenure in resettlement areas

As mentioned earlier, the Namibian Government’s land reform programme has land resettlement as an essential component. Resettlement involves both redefining and reconstructing of land rights that need to be vested in the beneficiaries of land resettlement. The determination of appropriate land rights in these resettlement areas has been premised by the Government’s objectives of resettlement. The National Resettlement Policy of 2001 states two objectives of resettlement as firstly, to enhance the welfare of the people through improvement of productivity and secondly to develop the destination areas where people are supposed to earn a living.

In view of the fact that with the acquisition of these holdings by the State, it is not only the freehold title but logically the allodial title that are vested in the State, the position of the Government in the reconstruction of adequate titles for the resettlement areas is the retention of the freehold and allodial titles and the granting of lesser titles to the settlers. Consequently, the tenure system in the resettlement areas is based on non-freehold where the Government provides long term leases of 99 years to current holders and future generations. The leasehold tenure system allows beneficiaries to use a lease as collateral to secure a loan from lending institutions for agricultural production purposes. However, the reality of the actual situation on the ground is that resettlement areas cannot be used for collateral purposes due to the following reasons;

1. The State/Government is registered owner of the property;
2. The ownership structure makes it difficult for the banks to repossess this land in the event of default in payment of loans;
3. The leasehold of 99 years granted by the Government is not transferable or “non-tradable”.

The land rights may be granted as individual, group or co-operative holdings.

\textsuperscript{80} White Paper on National Land Policy.

\textsuperscript{81} These projected forms of tenure are the starter title and landhold title. But it is now possible for holders of PTO’s to acquire freehold titles over such properties through alienation and transfer of rights of ownership.
4. LAND REFORM IN NAMIBIA.

4.1 The legal regime of land development in Namibia

The concern for land reform in Namibia is raised in the opening paragraph of the White Paper in the following terms:

“Access to and tenure of land were among the most important concerns of the Namibian people in their struggle for independence. Since 1990, and following the 1991 National Conference on Land Reform, and the Consultative Conference on Communal Land Administration 1996, Namibia’s democratically elected Government has maintained and developed its commitments to redressing the injustices of the past in a spirit of national reconciliation and to promoting sustainable economic development. The wise and fair allocation, administration and use of the nation’s urban and rural land resources are essential if these goals are to be met.”

Pursuant to various national conferences on the land question and consistent with its avowed policy of land reform, the Government promulgated the Agricultural (Commercial) Land Reform Act (Act 6 of 1995) in 1995. This Act is meant to provide the Namibian Government with the necessary legal tools to acquire commercial farms for the resettlement of displaced persons, and for the purposes of land reform. To date, the implementation of the policy has been facilitated by the State and by market-assisted acquisition schemes based on the “willing seller-willing buyer” principle. The State acquisition scheme known as the National Resettlement Programme (NRP) acquires land for resettlement purposes in the market under the auspices of the Ministry of Lands and Resettlement (MLR). The Affirmative Action Loan Scheme (AALS) is a programme implemented by the Agricultural Bank of Namibia on behalf of the Ministry of Agriculture, Water and Forestry (MAWF). This programme assists formerly disadvantaged persons to acquire land themselves on the open market with subsidised interest rates. Between 1990 and October 2004, the two programmes together redistributed 4, 31 million hectares, or 12% of the total area of freehold land in Namibia, benefiting some 2151 families. Since 1992, the AALS has distributed nearly four times the amount of land the NRP has

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83 The Namibian Government has held a number of consultative conferences on the land question since the National Conference in 1991. These have led to the enactment of legislation on land and related matters and to the drafting of the *White Paper on National Land Policy*. References to appropriate legislation and the White Paper are made elsewhere in this article.
distributed since 1990, namely 3.47 million hectares compared with some 874,000 hectares. In addition, the MAWF transferred 398,859 hectares to the MLR in 1992. ⁸⁴

The implementation of the Act has, however, not been free from problems. As pointed out by the then Minister of Lands, Resettlement and Rehabilitation, Pendukeni Ithana, the Government’s policy of “willing seller, willing buyer” has imposed constraints on its ability to acquire fertile and more productive commercial farms. ⁸⁵ However, an option that is open to the Government as a possible solution to this constraint may be found under the provisions of Chapter IV of the Act. Section 20, read together with section 14(1), empowers the Minister to expropriate any commercial land for purposes of land reform in case of failure to negotiate the sale of property by mutual agreement. Under article 16 of the Constitution the Government of Namibia has the sovereign power to expropriate private property. ⁸⁶ Consistent with the norms of international law, ⁸⁷ the Namibian Constitution provides for the justification of such expropriation on grounds of public interest and the payment of compensation. The power to expropriate, therefore, is a legal matter, while the decision to expropriate and determine the public interest is a political one. It is also worth mentioning that this clause is not entrenched and therefore can be derogated should a State of emergency be declared under Articles 24(3) and 26 of the Constitution. ⁸⁸ The Namibian Government has to date expropriated about nine farms. This may be attributed both to political reasons and budgetary constraints relating to the payment of compensation.

4.2 White agriculture in modern day Namibia

Just as land dispossession has its history, so does the white agricultural order which followed. Namibian agriculture, under colonialism and Apartheid, took on particular forms. In a land where farm ownership is politically and racially charged, it is not easy to determine exactly who owns the land because some ownership is concealed through various legal devices. ⁸⁹ It is generally thought

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⁸⁶ See article 16(2) of the Namibian Constitution and section 14(1) and 20 of the Agricultural (Commercial) Land Reform Act 6 of 1995.
⁸⁸ This clearly means that the Government, under such a State of emergency, can expropriate private property without compensation.
⁸⁹ Because these various legal arrangements are secret it is not possible to say precisely how common these forms are, or even exactly what they are. Some “foreign” ownership, for example, is concealed by putting farms in the name of Namibian citizens. Other farms are held in the name of relatives, or corporations. Corporately held farms may legally appear in individual ownership. Still other farms may be legally registered to their former owners, although ownership has been secretly transferred by an unregistered legal arrangement. Some Affirmative Action scheme farmers have apparently bought land from whites at inflated prices, then leased these farms back to the original owners. There are rumours that politicians do
that about 4,200 families own about 6,000 commercial farms, with up to 700 of these farms held by blacks. Since independence, black businessmen and politicians have purchased farms and about 700 black farmers have been loaned money through various State affirmative action programmes to buy commercial farms.\textsuperscript{90} But the commercial agricultural sector is still overwhelmingly white, and is so perceived by Namibian blacks.

These 4,200 families represent much of the wealth in Namibia, with many urban residents owning farms that they use on weekends and holidays. At the same time, little of this wealth is actually generated by these farms, a situation much different from Zimbabwe where white-owned commercial farms were major sources of income, particularly foreign exchange. Many Namibian farms are held as “hobby farms”, one asset of people wealthy from other areas of enterprise. Again, this data is difficult to access, but it is clear that the average Namibian farm does not produce a profit and the average farm is far in debt. At least 60%, and up to as many as 70% of all Namibian farms are unprofitable. Debt loads are large, with debt repayment amounting to about $300 million (N) a year; about one-third of Namibia’s estimated agricultural income.\textsuperscript{91} Debt loads are also rapidly increasing. In 1991 the average commercial farmer had to sell 31% of his livestock to pay his debts; in 1998 this had increased to 64%, effectively doubling debt in seven years.\textsuperscript{92}

Debt per farmer has doubled since 1990, increasing from $112,000 (N) to $227,000 (N). Given that some farmers – perhaps as many as 30% – carry no debt, the remaining farmers are even further in debt than these “average” data would indicate.\textsuperscript{93} These farms, averaging about 8,000 hectares each – 20,000 in the south – are losing money from year to year. This means that the present generation of white farmers with an average age of fifty-five is content with a rural lifestyle that produces little cash income and is willing to borrow against their capital investment in order to maintain their agrarian lifestyle.\textsuperscript{94}

Ironically, it now seems that this was always the case with Namibian farms: they were never profitable, and always heavily subsidised by the State.

\textsuperscript{90} There is no firm data on the number of blacks who own commercial farms. While 500 loans have been taken out under an affirmative action farm loan scheme, it is not clear that 500 farms have been purchased with this money.


\textsuperscript{92} Ibid, p. 33.

\textsuperscript{93} Ibid, p. 33.

\textsuperscript{94} Martin Adams and John Howell, “Redistributive Land Reform in Southern Africa,” Windhoek, Namibia Institute for Social and Economic Research (1990), pp. 4-5. This is a logical conclusion, drawn from the above data. The farming sector is distrustful of the Namibian Government and may want to appear stronger and more important to the nation’s economy than it is, therefore accurate economic data is not easily gained. It should also be noted that the threat of expropriation has encouraged farmers to use various devices to raise the value of their farms, both to discourage expropriation, but also to increase the payment in the event of expropriation.
First, the German Government, using the model of the yeoman German farmer that worked so well in Canada and the United States, subsidised small farmers in order to populate its colony with Germans, a necessary requirement to create a colonial settler society on the model of North America or South Africa. Later, the South African Government moved thousands of poor Afrikaners to Namibia, setting them up in a rural welfare scheme, a bulwark of agrarian Afrikaner values. Even the choice of cattle or small stock as the major “crop” was determined by South African officials: they loaned money only for particular types of agricultural enterprises. A vast road system was built; still among the best in Africa. Wells were sunk all over the country in order to ensure a constant supply of water in a semi-desert environment. Dam building and canal projects were undertaken, with plans developed to divert water from the Kunene and Kavango Rivers into central Namibia.

Even with elaborate State efforts to develop water sources, drought is a periodic occurrence in Namibian agriculture. What rainfall that exists occurs during a few months between November and March. But rainfall, even in the “rainy” season, is often irregular. Therefore, it is difficult to plan for herd development. Periodic drought has also resulted in high levels of environmental degradation, that, ironically both lower the value of the farms making it easier for the Government to purchase them, but also making it harder to successfully resettle black farmers on the land. Namibian grazing lands are stressed even under good conditions. Drought forces overgrazing, which has led to the permanent depletion of grasslands, desertification, and bush encroachment, as worthless species of bush take hold where grass is gone, converting grasslands to shrubby wastelands.

Since the 1950s, Namibian agriculture has become increasingly monocultural: cattle are the main cash source, and most farms are now “ranches”, raising nothing but cattle. Cattle herds in the commercial areas

96 Ibid; see also R. Moorsom, Transforming a Wasted Land, Catholic Institute for Land Reforms (1982), pp. 9-36.
103 B. Lau and P. Reiner, 100 Years of Agricultural Development in Colonial Namibia, Windhoek, Namibia
have declined by 27% since 1990, now numbering under 1,000,000 head. Because Namibia has little grain, its cattle are grass fed, further stressing the environment. This means that it takes longer to raise them to market weight and that they produce an inferior grade of meat in the world market. In the south, where there is too little grass for cattle, farmers raise over two million sheep. Namibia, a vast agricultural land, is self-supporting only in beef and mutton. Most of its food products must be imported, almost always from South Africa. Although cattle and small stock production dominates Namibian agriculture, there are several regions that support commercial crop production. A “maize triangle” in the north, where there is more rainfall, grows about half of Namibia’s corn and wheat requirements.

What is now left of Namibian agriculture is the remnants of a wasteful, politically determined, and subsidised system that never originally belonged in Namibia, but rather, was State subsidised for underlying purposes related to colonial policy that no longer exists. The irony here is striking: even if those farms were vacated tomorrow, it is not clear that they should – or even could – be re-occupied as farms. To do so would simply continue a wasteful form of colonial era agriculture. If white farmers have required vast subsidies to operate in Namibia, it is also likely that black farmers will as well. Thus, the major expense of land reform is probably not the cost of the land itself, but the cost of generations of future Government subsidies.

These commercial farms are at the core of an agrarian social structure that may provide jobs for about 15% of the population. In 1997, 42,277 farm workers were employed in the commercial agricultural sector. An additional 38,125 were “unpaid family workers”. With an average household size of 5.1, about 211,000 blacks are employed or supported by commercial agriculture. Many black Namibians have worked on these farms their whole lives, and often have known no other home. While farm wages are generally low, farm workers may also draw benefits in terms of food, housing, and medical care that are much better than for the average Namibian. Thus, any change in the ownership of these commercial farming operations will

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104 W. Werner, “Agriculture and Land,” in Henning Melber, Namibia: A Decade of Independence, pp.30-31; J. Sweet, “Livestock –Coping with Drought: Namibia – A Case Study” puts the number of cattle on commercial farms as 790,699 in (1997) p. 4. The same year blacks held 1.3 million cattle in the communal areas.
105 Cattle fed on poor grass take longer to mature and yield tougher, poorer quality meat.
106 Sweet, op.cit. at p. 4.
displace large numbers of poor blacks with no other homes, low educational levels, and few other job skills. Thus, an irony of “land reform” is that most of the people displaced are poor blacks, most of the whites who own farms already live in cities.

While the real wealth of Namibia is no longer in its agrarian sector, the vast expanses of ranches in white hands is a powerful symbol of both white wealth and white domination of the Namibian economy. Because Namibia has such an extensive agrarian heritage, both black and white, and the majority of blacks live in rural areas, owning land represents wealth and power. Rural blacks want “land”, even though most white owned commercial farms cannot simply be transferred to black ownership and profitably run.

4.3 Security of tenure in the informal areas

In terms of land holding rights and security of tenure, the other category that needs to be considered are residents of the informal areas. Most of these people obtain their rights of occupation from traditional leaders. Such rights approximate to rights of usufruct. This category of residence has, however, never been granted official land rights by the authorities. It is this group of residents, together with those in the spontaneous settlements on the fringes of proclaimed urban areas, at which the newly proposed form of tenure, the starter title, is aimed.

