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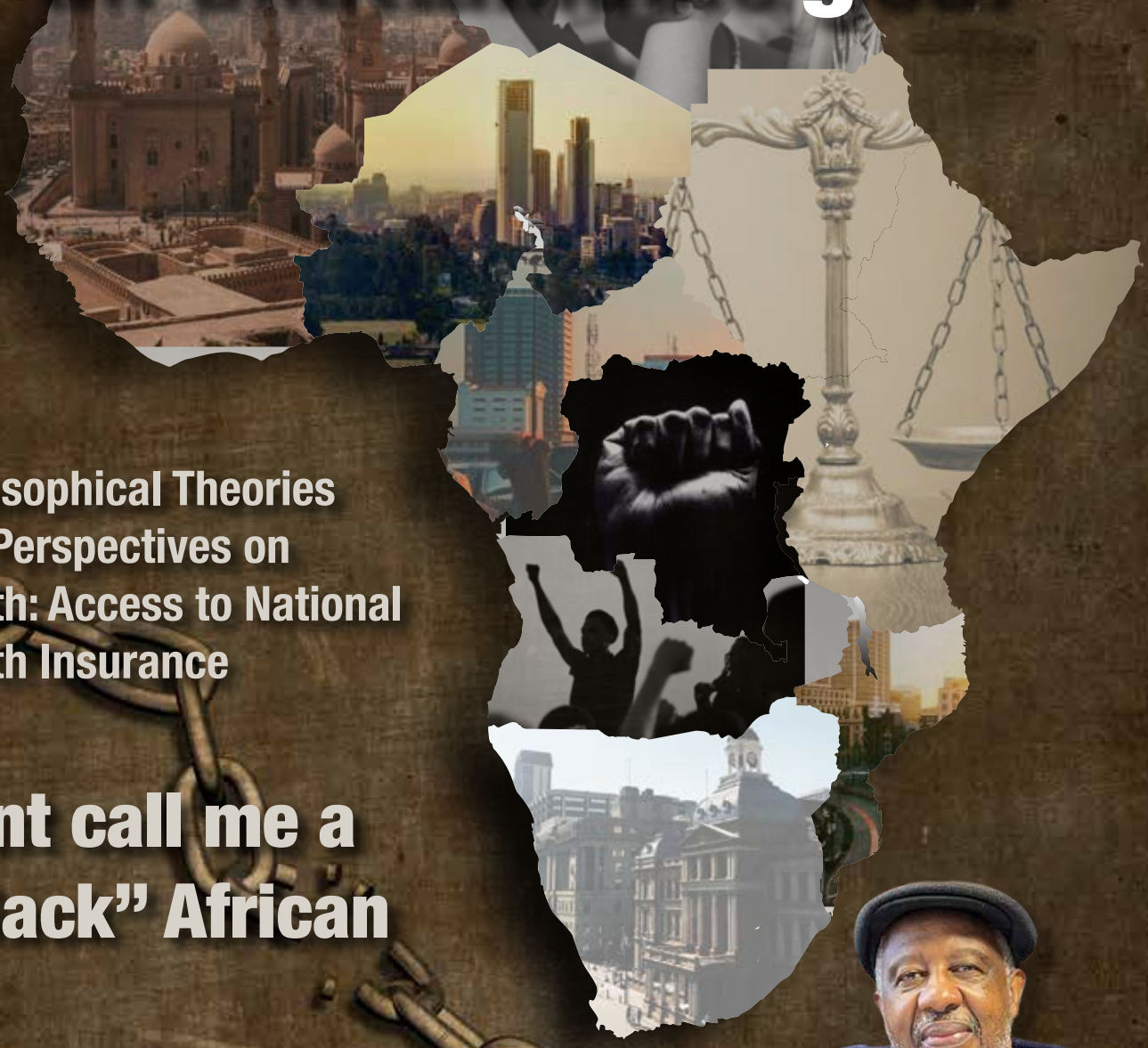
Social justice – an unattainable goal



Philosophical Theories and Perspectives on Health: Access to National Health Insurance

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Social justice - an unattainable goal

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The beginning of the year 2021 saw the continuation of COVID-19 vaccinations across the world with South Africa following suit. As at 16 April 2021, a total of 184 654 423 people have been fully vaccinated, which accounts for 2,4% of the world's population. In South Africa, 292 623 people have been fully vaccinated, which accounts for 0,5% of the country's population. On 16 April, the South African government began its second phase of the vaccinations by registering those over the age of 60 for vaccinations. Criticism has been levelled against the South African government on the slow rate of the number of vaccinations conducted in the country thus far.