With the advent of independence, more Africans were absorbed into the public service and, to a lesser extent, into the private and commercial sectors. This has resulted in the influx of more affluent Africans into the urban centres. The character of black settlement in the urban centres has consequently become more heterogeneous and, with the right of private ownership guaranteed by article 16 of the Constitution, more black urban dwellers are able to acquire property in the form of freehold title. Although this phenomenon may have corrected to a certain degree the effects of past racial discrimination, urbanisation has its own inherent problems. It is thus estimated that urban areas in Namibia are growing at a rate of 3.75 per cent per annum on average. The fastest growing towns, Walvis Bay, Katima Mulilo and Rundu, are estimated to be growing at a rate of approximately 6.5 per cent. Windhoek, with 34.5 per cent of Namibia’s total urban population, has seen an annual growth rate from 1991 to 1995 of 5.45 per cent. This growth means that there is not only need for more land for urban settlement, but also for security of tenure for people whose rights are not recognised by the existing system. It is estimated that about 30 000 families presently live in

111 Ibid, pp. 6-9.
112 These titles are the subject matter of the Flexible Land Tenure Bill which is currently in Parliament.
informal settlements in urban areas without security of tenure.\textsuperscript{113} Most of these residents are squatters on land belonging to individuals or local authorities.

One reason for the non-existence of a more secure tenure system for urban settlements in the former Bantustan areas was that it was the deliberate policy of the colonial administration to deny these urban centres official recognition as municipalities. This would have led to the establishment of local authorities with the jurisdiction to grant freehold title after the satisfaction of infrastructural and surveying requirements.\textsuperscript{114}

The first democratic Government of Namibia reacted to this situation by establishing local authorities in these areas under the Local Authorities Act, 1992. The formalisation of urban centres in terms of this statute involves, firstly, the proclamation of the area as an urban area under the jurisdiction of the relevant local authority. This step is then followed by the registration of the town in the name of the State or relevant local authority. The proclamation and subsequent registration enable the local authority to subdivide the area and create plots or erven of urban land. The occupants of such plots receive freehold title. In the formal areas, the intention is to sell existing erven to the relevant local authority, “subject to the holders of Permissions to Occupy being given the first option on the plots they occupy at the sale date.”\textsuperscript{115}

\section*{Proposed land tenure systems}

The formalisation of property rights, however, has not provided solutions to all problems related to land tenure. This process does not, for example, address the need for a unitary land system, or the question of security of tenure for informal settlements. There are also problems relating to the cost of registration and generally the question of whether the serviced plots are affordable for the ordinary citizen. Finally, it is estimated that the process of proclamation takes about three years.

The \textit{White Paper on National Land Policy} and the proposed flexible land tenure system are an attempt to provide solutions to some of these problems. With regard to the need for a unitary land tenure system, as stated earlier, the colonial regime in effect created “first and second class systems of land tenure divided along racial lines.”\textsuperscript{116} The White Paper, in keeping with the principles of Article 98 of the Constitution (which provides for a mixed

\textsuperscript{113} Christensen & Hojgaard (note 73 above).
\textsuperscript{114} The \textit{White Paper on Urban Land and the Proclamation of Local Authorities} States that prior to Independence many urban areas developed which, because of the discriminatory policies of the colonial regime, were never proclaimed as municipalities or townships and in which no local authority administration developed. The \textit{White Paper on National Land Policy} requires the establishment and proclamation of urban and urbanising areas as townships and municipalities where appropriate, to promote decentralisation of Government and the close involvement of communities in their own administration.
\textsuperscript{115} \textit{Ibid.}
\textsuperscript{116} \textit{White Paper on National Land Policy}. 
economy), envisages a land tenure system in which all citizens have equal rights, opportunities and security across a range of tenure and management systems.\textsuperscript{117} The proposed range of tenure forms includes customary grants,\textsuperscript{118} leasehold; freehold; licences, certificates or permits; and State ownership. The categories of right holders will be individuals; families that are legally constituted as family trusts (in order to assure specified individuals and their descendants shared land rights); legally constituted bodies and institutions to exercise joint ownership rights; duly constituted co-operatives; and the State.

With regard to the question of access to affordable land with secure tenure, the National Land Policy aims to correct the inequalities in the existing system by devising a system that will address the needs of the poor and the disadvantaged sectors of society. The proposal involves the provision by local authorities of serviced land with a planned layout and a graded access road to that part of the urban population that can afford it. For those that cannot afford to purchase the most basically serviced plot, the proposal envisages the provision of a long-term right of occupation to a plot where regular rental payment will count towards the purchase price of the land over time. Two new statutory systems of tenure have been proposed for the achievement of these objectives: the ‘starter title’ and the ‘landhold title.’

4.5 Reform of customary land tenure

Apart from the mal-distribution of land along racial lines, the Namibian land programme has to be analysed from the perspective of customary land tenure systems that operated in the communal areas within the general context of customary law. Some of the issues of customary land tenure discussed in this article centre on the recognition and status of customary law and the nature of customary land tenure.

One of the legacies of colonisation in Africa is the juxtaposition of the received law emanating from the legal systems of the metropolitan countries alongside the customary law of the indigenous African communities. This juxtaposition subjected the application of customary law to various tests of recognition. As Max Gluckman\textsuperscript{119} and other students of the jurisprudence and legal systems of traditional African societies have acknowledged, before the advent of colonialism African communities had their own laws and legal systems regulating the behaviour of individuals in society. These laws covered areas like civil and criminal liability, marriage,

\textsuperscript{117} Ibid.
\textsuperscript{118} For a detailed discussion of issues relating to customary law in Namibia, see Hinz, “Communal Law, Natural Resources, and Traditional Authorities” in MO Hinz et al. “Traditional authority and democracy in southern Africa: proceedings from the workshop, traditional authorities in the nineties – democratic aspects of traditional Government in southern Africa”: 15-16 Windhoek, November 1995, pp. 183-188.
\textsuperscript{119} M. Gluckman Judicial Process Among the Barotse, op. cit.
inheritance and succession and land tenure systems. Faced with the problem of accommodation, the colonial administration accorded limited recognition to customary law by subsuming it under the received law and by subjecting it to the all too familiar repugnancy clause test of equity, good conscience, and morality. This precondition for the recognition of customary law still exists in the constitutions and statute books of many African countries.

Customary law principles relating to criminal law generally did not withstand scrutiny under the repugnancy clause test. In the area of land law, however, the recognition and survival of indigenous legal principles depended upon different factors and considerations, including the ultimate colonial intent and design, economic factors, public domain concerns, and environmental and land use preoccupations. The general pattern was that in territories where the colonial administration did not intend to settle immigrants from the metropolitan country or from elsewhere in Europe, customary law relating to land tenure was given a fair amount of recognition. In territories where the settlement of immigrants from Europe was the ultimate goal of the colonial powers, indigenous land tenure systems and property rights were given marginal recognition only, and the indigenous communities dispossessed of their property rights in favour of the immigrants and their property rights regimes. By legislation, land was classified into Crown or State land, native reserves or communal lands so that, as pointed out by T.W. Bennett, “the authority of customary law recognised in the administration of communal lands was a creation of colonial authorities.” In other words, native land was not communal land until the colonial authorities defined away all other forms of native land tenure. The latter pattern was more prominent in southern Africa, so that in these areas the characteristic feature of the customary law of land tenure is either the adulteration or lack of development of the indigenous systems. The Namibian pattern of classification, as described earlier, fits into this general southern African pattern.

With the promulgation of the Namibia Independence Constitution, customary law was recognised as one of the sources of law in Namibia. In its recognition of customary law as a source of law, the Constitution removes the repugnancy clause and equates customary law with the common law.

120 B. J. da Rocha and C. H. K. Lodoh, Ghana Land Law and Conveyancing, Ghana, Anansesem Publications (1995) state that in Ghana, for example, neither in theory nor in practice can it be said that all land is held from the State. Land in Ghana is held from various stools (skins) or families or clans, which are the allodial owners. The State holds lands only by acquisition from these traditional allodial owners. This right was recognised by Rayner CJ in a report on land tenure in West Africa, cited in the judgment of the Privy Council in the case of Amodu Tijani v. Secretary, Government of Southern Nigeria (1921) AC 399.


122 Article 66(1) of the Constitution States that both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary and common law does not conflict with this Constitution or any other statutory law.
However, the Constitution left open the question of whether the new constitutional status of customary law in Namibia means that ownership of the communal lands is vested in the indigenous people as the holders of alodial titles to their ancestral lands. Article 100 of the Constitution vests ownership of all land in Namibia, except for the land otherwise lawfully owned, in the State. The application of customary law in the communal areas, coupled with the fact that communal lands were the creation of legislation, has left many uncertainties regarding the exact rights of the indigenous people who occupy the communal lands and the administrative authority of the chiefs.

The position adopted in the White Paper on National Land Policy is that in terms of Schedule 5(1) of the Constitution, communal land is vested in the State to be administered in trust for the benefit of traditional communities and for the purpose of promoting the economic and social development of the Namibian people. This position constitutes one of the underlying principles of the Communal Land Reform Act, 5 of 2002, as discussed earlier.

5. THE LAW OF LAND REFORM IN NAMIBIA

Land reform does not occur in a legal vacuum. Land rights are among the most protected legal rights in most societies. Any land reform programme, therefore, must be conceptualised as a legal problem, whatever else it might be. The law, itself, defined and protected the colonial order, and Namibian land law is itself a remnant of the Apartheid era. There is one property law regime for blacks; another for whites. The challenge of the new Constitution of 1990 was to end this inequality. That is the process of “decontamination” of the land law itself.

Article 16 of the Constitution, broadly protecting existing individual rights to private property, is the product of a political compromise. Its recognition of “existing” (implicitly meaning “white”) property rights was a political necessity; expedient to quickly end the war for independence and bring about a democratic (meaning “black”) Government.123 Privately held Namibian farms were not only left in white hands, but the “existing” property rights of the white owners were constitutionally protected. The Namibian Constitution, however, clearly anticipated land reform, with language in the same Article 16 providing that the Government “may expropriate property in the public interest subject to the payment of just compensation”.124

Thus, there is no constitutional impediment to land reform: the State could, under Article 16, legally expropriate all the farms in Namibia tomorrow and redistribute them according to any land reform scheme “in the public interest.” Rather, the impediments are economic and political: such

124 Article 16 of the Namibian Constitution.
expropriation requires compensation, money that the Government does not have, and the political will to carry the process through in the face of white opposition. The Namibian Constitution fails to provide any guidance on the range of difficult land reform issues to be resolved: these are left to Parliament.\(^\text{125}\) This contentious and complex legal process is entrusted to the constitutional framework as stated in the preamble to the Constitution.\(^\text{126}\)

All these legal protections of white property rights are at least partially anomalous in black Africa. It is unclear to many black Namibians how lands that were “stolen” from the indigenous peoples of Namibia, could still be in white hands, protected by current Namibian law. The explanation – that this was a political compromise at the time of the making of the Constitution, a concession accorded the apartheid era owners of Namibia as an inducement to get them to agree to free elections and a democratic Government that would certainly be won by landless blacks – may make complete sense to political scientists and lawyers, but not to the poor and landless. It strains the Government’s political credibility.

We have to start with the premise that the legal source of white land rights in Namibia, whatever the roots in fee simple/freehold land titles, and whatever the history of the violent expropriation of indigenous lands by Germans and South Africans, is Article 16 of the current Namibian Constitution.\(^\text{127}\) Thus, while the Constitution may be a progressive document, embodying the hope of a new Namibia, it also legally embodies some of the worst of German and South African colonialism, the violent seizure of indigenous lands.

The underlying political and economic “rights” underlying the existing Namibian economic order are derived from western constitutional law and are protected by the Namibian Constitution in the form of a bill of rights guaranteed in Chapter III as “fundamental human rights and freedoms.” The influence of the United Nations and of various foreign, primarily Western, constitutions in the Namibian Constitution is well documented.\(^\text{128}\)


\(^{126}\) Whereas we the people of Namibia –

\(^{127}\) The Namibian courts have given a basic and conservative interpretation to Article 16 in Cultural 2000 and Another v. Government of the Republic of Namibia and Others 1993 (2) SA 12 (NmHC); and 1994 (1) SA 407 (NmSC).

Indeed, the borrowing of ideas from these constitutions is one reason why the Namibian Constitution was so quickly written and adopted. While the benefit of this is obvious, it also creates inflexibility in the area of property rights, making meaningful land reform expensive and inefficient.

The basic constitutional protection of private property in Article 16, for example, was clearly influenced by South African Roman-Dutch apartheid era real property law. The constitution is silent on the protection of the various kinds of communal property rights held by blacks. The language “all forms of immovable and moveable property” apparently was meant to refer to existing categories of real and personal property under Roman-Dutch law. However, in a broader, common law context, the word “all” may include literally all possible property holding regimes present in Namibia at the time of the making of the Constitution, including all forms of communal property, no Namibian court has held this.

But, irrespective of this issue, article 16 directly protects the types of property in white hands while it fails to directly protect the communal property in black hands giving the Constitution a one-sided and potentially biased role in the process of land reform, protecting white property from being expropriated for the benefit of blacks. As the South African lawyer Heinz Klug wrote; “Legal frameworks for land holding are never neutral. The impact of any particular legal regime will be either to hinder or facilitate particular ... policy options.”

Further article 16 language “in any part of Namibia” in race-neutral language, equates the right of whites to purchase communal lands with the rights of blacks to purchase apartheid era white-owned commercial farms, a political Statement of juridical equality that is hollow to the point of being cynical and offensive. Indeed, and perhaps of more consequence, it also apparently means that the holders of various communal lands, held under a complex variety of customary regimes under both traditional and State law, can move on to other communal lands in any part of the country. The clear political Statement against tribalism and against confining black people to the former Odendaal – era “homelands” is understood, but there are implications here that undermine and confuse the legal basis of communal land rights, the only land rights that most blacks have. Weakening communal land rights,

129 The Namibian Constitution, described as an “80 day miracle” was written in little more than two months in 1989 and 1990 by a committee composed of all factions, and then immediately supported by SWAPO, signaling its acceptance by the Constituent Assembly as a whole. This was a brilliant political move on SWAPO’s part, designed to bring them to power quickly, with broad based support. J. Diescho, The Namibian Constitution, op. cit. pp. 29-30.


132 The Commission of Enquiry into South West African Affairs, (1962), the “Odendaal Commission,” created
even toward “outside” communal land holders, carries significant economic and political costs to communal landholders.

Even if article 16 is one day interpreted or amended to include the protection of communal land rights, the failure of the Constitution to take the same account of black property as white property creates for the present an inequity when read in the context of the legacy of apartheid era land laws: blacks then could not legally buy the thousands of farms that are now protected as private property under article 16. Since these communal land rights, however defined, represent most of the property of a majority of Namibian citizens this amounts to a significant constitutional lapse in the protection of the property rights of the poorest Namibians. The private property that blacks had no access to before 1990 is clearly protected under article 16; while the communal property, the only property available to blacks, is under far less legal protection, indeed, it is unclear that Article 16 applies to communal lands at all.

Other provisions of the Constitution enter here, provisions that must be read liberally within the context of the Constitution, including the preamble.\textsuperscript{133} The Namibian Constitution intervened directly in apartheid: apartheid was in place one day; the new Namibian legal order the next. Article 10, for example, clearly proclaims that “all persons shall be equal before the law.”\textsuperscript{134} How is this to be read in interpreting a land law under which whites could own farms in fee simple or freehold and blacks could not? A narrow reading suggests only that the law must treat all persons in the same way: people are all “juridically equal” even though they are equal in no other way. But a broader reading suggests that the law should protect the various forms of black property in the same way that it protects the various forms of white property. To suggest otherwise leaves the concept of “equality” substantively meaningless, a hollow juridical Statement of principle.

While the “equality” language in article 10 also might have had some legal meaning impeding the land reform process – poor people can surely not be assigned lands “equally.” This was anticipated in article 23 which provides that “nothing in article 10 shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons … who have been socially, economically, or educationally disadvantaged by past discriminatory practices …”\textsuperscript{135} This provision directly enables Parliament to
pass land reform legislation that benefits disadvantaged groups at the expense of previously empowered groups – “unequal laws”. It also clearly puts the land reform process under the control of Parliament and may also limit judicial review of the legislative choices that Parliament makes in pursuing “affirmative action” land reform goals. The implications of this are many: Parliament constitutionally has the choice to enact unequal laws, for the benefit of particular individuals or groups, and to the detriment of others. This provision will put land – and money – in the hands of some people, at the expense of others.

Article 66 provides that “both the customary and common law of Namibia...shall remain valid to the extent to which such customary or common law does not conflict with this Constitution”, a provision which expressly recognises customary land law, so long as it does not directly conflict with the Constitution. Since, in most contexts, customary and common law land regimes are not in conflict, ironically a legacy of an apartheid era set of land laws that very deliberately kept them distinct, article 66 may indirectly protect a wide variety of customary and traditional land rights, but it does not directly do so. If article 66 does protect customary land rights, it clearly does so only as long as the National Assembly, acting under the Constitution, permits it to do so.

Article 100, providing that “land, water and natural resources” shall belong to the State has a saving clause, “if they are not otherwise lawfully owned”. This section is meaningless until all other ownership rights are resolved: the State, by default, takes title to property after all other possible forms of ownership are determined. Nevertheless, as vague as section 100 is, the Government of Namibia has cited it as the legal authority that it “owns” the communal lands and that it can displace the occupants of communal lands at its will and without compensation. This kind of politics does not strengthen the economy of the 43% of Namibia that is held as communal lands, nor does it give confidence to communal land holders that the State will protect their land rights. Indeed, a substantial proportion of the Government’s “land reform” programme has involved the resettlement of communal land holders to other communal lands. This approach to land reform is far cheaper than acquiring private property because communal lands can apparently be resettled without “just compensation” – the Namibian Supreme Court has never decided this issue.

Finally, Schedule 5 of the Constitution specifically lists the State property of South Africa that was transferred to Namibia at independence. Included in the language of Schedule 5 is “all property of which the ownership

136 Article 66 of the Namibian Constitution.
137 Article 100 of the Namibian Constitution.
139 Schedule 5 of the Namibian Constitution.
and control ….vested in the Government of the Territory of South West Africa or in any Representative Authority…” The Representative Authorities were the successors to the various Native Commissioners who held the “communal lands” “in trust” for “natives.” Each black homeland was legally under the control of a Representative Authority. Therefore, Schedule 5 apparently transferred the ownership of these trust lands, the communal lands, to the Government of Namibia, but it would then also have continued the trust relationship.

Whether the communal lands and other forms of black property held under customary law fall under Schedule 5 or Article 100 is a complex issue, not clearly resolved by the Constitution. Mabo v. Queensland\(^{140}\) and Delgamuukw v. The Queen\(^{141}\) have set out complex arguments about indigenous land rights (often called “native” or “aboriginal” land rights) that bring South Africa's title to Native lands in Namibia into dispute.\(^{142}\) To the extent that Namibia's title stems from South Africa's title and, in turn, Namibian law owes a great deal to international law and the Spanish Sahara\(^{143}\) case which also implicitly recognises an indigenous land title unextinguished by colonial powers, this is now a very difficult legal matter which will ultimately have to be decided by the courts.\(^{144}\)

Ismael Mohamed, then Chief Justice of Namibia, asked from the bench in the Rehoboth Baster appeal, the attorneys for both sides whether Mabo had any effect on their arguments.\(^{145}\) Both lawyers were apparently caught off-guard by the question and were unprepared for it. Since the Basters are an immigrant “coloured” population from South Africa who took their land title from the Germans through a treaty, they did not raise a case of indigenous land title and lost the case on narrow, statutory grounds.

The question of indigenous land rights is still unsettled in Namibian law, but Justice Mohamed's question clearly raises the inference that he believed that the principles set out in Mabo might hold in Namibia – otherwise he had no need to ask the question. Indeed, the Australian Supreme Court in Mabo did not focus the case particularly on Australian law, but rather discusses indigenous rights under the common law. The common law became


\(^{143}\) International Court of Justice, Advisory Opinion on the Spanish Sahara, Case (1987). This case holds that the peoples of the Spanish Sahara have an inherent right to self-determination. Their land rights follow from this same logic.


\(^{145}\) Harring was present during the oral argument and heard this exchange. The case, decided on narrow, non-constitutional grounds, is reported as The Rehoboth Bastergemeente v. The Government of the Republic of Namibia, Case No. SA5/05. Delivered May 14, 1996.
operational, along with Roman-Dutch law, in Namibia with British occupation of the country in 1915 and the succeeding League of Nations Mandate.

While the Constitution is silent on the question of customary property rights, it does speak to the legacy of colonialism and apartheid. The preamble sets out the policy mandate to use the Constitution in a bold and creative way to remedy the injustices of the colonial era; “We the people of Namibia have finally emerged victorious in our struggle against colonialism, racism, and apartheid and are determined to adopt a Constitution which expresses for ourselves and our children our resolve to cherish and to protect the gains of our long struggle.”\(^{146}\) The idea that the current Namibian Government may rely on apartheid era South African law to deny land rights to communal land-holders is inconsistent with the preamble as a statement of legal and political policy. Namibia, of all countries, must recognise the indigenous land rights of its many peoples and Namibian law must carefully consider the impact of colonisation and de-colonisation on those rights.

*Mabo* has since come to Southern Africa indirectly in the case of *Richtersveld Community and Others v. Alexkor Ltd*.\(^{147}\) That decision, in brief, holds that a right in land through customary law interest exists in South African land law. This brings the colonial law of land title full circle: since black people could not hold title under South African or German law, any court in interpreting a modern land law case, must in order to comply with the “equality” provisions of Article 10 read the customary law of land ownership together with the formal law of land title.

6. CONCLUSION

Namibian land law today embodies the legacy of Apartheid: there are two land laws, one black and one white, and two Namibian lands, one black and one white. Property law does not just represent black letter rules, but it lives on the soil – not forever, but until it is changed. Thus, until land law changes, there will be two Namibias – rooted in the past, the past that must be changed in land law.

There is no question that land law must be changed: the maze of different levels of juridical rights, fee simple/freehold, PTOs, communal rights, long term leaseholds have to be changed to give all people the same property rights. But this “juridical equality” is meaningless without land reform. As long as whites hold most of the fee simple/freehold titles to

\(^{146}\) Namibian Constitution, Preamble.

valuable property, the issue is not legal rights of property ownership, but the property itself – property as an economic, social, and political entity. The lands of Namibia are primarily in white hands because of colonialism, racism, and imperialism, through social processes that were violent, corrupt, and inefficient, but still structure property in Namibia.

Land reform, whether justified on economic, political, or social grounds is the only remedy. The alternative is to see a Namibia in twenty or fifty years that looks much like it does now, two Namibians, in black and white. All parties within Namibia have recognised this, and the Government has recently pledged to increase the pace of land reform. Land reform is politically necessary regardless of its economic costs in order to ensure both the long term stability of the country, as well as to render Namibian land law finally “equal” both juridically and in fact. That said, land reform, itself, will not cure the economic, political, and social divisions within Namibia. Land reform is a process, as well as a solution. The black farmers who resettle on the currently white farms will need training, equipment, fertilizer, water, and financial assistance for generations – just like the white farmers did. Namibia will need its own “green revolution”, a fundamental transformation of its agricultural social order. Given that this is an agricultural country, this will have powerful social effects in other sectors as well. None of this will be easy, but nothing “decontaminates” easily.
RECENT LEGAL DEVELOPMENTS

BOTSWANA

E.N. Macharia-Mokobi*

1. ACTS

1.1 Financial Intelligence Act¹

This Act provides for the establishment of the Financial Intelligence Agency.² Its responsibility shall be to request, analyse, disseminate and disclose financial information concerning suspicious transactions relating to financial offences and the financing of terrorism.³ The agency is also supposed to monitor and report suspicious financial transactions and provide mutual assistance with comparable bodies outside Botswana.

The process of monitoring financial transactions shall be aided by a National Coordinating Committee made up of representatives from government ministries and departments. The primary task of this committee shall be to assess the effectiveness of government policies to combat financial offences and to recommend legislative, administrative and policy reforms in this regard.⁴ The Act also lists a series of individuals and organisations referred to as “specified parties”,⁵ who include attorneys, accountants, realtors, banks and other financial institutions, casinos, as well as dealers in precious and semi precious stones who have a duty to identify their customers and maintain records. The specified parties are required to develop a policy on customer acceptance and designate compliance officers to ensure that their organisations are complying with the requirements of the Act. The aim of this duty to identify and keep records is to ensure that specified parties are able to detect and report suspicious transactions to the Agency.⁶

This Act is a much needed law enforcement tool in the current national and international climate. As Botswana grows into a commercial services centre, so too does the increased likelihood that lax legislation may open the door to money laundering and other financial offences. The financial system may also be abused by persons financing terrorism. The Act is an important step in securing the integrity of the nation’s financial system.

¹ Act No. 6 of 2009.
² See section 3 thereof.
³ See section 4 thereof.
⁴ See section 6 thereof.
⁵ See first schedule to the Act.
⁶ See section 17.

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* LL.B (Botswana); LL.M (Cantab); A.Arb; Lecturer, Department of Law, University of Botswana; Attorney, Botswana.
1.2 National Meteorological Service Act, 2009\(^7\)

The object of this Act is to provide for the establishment of a National Meteorological Service. The functions of this service as set forth in section 4 of the Act will be the establishment of meteorological observation stations country wide; collection, analysis and archiving of meteorological data; weather forecasting; exclusive responsibility for the issuing of adverse weather warnings like floods, drought, veld fires, pests and disease; and the regulation and licensing of private meteorological services.

The Act seeks to launch Botswana into monitoring climate change and implementing international obligations in this regard. It requires the National Meteorological Service to formulate, implement and publish measures to mitigate against climate change. Botswana will be required to control the use, movement and trade in ozone depleting substances. Lastly, the Act seeks to ensure compliance with Botswana’s obligations under the Montreal and Kyoto Protocols to the United Nations Framework Convention on Climate Change. This Act sees Botswana take the first legislative steps in tackling climate change. Its enactment means that Botswana wishes to comply with its obligations under international environmental treaties. It will come into force on notice.

2. BILLS

2.1 Children’s Bill, 2009\(^8\)

Twenty years after the United Nations Convention on the Rights of the Child (CRC) was concluded, Botswana has adopted the Children’s Bill, 2009 whose primary purpose is “to give effect to Botswana’s obligations in terms of the United Nations Convention in the Rights of the Child and the African Charter on the Rights and Welfare of the Child…”\(^9\) as well as promoting the well-being of families and communities in Botswana.

The bill proposes a bill of child rights, a milestone for children’s rights in Botswana where the traditional African attitudes that children should obey their elders and never question their authority remains very much entrenched. The bill of rights guarantees to children the right to life, a name, nationality, health, shelter, clothing, free basic education, leisure, play and recreation, expression, religion, association and privacy. The child is also guaranteed protection from harmful labour practices, sexual abuse and

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\(^7\) Act No. 5 of 2009.

\(^8\) See Bill No. 1 of 2009.

\(^9\) See Memorandum to Children’s Bill, 2009 by Minister of Local Government, Margaret N. Nasha.
exploitation and involvement in armed conflict.\textsuperscript{10}

An important novelty is the right guaranteed to each child to know and be cared for by both biological parents.\textsuperscript{11} The bill proposes a right of access to the absent parent where a child is born out of wedlock. This is a new idea in a country where a child born out of wedlock is rarely recognised by its biological father unless he takes steps to adopt the child under customary law. Given the divergence of views between the traditionalists who believe that the provision all but legitimises extra marital children and the modernists who argue that a child has a right to know both parents, this right of access of the absent parent has been hotly debated in and outside Parliament. Regulation of this right of access will be achieved through co-parenting agreements.\textsuperscript{12}

In order to achieve balance and reflect the mindset of the populace, the bill seeks to preserve parental rights to guide and control their children in a bid to assure parents that the state has no intention to undermine their authority in their children’s lives.\textsuperscript{13}

The bill also enshrines the best interests of the child principle as being the paramount consideration of any person or court acting under the bill.\textsuperscript{14} This is a welcome development which brings statute law in line with the common law already applying this principle in Botswana’s courts.

2.3 Statistics Bill, 2009\textsuperscript{15}

The object of this bill is to re-enact the Statistics Act with amendments. The bill recognises statistics as being essential to sustain economic, environmental and social development. It sees the creation of a corporate body, “Statistics Botswana”, which will be the principal agency in the nation, charged with carrying out statistical business. It will serve as the national custodian of official statistics and develop and maintain a data repository.

The bill reiterates the need for public trust in statistical data. It seeks to do this through promoting professional independence and impartiality of statisticians along with use of scientific and transparent methods of data collection and analysis. Confidentiality with respect to identity and other sensitive information provided by individuals will be secured by means of an oath or affirmation of secrecy to be taken by all officers employed by Statistics Botswana.

\textsuperscript{10} See Part III, sections 9 to 26.
\textsuperscript{11} See sections 13 and 28 thereof.
\textsuperscript{12} See section 29 thereof.
\textsuperscript{13} See sections 14, 27 and 28.
\textsuperscript{14} Section 5 thereof.
\textsuperscript{15} See Bill No. 6, 2009.
3. COMMENCEMENT ORDERS

Parliament has ordered the commencement of several Acts this session. Amongst them are the Architects Registration Act, 2008 which came into force on 23 March 2009 and the Engineers Registration Act (Cap 61:06), which came into force on 1 May 2009. These statutes are concerned with the setting of standards for the registration and regulation of members of these professions in Botswana. Unlike their counterparts in the media fraternity, architects and engineers have welcomed the formal regulation of their industry.

The Road Traffic (Amendment) Act No. 27, 2008 also came into force by order on 1 April 2009. It aims to amplify provisions of the Road Traffic Act by increasing fines and introducing new monetary penalties for road traffic offences. It also introduces a new demerit point system which will result in the suspension or revocation of licenses of repeat traffic offenders who rack up the requisite demerit points. The Act makes unlawful the installation of detecting devices to be used by law enforcement to detect traffic offences. Evidence provided through the use of these devices is admissible in court.

The impact of this amendment has been immediate and profound. The public is now aware that previously innocuous traffic offences which were sanctioned by low fines will now attract stiff penalties. The amendment has given law enforcement a second wind as they are vigorously enforcing the new statute. Whilst some complain that government coffers are being unjustifiably swelled by exorbitant fines, most agree that it is a small price to pay for heightened road safety.

The Plant Protection Act, No. 21 of 2007, also came into force by order on 1 April 2009. This Act replaces the Plant Diseases and Pests Act which is woefully out of date. It enacts concepts and adopts terminology of the 1997 International Plant Protection Covenant (IPPC) identified by WTO as a source of binding international standards on plant health matters. The Act establishes a National Plant Protection Organisation whose functions include phytosanitary certification, surveillance and inspection of plants, protection of endangered plants and the regulation of plant importation in Botswana.

16 See Architects Registration Act (Date of Commencement) Order, 2009, Statutory Instrument No. 20, 2009 and Engineers Registration Act (Date of Commencement Order), 2009, Statutory Instrument No. 35, 2009.
18 See Road Traffic Amendment Act (Commencement Date) Order, 2009, Statutory instrument No. 25, 2009.
20 (Cap 35:02).
21 Section 3 thereof.
4. JUDICIAL DECISIONS

4.1 Validity of Industrial Court Rules

Botswana Mining Workers Union v. Debswana Diamond Company (Pty) Ltd

This was an appeal to the Court of Appeal against a decision of the Industrial Court. The Union representing over 400 Debswana employees sought to bring an application contesting their dismissal from the company for participating in an illegal strike. The Union referred the case to the Industrial Court five months late and sought to remedy the delay through an application for condonation of late filing. The Industrial court ruled against the Union holding that its explanation for lateness was wholly unsatisfactory; that the affected employees had taken no individual action to enquire about the progress of their case, and further that the substantive application for reinstatement of the dismissed employees had little prospect of success.

On appeal, the Union challenged the decision of the Industrial Court on several grounds. Notably, it mounted an assault against the validity of the Industrial Court rules arguing that they were not legally valid because the process by which they came into being lacked validity; that the rules were ultra vires the Trade Disputes Act, and that the rules themselves stated that they had no force of law. Consequently, the argument went, the Union could not be bound by procedures set by invalid rules. Debswana for its part argued that the rules were in fact valid having been published under the old Trade Disputes Act and widely accepted and used since then. The repeal of the old Act, they argued, did not in turn repeal the rules of court created under it.

Although this challenge to the rules was raised for the first time on appeal, and could have been easily disposed of on this ground alone, the Court of Appeal considered it important enough to address the issue. The Court of Appeal traced the origin and development of the Rules of the Industrial Court and noted that they had been drafted by the first Judge of the Industrial Court before its first sitting in 1994 and accepted by the Attorney General, trade unions, employers’ organisations and the Ministry of Labour alike. The rules were amended several times, after consultations with representations from stakeholders, and were finalised and published in July 1995. The Court of Appeal was alive to the fact that the rules had never been gazetted but noted that they had been in the public domain since their publication.

The Court decided that the repeal of the old Trade Disputes Act and enactment of a new Act had no effect on the validity of the rules since, under both the old and new Act, the Industrial court was empowered to direct how...
it’s proceedings should be conducted. The Court of Appeal concluded that the Industrial Court’s power to give directions by way of rule-making existed at all material times despite the repeal.24 With respect to the argument that the rules had no force of law, the Court of Appeal ruled that the disavowal of “the force of law” was merely an acknowledgment that the rules ought not to be viewed and acted upon as gazetted subordinate legislation. The Court of Appeal held that the disavowal was intended to give the Industrial Court the greatest flexibility in its procedure. It did not imply that compliance with the rules was unnecessary, only that the consequences of non-compliance could conceivably be treated differently to non-compliance with subordinate legislation such as the High Court Rules, for example. The Court of Appeal upheld the Industrial Court decision that the application was woefully out of time and that late filing could not be condoned.

This is an important decision as it clarifies the status of the ungazetted Industrial Court rules. It also underscores the unique nature of the Industrial Court which must, through its rules, balance the interests of the feeble employee against the powerful employer. The decision of the Court of Appeal also protects the procedures, and in particular the flexibility of the Industrial Court rules from abuse resulting from negligent litigants. Whilst the rules are flexible, the decision of the Court of Appeal is that they should not be stretched too far. The Court’s decision would ensure that litigants comply with the Industrial Court rules.

4.2 Father’s right of Access to extramarital child

*Letsile Macheme v. Dumisani Ndlovu*25

The respondent, Mr. Ndlovu, fathered the applicant’s child. They were never married. In the early years of their relationship, the respondent had access to the child. The relationship between the parties soured and the respondent found himself denied access to his child. He then made an application to the High Court for an order for access.

The parties debated the rights of the father and mother of an extramarital child. The judge *a quo* noted that under Roman Dutch law, which is the common law of Botswana, the father of a child born out of wedlock has no relationship to the child and no rights of access or guardianship, though he is liable for maintenance. The only exception the appellant maintained would be where there are compelling reasons to give him access based on the interests of the child such as where the character or behaviour of the mother

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25 CACLB 000035-08 (unreported).
might endanger the child.\(^{26}\) The court took the view that “the Roman Dutch law principle that subordinated the best interest of the child standard to parental interests can now safely be regarded as a relic of the past as it has been overtaken by the principle of the best interests of the child as the applicable standard where access or custody is sought by one of the parents”.\(^{27}\) The judge also adverted his mind to the provisions of the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, both of which adopt the best interests principle. He also had recourse to the Constitution of Botswana and the *Attorney General v. Unity Dow*\(^{28}\) decision on the question of non discrimination.

On appeal, the appellant argued that the Roman Dutch law position was correct and that the judge *a quo* had erred in his determination of the matter. The appellant maintained that the right of access of the absent parent depended on parental authority for its existence and that there was no room for judicial activism or constitutional discourse on the matter.

The Court of Appeal decided the matter in favour of the respondent. It noted that the position taken by the appellant reflected traditional Roman Dutch Law which focused primarily on the rights of the parents when considering issues of access. The Court of Appeal took the view that the law had since developed, abandoning the old position in favour of the best interests of the child in which the welfare of the child is the overarching consideration. This, the Court of Appeal pointed out, was not a case of judicial activism; the judge was merely adopting the preferred approach of the international community. The Court of Appeal held that it is now settled law in Botswana that the primary standard to be applied in all questions of guardianship or access to children is that of the best interest of the child.

Botswana will soon adopt a new Children’s Act which enshrines the best interests of the child principle into legislation. The question whether access should be regarded as a right of the child or a right of the parent has now received a definitive answer.

### 4.3 The next episode in the Daisy Loo debacle

*DPP v. Daisy Loo (Pty) Ltd and 6 others*\(^{29}\)

It appears that there is no end in sight in the long running Daisy Loo saga. Another year gone by and its proprietor, Moemedi Dijeng, has yet to receive payment of the P21 million allegedly due to him from Gaborone City Council.

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29 Court of Appeal Criminal Appeal No. CLCLB 000067-08.
as consideration for grass cutting and bush clearing along the Segoditshane river valley.

It all began on 14 April 2005, when Daisy Loo obtained an arbitral award against the Gaborone City Council for just over P16 million in respect of a bush clearing contract. Daisy Loo had the award made an order of court and a writ of execution was issued out of the High Court for the amount due. In July 2005, Daisy Loo’s Deputy Sheriff attached virtually all the Council’s movable property in order to satisfy the judgment where upon the Council, which adamantly refused to pay, was directed by the Assistant Minister of Local Government to pay the amount owed as required by the court order. The Council then prepared a cheque for P21 million to satisfy the judgment and costs. However, before the cheque could be deposited, it was impounded by the Directorate on Corruption and Economic Crime on suspicion that offences had been committed in connection with the bush clearing contract. By order of Court, the cheque was then deposited into an interest bearing Daisy Loo/Council account pending resolution of the matter.

In October 2005, the City Council took Daisy Loo to court seeking an order setting aside the arbitral award on the basis that the bush clearing contracts between Daisy Loo and the Council had been improperly awarded and were therefore null and void. The learned Chief Justice granted the Council’s application finding that the contracts had in fact been fraudulently concluded. The Director of Public Prosecutions then joined the fray launching criminal charges against Daisy Loo, its proprietor Dijeng and a series of Council employees alleging that they had fraudulently conspired to defraud the Council of P21 million.

In the meantime, Daisy Loo appealed against the Chief Justice’s judgment setting aside the arbitral award with success at the Court of Appeal. In the twist that followed this reversal, the Court of Appeal ordered that the proceeds of the cheque and interest thereon be paid to Daisy Loo immediately. Daisy Loo’s attorneys then had the money transferred from the Daisy Loo/Council account into its trust account.

Before the ink was dry, the DPP launched an *ex parte* urgent application in terms of the Proceeds of Serious Crime Act for an order restraining any person from drawing from the funds held in the said trust account on the basis that they were proceeds of serious crime. The matter could not proceed as all parties had not been given notice. The DPP then withdrew the application but the very next day the Botswana Police obtained an order at the Magistrates Court in Gaborone freezing the funds on the basis that they intended to use them as an exhibit in the criminal prosecution of Daisy Loo, its proprietor and Council agents. The funds were again out of

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30 Cap. 08:03, section 8 thereof.
31 Per section 81, Criminal Procedure and Evidence Act Cap. 08:02.
Daisy Loo’s reach.

In the latest round of litigation, the DPP launched an application against Daisy Loo (which is now under judicial management), Dijeng and the four Council employees, seeking an order under section 8 of the Criminal Procedure and Evidence Act, restraining the respondents from dealing in any way with the “exhibit” and seeking an order that the manager of First National Bank, where the monies are deposited, hand over the sum and all interest to a Receiver being the Accountant General of Botswana to hold the same pending the outcome of the criminal case against the above mentioned respondents. The application was dismissed with costs at the High Court whereupon the DPP sought relief at the Court of Appeal.

The Court of Appeal differed with the judge *a quo* taking the view that the DPP had fulfilled the requirements under the Act to obtain the restraining order. The Court found that the test to be applied is whether the respondents stood to benefit from the proceeds of a serious crime of which they may be charged. The test is satisfied not on a “reasonable doubt standard” or “balance of probabilities standard” but a much lower standard of proof being satisfaction on reasonable grounds that there might be a conviction and consequent to that, a confiscation order.32

The court found that the DPP had met the standard of proof. It relied on the following facts – firstly that the invoice for the work done on the Segoditshane river bed in the amount of P 24 million was inordinately large, far exceeding the contractual amounts for other similar contract thus arousing suspicion; secondly, the strange circumstances under which Daisy Loo came to be awarded the bush clearing contract along the river bed; and lastly, the fact that Council employees did not follow standard procedures in allocating the river bed contract to Daisy Loo. The P21 million now lies with the Accountant General; what remains to be seen is the result of criminal prosecution against the respondents.

This case has tested the robustness of Botswana’s laws for the prosecution of serious economic crime. From the to-and-fro of the past four years, it is evident that the judicial system still has some way to go before it can decisively deal with such cases in a coordinated and expeditious manner. From the litany of applications and counter applications, it does appear that various agencies did not have a coherent strategy towards this matter. Nevertheless, the matter has provided an invaluable opportunity for a broad group of law enforcement agencies to work together to investigate and prosecute a serious suspected fraud and test legislation which is rarely used.

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4.4 Invitation to apply for Voluntary Exit Package (VEP): contract or invitation to treat?

Botswana Telecommunications Corporation v. Boitumelo Gaabaake-Kauta & 41 Ors. 33

The Botswana Telecommunications Corporation has been undergoing a restructuring and staff rationalisation process in recent years. Boitumelo Gaabaake and her 41 colleagues were middle management employees of the Corporation. They formed themselves into a group and demanded negotiations with the corporation on the matter of staff rationalisation. The Corporation declined to recognise them and refused to negotiate with them.

The Corporation then sent out a letter to all affected employees containing within it details of a Voluntary Exit Package (VEP) which employees were requested to apply for should they choose to do so. Some employees put in applications for the VEP. The Corporation, realising that the VEP was over generous, withdrew it and proposed a lesser package. This provoked the ire of many employees who took the view that the VEP was an offer which they had accepted. The Corporation, taking issue with that position, maintained that the letter to affected staff was not an offer. In fact, the Corporation argued, the application form filled by interested employees was the offer which the Corporation was at liberty to accept or decline.

At the High Court, the learned judge a quo ruled that the letter in question was not an offer but merely an invitation for employees to submit offers in the form of applications for the VEP. Having gone so far, the Court then curiously ruled that by reason of the requirements of section 25 of the Employment Act 34 the doctrine of unfair labour practice and the principle of legitimate expectation, the Corporation was bound by the original more generous VEP. Needless to say, the Corporation lodged an appeal against this decision to the Court of Appeal.

On appeal, the Court of Appeal held that the letter was in fact a mere invitation to treat. The contents of the letter negated any intention to enter into a contract. The Court of Appeal affirmed the court a quo’s finding that that there was no offer and acceptance and thus no contract as correct. However, there remained the thorny question of how the court a quo arrived at the conclusion that the Corporation was nevertheless bound by the original VEP. The Court of Appeal noted that the employees had been given notice of the Corporation’s intention to rationalise its staff compliment in terms of section 25 of the Employment Act.

33 CACLB 000022-08 (unreported).
34 See subsection 2 “without prejudice to the other provisions of this part in relation to the giving of notice, when an employer forms the intention to terminate contract of employment for the purpose of reducing his workforce, he shall forthwith give written notice of that intention...”
With respect to the issue of consultation, the Court noted that section 25 had no requirement of consultation. The Court of Appeal pointed out that the matter of consultation should properly be discussed under the head of legitimate expectation and not as a section 25 requirement. The Court ruled that the consultation with respect to the size of the VEP was minimal and probably inadequate. However, it emphasised that the Corporation was only obliged to consult not to negotiate.35

The Court found that the employees had been given the opportunity to make representations during which they failed to address the issue of the size of the VEP opting instead to discuss the alleged repudiation of contract. The Court also took the view that consultation would not have been meaningful and would have been to no avail. It noted that the directors of the corporation were probably under pressure from its major shareholder, the Botswana Government, with respect to the size of the VEP, a matter which could not have been resolved by consultation. In view of this, the Court of Appeal ruled that the alleged failure to consult was not serious enough to justify a finding of injustice or unfair labour practice. The Court allowed the appeal.

The significance of this case is twofold. Firstly, the court clarifies the scope of section 25 of the Employment Act as enacting a requirement to give notice of staff rationalisation. The provision does not enact a requirement to consult, this being a matter to be dealt with under the principle of legitimate expectation. Secondly, the court was at pains to distinguish a VEP from a retrenchment. Clearly, the employees in this case were labouring under the misconception that the Corporation was bound by the letter inviting them to apply for a VEP, so much so that they failed to engage the Corporation on the size on the VEP, instead opting to argue that the Corporation was contractually bound to honour it. In the end, what emerges is that an employee is under no obligation to accept the package offered in a VEP and conversely that an employer enters into no contract when he invites applications for a VEP.

4.5 Principles Governing Determination of Appropriate Damages

*Attorney General v. Shatiso Makhumalo*36

In this case, the Court of Appeal had to consider the appropriate amount to be awarded in damages to a 12 year old girl rendered permanently blind due to the negligence of a medical practitioner. The Court reiterated the general principle

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35 *Mokaya v. Morteo Condotte (Pty) Ltd* 1994 BLR 394 at 400 D.
36 CACLB 000034-08(unreported)
under the Aquilian Action that the compensation awarded must be such as to place the injured person, as far as possible, in the position that person would have been in but for the injury. The Court noted the extreme difficulty of the task where the person injured was a child whose injuries are so debilitating as to deprive them of employment and a normal quality of life. The Court in effect has to award a “monetary value for a loss that no money can buy.”

What the Court had to assess was compensation for loss of the child’s future earnings, compensation for pain and suffering, loss of amenities of life, disfigurement and disablement. The court noted that the approach of the South African Courts was to make a global award for loss of earning capacity and general damages because of the vast imponderables in making such an assessment. Awarding a global amount as opposed to a piecemeal approach to each category of loss would mitigate to some extent the speculative, conjectural and arbitrary nature of such an assessment. The Court also cited several authorities indicating that it should lean to conservatism rather than liberality in arriving at an appropriate figure. Further, in exercising its discretion, the judge would find that previous awards act as a useful guide. Whilst taking account of the fall of value of money over time, the judge also had to bear in mind that too rapid an increase in the amount awarded over earlier awards may set a standard for future awards that would be out of step with what society would view as being fair and reasonable.

Noting that the award must alleviate the child’s plight and give her an acceptable quality of life in terms of ordinary living and education, the Court ruled that the Court a quo’s award of P 2.2 million was completely out of line with earlier awards and would set an unacceptable standard in the context of societal norms and economic conditions in the country. A global award of P 1.2 million was found to be suitable. The elucidation of the principles applicable in cases of this nature in Botswana will serve as a useful guide in similar cases in future.

37 Per Brand JA in De Jongh v. du Pisanie N.O 2005 (5) SA 457 (SCA) at 475E at pp. 5 of cyclostyled judgment.
38 Ibid at pp. 12 cyclostyled judgment.
39 Approximately USD 314 000.
40 Approximately USD 170 000.
LESOTHO

Q. Letsika*

1. ACTS OF PARLIAMENT

1.1 Members of Parliament Salaries (Amendment) Act No.2 of 2009

The Act amends the Members of Parliament Act of 1998 with the purpose of altering the period a member of parliament should serve for them to qualify for pension. In terms of section 2 members of parliament are entitled to pension if they have served for two terms the aggregate of which is a minimum of five years.

1.2 Lesotho Communications Authority (Amendment) Act No.16 of 2008

The Act amends the Lesotho Communications Act of 2000. The Act introduces direct government control of the communications sector. In terms of section 2 of the Act, licences for the use of radio frequency spectrum are issued by the Lesotho Communications Authority (“Authority”) with the approval of the minister responsible for the communications sector. In terms of section 4(2), the Authority is obliged to issue licences to private and public communications service providers “as market conditions and the public interest may warrant”. Section 5 authorises the Authority to make rules that govern procedure for the issue of licences and it is obliged to impose such conditions as the minister may direct from time to time. The minister is authorised to revoke or suspend a licence (Section 5(3)). The Act authorises the minister “in substantial, exceptional and compelling circumstances” to revoke a licence and close or cause to be closed the communications services without prior hearing. He is entitled to do this if he has reason to believe that the licence may prejudice or endanger public interest unless urgent action by him is taken. Section 8 authorises the minister to revoke a licence for non-compliance with or violation of the Act. In terms of section 11 the minister is authorised to deny or restrict access to any documents or information requested by any person “for the purpose of preserving national security”. The Authority is authorised to conduct inspections upon complaint by “an interested party”. If it “appears” to the Authority that a contravention has occurred it may, or if the Minister gives a directive, must issue an enforcement order, which must be complied with in thirty days. The Minister is authorised to enforce the provisions of the Act and

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failure to comply with the Minister’s directive constitutes a criminal offence.

1.3 Water Act No.15 of 2008

The main purpose of the Act is to provide for the management, protection, conservation, development and sustainable utilisation of water resources. All water management institutions are obliged to take into account and give effect to, as far as practicable, the general principles applicable to the effective management, conservation and protection of water resources. In terms of section 4 of the Act ownership of all water resources in Lesotho is vested in the Basotho nation. Section 5(2) provides that in the event of conflicting water use and if water is inadequate to cater for other users, domestic use must prevail and will be given first preference over other users. The minister may restrict the use of water in cases of emergency such as drought or pollution. Section 9 establishes a water tribunal whose mandate is to resolve disputes relating to the management of water resources. The Commissioner of Water is obliged to develop a water and sanitation strategy in consultation with relevant stakeholders (Section (10)). The strategy must set out objectives, plans, guidelines, procedures and institutional arrangements in relation to the protection, conservation, development, management and control of water resources within the existing government water and sanitation policy. Section 13 authorises the Commissioner of Water to determine a reserve for all or part of the water resources within the country. Sections 18 and 19 authorises the minister to declare certain wetlands areas and natural springs as protected areas and for this purpose may prohibit their entry or use. Persons desirous of abstracting water must obtain a water use permit (Section 20). The Director of Water Affairs is entitled to suspend, cancel and/or vary water use and construction permit for non-use, violation of the Act or violation of the conditions of the permit or where the permit is not used within six months after it is issued. In terms of section 28, where land is required for water resources development the minister must declare such land to be a selected development area in accordance with the provisions of the Land Act of 1979. Where land is acquired compulsorily compensation may be paid in accordance with the provisions of the Land Act. In terms of section 33, the minister may, on the advice of the commissioner, declare a dam to be a dam with a safety risk. Once that happens, the commissioner is obliged to undertake safety measures. The commissioner is obliged to keep a register of dams with a safety risk. The commissioner is authorised to engage in certain defined activities to prevent the risk of floods.
2. JUDICIAL DECISIONS

2.1 Retrenchment – procedural fairness

*Standard Lesotho Bank v Molefi ‘Nena and Another*  Labour Appeal Court Civil Appeal No.6 of 2008 (delivered on 19 January 2009) (unreported)

The respondent was retrenched in March 2006 by the appellant bank. He challenged the retrenchment in the Labour Court on the ground that it was substantively and procedurally unfair. He contended that the appellant bank had not calculated his severance pay properly because they had based it on fourteen years of service instead of thirty four years that he had actually served. He also alleged that the appellant bank had not followed the procedures laid down in the recognition agreement in retrenching the respondent. It was also argued that the bank had failed to comply with the recognition agreement which contained provisions on how consultations should be conducted. The Labour Court held that the retrenchment was procedurally fair because there was fair consultation. It, however, awarded compensation as far as severance pay was concerned based on the difference between the years the respondent had served and the period the appellant bank took into account in assessing his severance pay. The bank appealed the decision of the Labour Court on the ground that it had not properly calculated the respondent’s severance pay. On appeal the appellant bank conceded that the severance pay was short-calculated and accepted that the retrenchment was procedurally unfair because it failed to observe the provisions of the recognition agreement when it gave respondent a separation package. The Labour Appeal Court held that the breach of the recognition agreement constituted procedural unfairness. It reversed the decision of the Labour Court and awarded respondent nine months’ salary compensation. The appeal was dismissed with costs.

2.2 Lack of jurisdiction

*Ts’eliso Pitso v Ellerines Furnishers (Pty) Ltd* Labour Appeal Court Civil Appeal No. 5 of 2007 (delivered on 28 October 2008) (unreported)

The appellant instituted proceedings in the Labour Court claiming the difference between the monies he had paid his employer and the amount to which his employer was entitled in terms of its regulations. The appellant had been involved in three separate accidents involving his employer’s vehicle. He signed an acknowledgement of debt in terms of which he agreed to re-imburse his employer for the expenses incurred to repair the vehicle. In terms of the employer’s regulations the employer was entitled to less than what the
The employer raised a special plea in bar of jurisdiction on the ground that since this claim involved overpayment of money it ought to be referred to arbitration in terms of section 226 (2) (c) of the Labour Code (Amendment) Act of 2000. The Labour Court upheld the special plea and decreed that it lacked jurisdiction to entertain the matter because in terms of section 226 (2) (c) of the Labour Code (Amendment) Act of 2000 claims for underpayment of moneys have to be referred to arbitration by the Directorate of Dispute Prevention and Resolution and so are claims for overpayment of money. He appealed this decision. The Labour Appeal Court upheld this decision on the same reasons and dismissed the appeal with costs.

2.3 Re-opening of criminal trial

*Reatile Mochebelele and Another v The Crown* Court of Appeal Criminal Case No.1 of 2009 (delivered on 9 April 2009) (unreported)

The applicants brought an application to the Court of Appeal to re-open a case in which they had been convicted of fraud and bribery on the grounds that the evidence of the main witness was false. They had been convicted by the Court of Appeal relying on circumstantial evidence. In their application they contended that the witness had made an admission to one of them in the presence of a third person that he gave false evidence during the trial. They also alleged that this witness wrote a letter in terms of which he intimated that he was prepared to contradict the evidence he gave at their trial and this letter was attached to their pleadings. The court rejected these allegations to be without substance for two reasons. First, the court held that the alleged admission by this witness to have given false evidence could not be correct because his evidence was corroborated by the evidence of other witnesses in a number of respects. Further, that this alleged admission ought to have been brought to the attention of the court but this was not done. Second, the court indicated that the letter in question properly interpreted did not contain unequivocal admission that his previous evidence was false and that he was willing to change it for that reason. The court pointed out that there was need for finality in litigation. It held that it is only in an exceptional case that the relief of re-opening a case will be granted. It held that the applicants had to satisfy three requirements for their application to succeed. First, there should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence they sought to tender was not led at the trial. Second, there should be a *prima facie* likelihood of the truth of the evidence. Finally, the evidence should be materially relevant to the outcome of the trial. The applicants having failed to satisfy these requirements the court dismissed their application.
2.4 Delictual liability

The Superintendent – Queen Elizabeth II Hospital and Others v ‘Mammutsoe Nteso Court of Appeal Civil Case No.24 of 2008 (delivered on 9 April 2009) (unreported)

In this matter ‘Mammutsoe Nteso, the plaintiff, instituted legal proceedings in the High Court claiming damages. She alleged that the amputation of her leg in a hospital in South Africa became necessary as a result of the negligent treatment which she received from the doctors at the Queen Elizabeth II Hospital (Queen II) in Lesotho. According to the plaintiff’s evidence she sustained a knee injury after slipping and falling on her way to work. Her co-workers took her to Queen II. She was referred to the x-ray department upon arrival at the hospital. One of the doctors who attended her indicated that he did not see anything wrong with the leg after examining the x-ray report. She was then released to go home. A few days later she experienced severe pain and went back to the hospital. She was referred to a physiotherapist who massaged the leg and told her that she was improving the circulation of blood. After this she was allowed to go back home despite her complaint that the pain was “unbearable”. She went to a private clinic the following day where she and the medical officer wrote a letter addressed to the casualty officer at Queen II in which he indicated that the plaintiff was experiencing numbness in her left leg. He concluded the letter by saying that the plaintiff required “serious” care and attention at the hospital. The plaintiff went back to Queen II the same day but was told by one of the doctors that he did not see anything wrong with her leg and that she should go back home. The doctor did not take the trouble to examine her or to hospitalise and treat her. Two days later she came back to the hospital and her leg was swollen. She was told that a doctor who would operate her was on leave and would be at work three days later. She was operated and remained in the hospital for another eleven days. Her wounds were washed and dressed every day, but it became clear during this period that gangrene was setting in. Her relatives requested the Superintendent of Queen II to refer her for further medical treatment in South Africa and she agreed. The plaintiff was later transferred to South Africa where she stayed in hospital for three months until the doctors finally decided that the best option was to amputate her leg. The High Court held that the doctors at Queen II were negligent in that they should have diagnosed the cause of the pain notwithstanding that the x-ray report did not show a fracture. The court held therefore that the conduct of the doctors amounted to negligence in that they failed to act in the manner reasonably skilled medical practitioners would have acted in the circumstances. It upheld the plaintiff’s claim with costs. The defendants
appealed the judgment. The Court of Appeal upheld the judgment of the High Court on the same reasoning. It then dismissed the appeal with costs.

2.5 Rules of natural justice

Teboho Matsoetlane v The Commissioner of Correctional Services and Another Court of Appeal Civil Appeal No.5 of 2008 (delivered on 9th April 2009) (unreported)

The Commissioner of Correctional Services (the Commissioner) transferred the appellant from his normal station of work to another district. The appellant accepted the situation and in accordance with the general practice was given time off to make arrangements for moving to his new post. The appellant later challenged the transfer on the ground that he ought to have been given a hearing before it was effected. In his application to the High Court he complained that the transfer was effected because his superiors had complaints about his conduct and that he was not given a hearing to contradict these complaints. In support of his contention the appellant indicated that his superiors had intimated to the Commissioner that he was disobedient and terrorised his subordinates using a gun. The Commissioner in reply indicated that the decision to transfer the appellant was taken before he received the reports about the appellant’s conduct. The High Court dismissed the application without giving reasons. He appealed the decision of the High Court. The Court of Appeal held that there was no evidence to suggest that the transfer was motivated by malice on the part of the appellant’s superiors. It held that the evidence established that transfers were a frequent occurrence and were not in themselves indicative of some wrongdoing. It made a finding that the appellant’s transfer was announced together with the transfer of sixteen of his colleagues. The appeal was dismissed with costs.
1. LEGISLATION

1.1 Acts of Parliament

1.1.1 The Lagos State Debt Management Office (establishment) Law, 2 February 2009

The law contains 29 sections and one schedule. It established the Lagos State Debt Management Office (the Office) and the Lagos State Debt Management Board. The office is a body corporate with perpetual succession; it could sue and be sued in its own name. The Office is established to regulate all activities relating to the issuance and management of loans, bonds and securities of Lagos State, as approved from time to time by the State executive council. It is also empowered to manage the consolidated debt service account established by the Lagos State Bonds, Notes and other Securities Issuance Law 2008. It shall also maintain a record of all guarantees by the government, of authorised loans, taken by any local government or other agencies of government; review and advise on the maintenance of statutory limits for all categories of loans or debt instruments at levels compatible with economic activities required for sustainable growth and development in collaboration with the Accountant-General of the State.

The Board shall oversee the activities of the Office to ensure that it fulfils its mandate. It shall be responsible for the appointment, promotion and discipline of employees of the Office as well as perform such other functions as may, from time to time, be necessary to achieve the objectives of the Office.

A law of this nature – the Debt Management Office (Establishment Act) No. 16 2003 – was first enacted by the Federal Government to sanitise activities relating to loans and guarantees on behalf of government. Presently, an executive Bill seeking to repeal the Act and replace it with the Debt Management Office and Related Matters Act is currently pending before the National Assembly. The Lagos State version of the law is similar to that of the federal government in many respects, though the former is bound to be more...
comprehensive, being the Government that relates with international financial institutions and foreign governments.

If the law is implemented to the letter, it will cure the mischief of the past, where a governor or ministerial agencies get into huge borrowing on behalf of the state without supervision and for purposes ranging from the sublime to the ridiculous; it will also cure the problem of the borrowed funds not getting to the project for which the funds were borrowed. The unfortunate development however, is the impossibility of assessing the impact of the legislation giving the secrecy with which government business is shrouded. Whether the Office or the Board performs its statutory function, in the present, can only become visible in the future, and by what time the mischief sought to be cured, would have continued unabated. Openness in the affairs of government is vital to the success of this piece of legislation.


This law aims to proscribe the prevailing trend in most Nigerian cities, where public roads are frequently used for private parties, resulting in serious inconvenience to road users. The law punishes with imprisonment or a fine any person who organises, holds or attends a social, religious or commercial activity/function on any public road or setback or engage in any related activity that will affect the flow of traffic on a public road. Law enforcement officers are empowered to use reasonable force to disperse the crowd and abate any such nuisance, where a road is used for any of the activities prohibited by the law. 6

This law, once again, puts Lagos State ahead of other states of the federation and even the federal government in legislative intervention in matters of public peace and welfare, which is the essence of legislation. The menace caused by partying folks on Nigeria roads across the country, especially in the southern part of the country, is alarming; countless roads are blocked with reckless abandon during weekends for the celebration of marriages, burial ceremonies and even birthday parties. It is expected that other states will take a cue from Lagos State.

6 Sections 1-7.
1.2 Bills

1.2.2 A bill for the regulation of the use of siren in Nigeria and for other matters connected therewith

This Bill aims to regulate the indiscriminate use of siren in Nigeria. The Bill seeks to punish both the unauthorised use and sale of siren with terms of imprisonment or fines, as alternative. Section 3 provides that it is unlawful for any one to offer siren for sale except authorised by the police while section 5 provides that the police can authorise its use with the approval of the president. Meanwhile, the penalty for sale is greater than that proposed for use.

The Bill is replete with controversial provisions. For instance, the schedule is unduly restrictive: it spelt out the list of persons or agencies entitled to use siren. The list does not include visiting envoys and diplomats; the police and the military. Are they excluded or should it be presumed that they can use siren? Also, the Bill prescribes penal sanctions without means of enforcement; what agency will enforce the law, is it the police or the Federal Road Safety Commission? What court should have jurisdiction; a mobile court or a regular court? The issue of enforcement is particularly important because, the indiscriminate use of siren still prevails despite a subsisting order of the Inspector-General of Police to the contrary. Not even the police have been able to enforce the order, which was made pursuant to the statutory powers of the Nigeria Police Force.

Notwithstanding the above, the Bill is important given the menace caused by the indiscriminate use of siren on Nigerian roads; banks, politicians and influential individuals harass other road users with sirens without regards to safety and decency.

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7 C189. HB161.
8 Section 2.
9 Section 3.
10 Section 4.
11 The penalty for use cannot exceed One Hundred Thousand Naira or to a term of imprisonment for not more than one month while the seller is liable to, not more than Five Hundred Thousand Naira or to a term of imprisonment for not more than one month.
1.2.2 A bill for an Act to Repeal the Exclusive Economic Zones Act Cap E17 and the Territorial Waters Act Cap TS LFN 2004 and enact the Maritime Zones Act to provide for the maritime zones of Nigeria and for matters connected therewith.\(^\text{12}\)

This Bill is aimed at bringing Nigeria law on matters relating to the maritime zones under a single piece of legislation and to make same conform with the United Nations Convention on Law of the Sea (UNCLOS). Although the latter aim was not mentioned in the Bill, it is obvious from the substantive provisions, that the Bill domesticates the provisions of UNCLOS in conformity with section 12(1) of the Constitution of the Federal Republic of Nigeria, 1999. The section requires all treaties to be passed into law by the National Assembly for them to be applicable in Nigeria.\(^\text{13}\)

The Bill deals, \emph{inter alia}, with the Nigerian territorial waters,\(^\text{14}\) which shall be 12 nautical miles from the baselines; the Exclusive Economic Zone, which shall be 200 nautical miles from the baseline used to measure the breadth of the territorial sea;\(^\text{15}\) the continental shelf, which shall be 200 nautical miles from the baseline from which the breadth of Nigeria territorial water is measured.\(^\text{16}\) It guaranteed the right of innocent passage of vessels of other countries through the territorial waters of Nigeria.\(^\text{17}\) Section 20 repealed the Territorial Waters Act\(^\text{18}\) and Exclusive Economic Zone Act\(^\text{19}\) while section 21 gives the proposed Act pre-eminence over any other inconsistent Act.

It is legitimate to expect a Bill of this nature to address some of the issues raised by the Supreme Court in \textit{Attorney General of the Federation v Attorney General of Abia State & 35 Ors},\(^\text{20}\) by incorporating the relevant views expressed by the Court. By so doing, it would forestall a situation where, due to the absence of a clear Nigerian law on the point, the Supreme Court had to resort to an Order in Council, common law, and international law to resolve the vexed issues raised in the case.

In the case itself, the Attorney General of the Federation had taken

\(^{12}\) HB.170 C215.

\(^{13}\) Nigerian courts will always refuse to apply a treaty that has not passed through this process. See \textit{Registered Trustees of National Association of Community Health Practitioners of Nigeria & Ors. v Medical and Health Workers Union of Nigeria} [2008] 2 NWLR (pt. 1072) 575, where it was held that the International Labour Organisation Convention was not applicable in Nigeria because it had not been domesticated in accordance with section 12(1) of the Constitution.

\(^{14}\) Sections 1-6. These sections implement articles 2, 3, 5, 7, 9, 10, of UNCLOS.

\(^{15}\) See articles 56 – 62, UNCLOS.

\(^{16}\) It is provided that the outer limit of the shelf shall not exceed 150 miles from the baseline form which the breadth of the territorial waters is measured. Sections 13-14.

\(^{17}\) Implements articles 17, 18 and 19, UNCLOS.


out a writ before the Supreme Court to determine the constitutionality of the formula for sharing oil revenue between the Federal Government and the States, after a disagreement arose between the former and the latter, particularly the eight littoral States of the federation – Akwa-Ibom, Bayelsa, Cross-River, Delta, Lagos, Ogun, Ondo and Rivers State. The Federal Government contended that natural resources derivable from Nigeria’s territorial water, continental shelf and exclusive economic zone are not derivable from any littoral State. The littoral States contend to the contrary; they claimed the areas were part of their respective territories.

Resolving this issue, Ogundare JSC, delivering the judgment of the court, relied heavily on the common law and international law. The Judge said:

“True enough, the facts and circumstances may not be the same. But the principles of the common law and international law pronounced in those cases are applicable equally here. I have already discussed the common law principles and their application to this case. I shall later in this judgment discuss in depth the international law relating to the matter on hand. Thus, at common law, the boundary-mark between a riparian owner, such as the littoral states are in this case, and the sea is the low-water mark. See: Bonze v. LA Mackie (1969-70) 122 CLR 177; Reference ownership of offshore Minerals Rights (supra); New south Wales & Frs. Commonwealth (supra), (1975-76) 135 CLR 337; United States v. Louisiana (supra); 332 US 19;67 US Reporter 1658; RV. Kin (1876) 2 Ex D63 at p.67...”

The court further noted that the rules of international law that have evolved over the centuries are now crystallised in the Geneva Convention on the Territorial sea and the Contiguous Zone 1958 and the Geneva Convention on the High Seas 1958, which are now superseded by the 1982 United Nations Convention on the Law of the Sea. The court had to rely on the aforesaid conventions, which inures only in cases between independent states inter se rather than between federating units in a federation like Nigeria, to resolve a matter that was strictly domestic.

Based on the above, the court declared that the affidavit evidence of the defendant States, that the areas of the Sea belonged in the past to communities indigenous to them, was nebulous and fell short of the nature and quality of the evidence required in a case like this, where the claim of the indigenous community to ownership of the sea runs against the grain of statutory instruments (Orders in Council), the common law and international law.

This Bill presents the opportunity for the status of littoral states in
relation to natural resources within the maritime zones adjoining their territories to be statutorily defined. It is expected that the National Assembly will take cognisance of this lacunae and fill the gap.

1.2.3 A bill for an act to make provisions for the prevention of hiv and aids-based discrimination and to protect the human rights and dignity of the people living with and people affected by HIV and AIDS\textsuperscript{21}

The purpose of the Bill is to protect the rights and dignity of people living with, and affected by HIV and AIDS, by: (a) eliminating all forms of discrimination based on HIV status; (b) creating a supporting environment for people living with HIV and AIDS to continue to work under normal conditions for as long as they are medically fit to do so; (c) promoting appropriate and effective ways of managing HIV in the workplace and other fields of human endeavour; (d) creating a safe working environment for all employers and employees; (e) creating a balance between the rights and responsibilities of all parties at the workplace; and (f) giving effect to the human rights guarantees contained in chapter 4 of the constitution of Nigeria and international and regional human rights and labour instruments.\textsuperscript{22}

The proposed Act seeks to protect the right of people living with and affected by HIV and AIDS to employment and use of health, religious and social activities without discrimination on the basis of their HIV status.\textsuperscript{24} Under the proposed Act, it is a criminal offence to discriminate against an affected person by denial of medical care, refusal of access to school, denial of access to place of worship, denial of access to the use of communal places, denial of right to public offices, denial of access to credit, loans and insurance facilities. Sections 15, 16, 17, 18 20, and 21 impose duties on employers to provide a safe workplace; report all occupationally acquired HIV to the Minister of labour and productivity; provide the employee with the cost of medical tests, and supplies of drugs and compensate an employee who becomes infected in the course of his employment. Sections 22-24 provide for general offences. It shall be an offence to discriminate against an employee, who exercises his right under the proposed Act;\textsuperscript{25} it shall be an offence for any one to claim to have found the cure for HIV and AIDS.\textsuperscript{26}

This Bill is commendable as it addresses the plight of persons living with HIV and AIDS in Nigeria. It is however not exhaustive; the Bill could

\textsuperscript{21} HP 196 C757.
\textsuperscript{22} Section 1.
\textsuperscript{23} Section 2.
\textsuperscript{24} Section 3-7.
\textsuperscript{25} Section 22.
\textsuperscript{26} Sections 23-24.
have incorporated relevant government policies on HIV AIDS. For instance, no reference is made to the National Agency for the Control of AIDS (NACA), an executive body set up by the Federal Government to implement its programmes and policies on HIV and AIDS. The Bill is too slanted towards work-based discrimination; this makes one wonder if the general title given to the Bill is justified. It is hard to see the rationale behind section 24; why criminalise a claim that has not been scientifically tested?

Without playing the devil’s advocate, one could also argue that the Bill is a mere duplication of effort and thus unnecessary.27 The pertinent question is, what uses have the guaranteed rights in chapter IV of the Constitution the Federal Republic of Nigeria and the lofty provisions of the African Charter on Human and Peoples’ Rights, been put to reassure those affected of equal protection of the law? This Bill may just be an exercise in legislative futility; a Bill of this nature should not only spell out rights but also empower the subjects of the rights with the means of enforcing the rights. How can a person, who has lost his job due to his HIV and AIDS status, afford the huge cost of litigation? This and other pertinent questions must be addressed by the legislature as it sharpens and chisels out the rough edges of the Bill.

2. Judicial Decisions

2.1 Court Martial Sentence: Whether a court martial can reconvene to substitute its earlier sentence with a stiffer one before the earlier one is confirmed by the confirming authority

_Nigerian Army v Major Jacob Iyela_ (Supreme Court decision delivered 5 December 2008)28

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27 This is so because there are ample provisions in Nigerian law, which could serve the purposes sought to be served by the proposed Act. Chapters II (sections 13-24) and IV (sections 33-46) of the constitution of the Federal Republic of Nigeria 1999, and the African Charter on Human and Peoples’ Right, applicable in Nigeria as the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act, Cap A.9 Laws of the Federation of Nigerian 2004, contain provisions, which if effectively used will ably safeguard the rights of everyone, including HIV/AIDS affected persons. In these legislations, specific provisions guaranteeing the right to work without discrimination – sections 17, 35 of the constitution; health – article 16 of the African Charter guarantees the best attainable state of physical and mental health; the right to dignity and privacy, which are the fulcrum of the proposed Act, are covered by articles 5 of the African Charter and sections 34 and 37 of the constitution. There is really no shortage of legislations in issues relating to human rights in Nigeria, what is missing is the failure of the courts to stretch the laws within its permissible elasticity to deal with changed circumstances in a continuously evolving society. This sentiment will be better appreciated when viewed against the extent to which South African judges have been willing to apply similar laws. See Albie Sachs, “Enforcement of Social Economic Rights”, 22 Am. U. Int’l L. Rev. (2006-2007), 673. (This article discusses several cases, where South African courts extensively applied provisions in the country’s constitutional bill of rights to uphold the rights of South Africans, in areas where courts would traditionally decline jurisdiction).

The respondent, a major in the Nigerian army, was away in Liberia on a military assignment under the auspices of ECOMOG, when his official residence at the barrack in Nigeria was burgled. His wife reported the incident to the army authority. Consequently, two men were sent to his residence to verify the state of facts. The two men however reported back to the superior officer that they found some controlled military items in the home of the respondent. The respondent was thereupon recalled to face charges before a General Court Martial (GCM), which found him guilty on July 28 1998 and sentenced him; his rank was reduced to that of a captain and he was compulsorily retired from the army. Subsequently, on 4 August 1998, the GCM reconvened and the respondent was again brought before it. The GCM substituted his earlier sentence with a heavier one; he was now dismissed from the army while his he was to become a captain with two years seniority. The latter sentences were confirmed by the Appropriate Superior Authority (ASA).

The respondent appealed to the Court of the Appeal, where the decision of the GCM was quashed. The army appealed to the Supreme Court. Upholding the judgment of the Court of Appeal, the Supreme Court said:

“The guilt of the respondent as well as the sentences for the two counts were pronounced and same were announced to be subject to the confirmation of the Appropriate Superior Authority, (ASA). There is nothing in this or any other provision of the Act which enabled the trial court martial to reconvene to review the sentences on the 28th July 1998 and substitute therewith the heavier sentences on the 4th August 1998. It is beyond any controversy that the trial court martial had no jurisdiction to do the acts complained of. It could only have the authority to reassemble and review the sentence or sentences if it had been so directed by the confirming authority by virtue of section 150 of the Armed Forces Act. There was no such direction. Furthermore even if the trial court martial were given a direction to review its sentence (which was not) it had strict limitations in terms of the scope of punishments that could be awarded. It had no authority to award or substitute a punishment which is more severe than that contained in the original sentence. This is expressly prohibited by section 150(5) of the Armed Forces Act.”

This case is significant; by it, the Supreme Court has once again shown that the requirement of fair trial is not imposed only on regular courts but also on all bodies, which engage in the determination of the rights and

29 Ibid, per Tabai JSC at p. 92.
obligations of individuals. The case has dislodged the belief of the military, and which belief dominated its argument before the Court of Appeal and the Supreme Court, that a court martial is not *functus officio* until its decision is confirmed by ASA. Such a contention if upheld, especially in the peculiar circumstance of this case, would be antithetical to all known tenets of the rule of law, fairness and the decency in a democratic society.

2.2 Election Petition

2.2.1 Alternative reliefs: The purport of “or” in section 145(1) of the Electoral Act, 2006 and (a) Exclusion of candidates: When can a candidate for an election be held to have been excluded?

*Alhaji Atiku Abubakar & 2 Ors v. Alhaji Umaru Musa Yar’Adua* (Supreme Court Judgement delivered on 12 December 2008)

This case arose from the presidential election conducted nationwide by the 4th defendant (the Independent Electoral Commission – INEC) on the 21 April 2007. The 1st and 2nd appellants contested for the office under the aegis of the 3rd appellant, the Action Congress (AC) while the 1st and 2nd respondents contested under the aegis of the 3rd respondent, the Peoples Democratic Party (PDP). The latter were returned as the winners of the election by the 4th respondent.

Dissatisfied with the result announced by the 4th respondent, the appellants filed a petition at the Court of Appeal, constituted as the Presidential Election Petition Tribunal, alleging fraudulent practices and widespread irregularities in the conduct of the election. In the alternative the appellants asked the tribunal to nullify the election by holding that the 1st and 2nd appellants were unlawfully excluded from the election. The Court of Appeal dismissed the petition holding that the appellants did not prove their case. The appellants further appealed to the Supreme Court, as the appellate court for the presidential election petition.

The Supreme Court had to decide a number of issues, which came before it for the first time since the Electoral Act 2006, took effect. To resolve the issues, the court construed several sections of the Act, which had received conflicting interpretations from the Court of Appeal while deciding the governorship and legislative houses petitions, which terminate at that court. In order to determine whether the Court of Appeal was right in striking out the appellants’ alternate reliefs, the court interpreted section 145(1) of the Act,

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“An election may be questioned on any of the following grounds:
(a) That a person whose election is questioned was at the time of the election not qualified to contest the election;
(b) That the election was invalid by reason of corrupt practices or non compliance with the provisions of the Act;
(c) That the respondent was not duly elected by majority of lawful votes cast at the election; or
(d) That the petitioner or its candidates was validly nominated but was unlawfully excluded from the election.”

Delivering the judgment of the court, Katsina-Alu, JSC, said:

“It will clearly be seen that grounds (a), (b) and (c) above are separated from ground (d) by the word “or” ... Without doubt the word “or” in section 145(1) of the Electoral Act has compartmentalized the grounds in (a), (b) and (c) together and ground (d) on its own ... The effect in law of a petitioner claiming exclusion under section 145(1)(d) of the Act, is that he has shut himself out from presenting his petition under any of the grounds stipulated in sections 145(1)(a), (b) and (c) as non of the grounds can still avail him. This is so because, the effect of the exclusion ground, if successful, would render the election void ... it will be seen that the ground of unlawful exclusion cannot stand with any other ground as presented in the instant petition. This would be tantamount to approbating and reprobating which the law frowns at.”

Having upheld the lower court’s decision striking out the alternate reliefs, the Supreme Court held that exclusion connotes, “an element of ban, debarment, total denial, ostracism, preclusion, prohibition, refusal, rejection, removal, riddance, and seclusion.” Based on this definition, the court held that the appellants, who were excluded from participating in the election by INEC until 16 April 2007 – barely ten days to the election, when the Supreme Court held that the INEC had no power to disqualify the appellants – were not unlawfully excluded because they participated in the election. In a rather strange obiter, Katsina-Alu JSC, reasoned that the “position would have been

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31 Ibid, pp. 64-66. All the other Justices, except Oguntade, JSC who dissented, agreed with this view.
32 Ibid, per Tobi JSC, at p. 121.
RECENT LEGAL DEVELOPMENTS – NIGERIA

Different if the petitioners had pulled out of the contest in protest against the hurdles placed on their path.”  

Since the last general elections were held in Nigeria in April 2007, the courts have been extremely busy deciding election petitions, as almost all the results declared by INEC were contested in court, and a number of them are still being contested till date, less than two years to the next general election. By constitutional design, all election petitions, except that of the presidential election, terminate at the Court of Appeal, which is divided into several divisions with coordinate jurisdiction. This situation has guaranteed nothing but conflicting decisions, which in some cases, are mind boggling, from different divisions of the court. The presidential election petition therefore presents a rare opportunity for the Supreme Court to establish a precedent that will unite the conflicting decisions of the lower court and create certainty. Concerning the Electoral Act 2006, this was the first time it came before the Supreme Court through an election petition.

I am constrained to share some thoughts on the views taken by the court in this case. It is difficult, with due respect, to agree with the manner in which the majority judgement construed the word, “or” in section 145(1) of the Act, reproduced above. It cannot rightly be said that paragraph (d) is disjointed from all the other paragraphs because the other paragraphs are separated, each from the other, by a semi colon and paragraph (d), the last paragraph of the subsection, is separated from the preceding paragraph by “or”. If the court had looked more closely, perhaps, it would have seen that “or” governed all the paragraphs and that the legislature allowed it to appear at the end of the enumeration to avoid repeating the word after each paragraph. If the court had taken this view, it would have been apparent that its view on the section makes each paragraph stand on its own and never in alternative with any other paragraph; an interpretation which would not have been intended by the legislature as, it would snuff life out of every petition presented under the section. It is hoped that the court will take a different view of this section, if the Act is not amended before the issue comes before the court again.

The same suffocating construction is apparent in the court’s view on “exclusion”. It is hardly conceivable that the legislature intended “exclusion” to be determined on the basis of “ballot day participation,” notwithstanding that the aggrieved person had been denied the opportunity of taking part in other pre-election activities put in place to ensure equal opportunities to the contestants. It is not difficult to see, even from the Electoral Act, that it is not the polling day alone that constitutes an election. All pre-election processes – nomination, screening and campaign – are as much, veritable aspects of election, as the actual voting. Consequently, the ordinary dictionary meaning

34 Supra, note 81, at p.79.
of the word “exclusion” does not meet the peculiar requirement of the Electoral Act. What is more, the court even suggested that the candidate should have pulled out of the election without considering inevitable threat to life and property such an action would have brought upon the Nigerian people given the already tense political atmosphere that characterised the election period in 2007. Be that as it may, the precedent established in the case shall stand until the court is seised with the opportunity to overrule same or until the Act is amended by the legislature.

2.2.2 Averments in election petition; whether the averments relating to presiding officers can be sustained after their names have been struck off the suit

Senator (Prof.) Osarheimen Osunbor v Adams Oshiomhole (Judgement of the Court of Appeal, as the final court in the governorship election petition delivered on 11 November 2008)35

This case arose from the Edo State gubernatorial election held on the 14 April 2007. Amongst other contestants, the Peoples Democratic Party (PDP) and the Action Congress (AC) fielded the appellant and the respondent for the said election, respectively. INEC, returned the appellant as the winner of the election. Dissatisfied with the result released by INEC, the respondent filed a petition before the Governorship Election Petition Tribunal alleging corrupt practices, non compliance with the Electoral Act and that the appellant did not obtain a majority of lawful votes. The tribunal upheld the petition and ordered that a certificate of return be issued to the respondent as the lawfully elected governor of Edo State. The appellants appealed to the Court of Appeal.

One of the issues that stood to be resolved by the court was the issue of joinder of presiding officers. In the petitioner’s averments before the trial tribunal, several allegations were made against the presiding officers, who were lumped together as the 23rd to 214th respondents. Upon the appellant’s objection, the tribunal struck off the 23rd to the 214th respondents from the suit but refused to strike out the averments relating to them. The tribunal had to construe section 144(2) of the Electoral Act, which states,

“... but if a petitioner complains of the conduct of an electoral officer, a presiding officer, a returning officer or any other person who took part in the conduct of an election, such officer or person should for the purpose of this act be deemed to be a respondent and

shall be joined in the election petition in his or her official status as a necessary party. Provided that where such officer or person is shown to have acted as an agent of the commission, his non-joinder as aforesaid will not on its own operate to void the petition if the commission is made a party.”

In retaining the averments, the tribunal said:

“By the proviso to section 144(2) of the Electoral Act 2006, the non-joinder of the presiding officers of all the polling stations will not and cannot operate to void the petition. This is because they are presumed in law and in fact to have been joined or are deemed joined as respondents once INEC itself is made a party in the petition ... the proviso to section 144(2) ... cured the mischief in section 133(3) of the Electoral Act 2002. It was the absence of the proviso in the Electoral Act, 2002 that caused the striking out or outright dismissal of several meritorious petitions after the 2003 elections ...”

Upholding this view the Court of Appeal added that:

“The 23rd to the 214th respondents did not cease to be agents of INEC in their individual capacities and since INEC is a party to the petition, they come within the contemplation of the proviso to section 144(2) of the Electoral Act, 2006 ... The averments against them in the said paragraphs of the petition subsist ... the tribunal was therefore right to hold as it did and refuse to strike out the averments in the said paragraphs of the petition.”

Generally, averments relating to persons not joined in an action cannot be sustained, particularly when the allegations are criminal in nature, as were the nature of allegations in this case. Under the previous Electoral Acts, this position was retained: thus a presiding officer, a law enforcement officer and other persons, whose conducts are complained of in a petition, must be joined as parties for the complaints to be sustained. Otherwise the averments relating to them will be ignored. This led to the failure of several petitions under previous Electoral Acts, giving that it was impossible for the petitioner to know the names of all persons whose conducts undermined the elections. The Electoral Act 2006, cured this defect by deeming all such

36 Reproduced in page 640 of the judgment of the Court of Appeal.
persons to be parties, if they acted as agents of INEC where INEC is joined, as a party to the petition. This is the first time a court is applying the provision to retain averments relating to persons whose names were struck off because they were not properly joined.
SOUTH AFRICA

A. Anderson*

1. LEGISLATION

1.1 Acts of Parliament

Due to the general election which took place during April 2009, and the early rising of Parliament for this purpose, not much new legislation saw the light of day since the last edition of the *UBLJ*.

1.1.1 Judicial Matters Amendment Act\(^1\)

This Act brings about a number of changes to various pieces of legislation. It deals with a large variety of matters but I will only highlight the following two aspects:

The first concerns attorneys.\(^2\) Attorneys employed by the Legal Aid Board are now also allowed to engage candidate attorneys (during their compulsory period of articles). The Legal Aid Board offers legal services to indigent persons. The purpose of this move is to increase the capacity of the Legal Aid Board and at the same time to increase the access to the profession by legal graduates. Fines that the Law Society may impose on attorneys and candidate attorneys found guilty of unprofessional conduct have been increased. This attempts to protect members of the public in their dealings with the profession.

The second concerns claims by a spouse against the other spouse in a marriage in community of property.\(^3\) A spouse married in community of property was not entitled to claim damages in respect of bodily injury caused by the spouse to whom (s)he was married, or for patrimonial loss caused by such spouse. This is now possible in terms of the amendment.

1.1.2 Stamp Duties Act\(^4\)

This Act which provided for various documents including court summonses to be affixed with revenue stamps has been repealed from 1 April 2009. This has the effect that documents such as long-lease agreements also no longer require revenue stamps in order for it to be enforceable in a court of law.

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4 Act 77 of 1968.
1.2 News

1.2.1 New Minister of Justice

The axing last year of Thabo Mbeki as President also brought about a number of cabinet shifts. Enver Surty has been appointed as Minister of Justice and Constitutional Development. One outstanding matter which is of great importance not only to legal practitioners (attorneys and advocates) but the legal fraternity as a whole, is the issue of the proposed new governance system for the whole profession as envisaged in the draft Legal Practice Bill. Two previous ministers have indicated their serious intent on finalising this matter, and Minister Surty has also hinted that this will be one of his priorities.

1.2.2 4-year LLB revisited

It is reported that University law deans have approached the Council on Higher Education to probe the relevance and adequacy of the four year LLB degree introduced in the late 1990’s. This is in response to ongoing concerns by many in the legal field, including the judiciary and organised practice, about the perceived declining quality of legal training and skills of law graduates.

1.2.3 Judicial code and judicial training

The Minister of Justice and Constitutional Development has announced a judicial code of conduct that is believed to help dispel the bad publicity that has unfairly dogged the judiciary as a result of the activities of a few of its members. The code, which has been developed in conjunction with the judiciary and with judicial independence as salient feature, will be finalised soon and will assist the conduct committee of the Judicial Service Commission in its deliberations. The code together with the establishment of the South African Judicial Education Institute which will in future be responsible for the training needs of members of the judiciary, are positive steps in strengthening the role of the judiciary in the South African constitutional democracy.

2. JUDICIAL DECISIONS

2.1 Finality in the Zuma saga

National Director of Public Prosecutions v Zuma\(^5\)

\(^5\) 2009(2) SA 279 (SCA).
The Zuma saga has finally come to a final conclusion when Acting National Director of Public Prosecutions Adv. Mokotedi Mpshe announced that the National Prosecuting Authority (NPA) is withdrawing all charges against Mr. Zuma. In recent times Zuma has won an internal political battle against former President Thabo Mbeki and has been inaugurated as South Africa’s new President. The legal battle started in 2003 when then National Director of Public Prosecutions, Bulelani Nqcuka publicly announced his decision not to prosecute then Deputy-President Jacob Zuma for corruption and fraud although he alleged that there was a “prima facie” case for him to answer. Zuma’s erstwhile financial advisor (and close friend) Shabir Shaik had been charged and convicted for fraud and the court noted that he had had what it termed a “generally corrupt relationship” with Zuma in that he (Shaik) had negotiated a bribe from French arms manufacturer Thint for Zuma. After the successful prosecution of Shaik, the prosecuting authority then set its sights on prosecuting Zuma. Many legal battles have followed regarding the validity of search warrants, the seizure of documents in raids on the homes and offices of Zuma, his lawyers and Thint etc. During December 2007 an indictment was served on Zuma including a charge of racketeering, four charges of corruption, one charge of money laundering and 12 counts of fraud. This resulted in the judgment of the Pietermaritzburg High Court (the so-called “Nicholson” judgment) which inter alia found that there had indeed been political meddling with regard this particular criminal prosecution by Zuma’s political rivals.6

The NPA appealed this judgment to the Supreme Court of Appeal (SCA)7 which reversed the Nicholson decision. The SCA held that the case concerned in main the interpretation of section 179 of the Constitution. It held that the section did not require the NDPP to invite Mr. Zuma to make representations as to why he should not be prosecuted before indicting him. He had no legitimate expectation to receive such invitation, he knew that he could make representations, and chose not to make any. The absence of such “invitation” therefore did not render the prosecution invalid as Nicholson had concluded. The court further lambasted Nicholson regarding his “inappropriate” findings relating to political meddling. It found that the learned judge had failed to have regard to some basic tenets concerning the judicial function. He had failed to confine his judgment to the issues before the court, made findings against persons who were not called upon to defend themselves, and overstepped the limits of his authority since there were no facts on the papers before him that could justify a finding of political meddling. The effect of the judgment on appeal is that the prosecution could indeed proceed.

The NPA has, however, subsequently allowed Zuma’s legal team to

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6 See 8 UBLJ (2008), pp. 185-186.
7 National Director of Public Prosecutions v Zuma 2009(2) SA 279 (SCA).
make representations regarding the case. Mr. Zuma had all along alleged that there was a political plot against him to charge him with criminal activities with a view to obstructing his political ambitions. After considering these representations, the NPA concluded that its case had been compromised and withdrew all charges against the accused. It has come to light that the representations included transcripts of conversations secretly taped by the National Intelligence Agency (NIA). It appears that the NIA had stumbled upon a conversation (whilst investigating an unrelated matter) between the previous National Director of Public Prosecutions Bulelani Nqcuka (the very one who in 2003 declined prosecution in the face of a “prima facie” case), the head of the investigating team, Leonard McCarthy and an unknown third person. The topic of the discussion was whether it would be advisable to charge Mr. Zuma before, or after, the 1997 Polokwane conference of the ANC. The NPA concluded that this represented a “serious abuse of process which offends one’s sense of justice” sufficiently so to halt any further prosecution. It has not been revealed how confidential NIA information found its way to the defense lawyers.

The withdrawal of charges effectively brings the prosecution to an end and Jacob Zuma was inaugurated as South African President on 9 May 2009. The SCA decision has been appealed to the Constitutional Court, but it is uncertain whether it would continue in the light of the withdrawal of the charges. What this case has exposed is the fundamental different viewpoints regarding the independence of the National Prosecuting Authority, what exactly is included in the “political control” exercised by the Minister of Justice over the functions of the NPA, and the vulnerability of the judiciary in the face of political onslaughts.

2.2 Intestate succession – marriage according to Hindu rites

Govender v Ragavayah NO and Others (Women’s Legal Centre Trust as Amicus Curiae)\(^8\)

In recent years the constitutional requirement for equality has been instrumental in extending the ambit of the judicial interpretation of the concept of “marriage”. This is another such case. Mrs Govender, the applicant, was married in 2004 in terms of Hindu rites to the deceased, Mr Narainsamy. The marriage was a monogamous one but was not registered in terms of the Marriage Act\(^9\) with result that it was not legally recognised. Mr Narainsamy died without leaving a will. His father, the first respondent, was appointed as

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\(^8\) [2009] 1 All SA 371 (D).
executor of the deceased’s estate. In terms of the Intestate Succession Act,\(^\text{10}\) if a person dies without leaving behind a will a descendant or spouse, or his/her parents are regarded as the sole heirs. The applicant brought an application to be declared as the “spouse” of the deceased for the purposes of the Act so that she could inherit the estate of Mr Narainsamy. It was not disputed that there was indeed a “marriage” between the applicant and the deceased which took place according to Hindu custom and tradition which did not require it to be registered in order to be valid. In previous Constitutional Court cases the definition of a spouse had been expanded to include persons in monogamous Muslim marriage, unregistered customary marriage and also to persons living in same-sex relationships. In the light of these precedents, the Court agreed that a marriage by Hindu rites may indeed lay claim to be regarded as a religious “marriage contract” even though it is not explicitly recognised in the Marriage Act. The applicant was therefore recognised as the spouse of the deceased enabling her to inherit from the deceased estate.

### 2.3 Rights of citizens to vote in elections whilst being abroad

* Richter v Minister for Home Affairs and Others\(^\text{11}\)

The Constitutional Court were approached to confirm an order of constitutional invalidity made by the Gauteng North High Court in respect of section 33(1)(e) of the Electoral Act\(^\text{12}\) and certain regulations in term of that Act. This was as a result of an application brought by a South African citizen who is temporarily employed as teacher in the United Kingdom, who is registered as a voter and who wished to vote in the recent general elections held on 22 April 2009 but who was precluded from doing so by the section of the Act. The Constitutional Court was unanimous in its finding that the right to vote has a symbolic and democratic significance and that the preclusion of the right to vote of registered voters who will be abroad on polling day constitute an unjustifiable limitation of section 19 of the Constitution. The Court ordered the extension of the period to allow those who are abroad on polling day to notify the Chief Electoral Officer of their intention to vote and identify the embassy, high commission or consulate where they intend to cast their special vote. The result of this decision is that many South Africans who would otherwise not have been able to vote, were indeed given the opportunity to do so.

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12 Act 73 of 1998
2.4 Protection of minority language rights

Hoërskool Ermelo and Another v Head of Department of Education: Mpumalanga and Others\textsuperscript{13}

The Supreme Court of Appeal dealt with an appeal from the Pretoria High Court by the governing body of an Afrikaans language high school which is a public school in terms of the Schools Act\textsuperscript{14} (the applicant). When the Department of Education had no accommodation for learners in a particular area to be taught in English, the head of the department withdrew the function of the governing body of the Ermelo Hoërskool to determine the language policy of the school and appointed an interim committee to change the language policy from Afrikaans medium to parallel medium. The governing body, being unsuccessful in the court \textit{a quo}, appealed to the SCA who found that the head of the department did not comply with the principles of legality as his actions were not authorised in terms of the Schools Act and violated the principles of the Promotion of Administrative Justice Act.\textsuperscript{15} The effect of this judgment is to confirm that the governing body of a school has the exclusive power to determine the language policy of an existing school.

2.5 Failure to maintain roads

McIntosh v Premier, KwaZulu-Natal and Another\textsuperscript{16}

Mr McIntosh, being an avid cyclist, suffered injuries when he fell off his bicycle on a public road under the management of the KwaZulu-Natal Provincial administration. The accident occurred when the plaintiff swerved to avoid a large pothole in the road. His claim was unsuccessful in the High Court which found that the accident was solely attributed to his own negligence. The SCA came to a different finding. The plaintiff argued that the defendant’s negligence lay in its failure to ensure that the particular pothole was repaired. Evidence indicated that, despite regular examinations of the road in question, the particular pothole escaped being fixed and even grew in size. No explanation could be given for this and the court accordingly held that the authority was negligent. The negligent omission was further ruled to be wrongful. The plaintiff was successful on appeal, but because of his own contributory negligence (in failing to reduce speed upon noticing the pothole) his damages were reduced.

\textsuperscript{13} Unreported Supreme Court of Appeal Judgement (219/2008) delivered on 27 March 2009.
\textsuperscript{14} Act 84 of 1996.
\textsuperscript{15} Act 3 of 2000.
\textsuperscript{16} 2008 (6) SA 1 (SCA).
2.6 Employment – affirmative action

*Gordon v Department of Health: KwaZulu-Natal*

This is was a matter dealing with the lawfulness of an affirmative action measure. In this case the plaintiff applied for a senior administrative position at a hospital under the control of the defendant. He was recommended for the position by the selection panel, but the provincial public service commission who ultimately makes the appointments decided to appoint a black candidate based on representivity demands. Gordon was unsuccessful in proceedings in the Labour Court which found the failure to appoint him did not amount to unfair discrimination (on the basis of race). After an unsuccessful appeal to the Labour Appeal Court (which did not deal with the merits of the matter), the matter finally came before the Supreme Court of Appeal. The plaintiff contended that the decision to appoint the black candidate in the face of a white candidate with better experience could not amount to “affirmative action” since there was no rational affirmative action policy, plan or programme in place. The Department submitted that it was not obligatory to have a policy or plan in place to advance this imperative and, that it was permitted to take the ad hoc decision to appoint the black candidate in the absence of an affirmative action policy or plan. The SCA concluded that affirmative action measures would only be lawful if is the result of a properly formulated policy, plan or programme which exclude inherently arbitrary or irrational decisions. The court therefore concluded that the department did not have an affirmative action policy or plan in place, the commission had not applied its mind to the implementation of affirmative action and was unable to provide a coherent basis for rejecting the recommendation of the selection panel who recommended the plaintiff for the position. It therefore held that the non-appointment of the plaintiff amounted to unfair discrimination on the basis of race.
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