The pandemic is not only affecting the health system in the country, it has also affected the country's economy and highlighted the stark difference between the "haves and have-nots". In South Africa the "haves" usually have access to medical aid and therefore, able to access private health care. The "have-nots" on the other hand have to use the facilities of the public health system. The solution for leveling the playing field between the "haves and have-nots" in the health system could lie in the long-awaited National Health Insurance Bill *Government Gazette* 42598. In this months' volume, an article written by Pritzman Busani Mabunda and co-authored by supervisor Dr Llewellyn Gray Curlewis titled "Philosophical Theories and Perspectives on Health: Access to National Health Insurance" on page 30 notes that having access to proper health care is a requirement of social justice . The article states:

> "The health of people in different socioeconomic strata is disparate whether measured by education, type of employment, or income level. However, those living in poverty exhibit the worst health status.[1] Many societies and nearly all wealthy, developed countries, provide universal access to a broad range of public health and personal medical services.[2] Such countries include Germany, Switzerland, Singapore, and Canada, to mention a few. Is access to health care a requirement of social justice? Or is it simply a matter of social policy that some countries adopt, and others do not?[3] If it is a requirement of social justice, we should be clear about what kind of care we owe people and how that is determined. If we cannot possibly meet every health need, as arguably no society can, the criteria for which health needs are met should be clearly established.[4] Universally many countries, including South Africa, are striving for universal health care (UHC). In an ongoing effort to address persistent injustice and access barriers, South Africa is implementing a National Health Insurance system which is currently the National Health Insurance (NHI) Bill[5] (soon to be an Act) in which affordable, quality health care will be available for those who need it, regardless of 'who' they are, 'where' they live or their ability to pay."[6]

In the conclusion of the article, author PhD Candidate Mabunda and co-author Dr Curlewis note that:

> "The right to health must be a system relative for another reason that is implied by a deeper feature of the opportunity-based account. What is special about meeting health needs, for purposes of justice, is that it contributes to protecting individuals' fair share of the normal opportunity range for their society. That range, to emphasise the point, is society-relative. This relativity, however, then also infects claims about what we are entitled to when a health system is designed for a specific society. The relativisation of the normal range to a society captures an important requirement for a theory of just health care. It is not a feature we should lightly abandon. The importance of meeting specific health needs will vary depending on facts about a society,

"Is access to health care a requirement of social justice? Or is it simply a matter of social policy that some countries adopt, and others do not?[3] If it is a requirement of social justice, we should be clear about what kind of care we owe people and how that is determined."

1 Papadimos "Healthcare access as a right, not a privilege: A construct of Western thought" Philosophy, *Ethics, and Humanities in Medicine* 2007 1.

2 Daniel "Justice and Access to Health Care" *Stanford Encyclopedia of Philosophy* 2008 1.

3 *Ibid*.

4 *Ibid*

5 National Health Insurance Bill *Government Gazette* 42598

6 Maseko "People-centeredness in health system reform. Public perceptions of private and public hospitals in South Africa" South African Journal of Occupational Therapy 2018 22

and a distributive principle must leave room for such variation. It is clear that the quest for universal health care for all remains an on-going dream aimed at improving the health of their respective citizens. It is also clear that these efforts are not free of problems and are not the alpha and omega in terms of their health."

The year 2021 will also see South Africans head to the polls for the wards to be contested in the municipal by-elections. The Electoral Commission of South Africa released a statement, on 31 Mach 2021, which notes that the commission has embarked on a comprehensive programme of stakeholder engagement, which included training all political parties represented in the National Assembly and the provincial legislatures on the workings of the Political Party Funding Act 6 of 2018 and use of a new Online Party Funding System. Training was also extended to all political parties registered with the Commission, including those that are currently not represented in any of the legislative houses. This volume's column by the Chairperson of the BLA-LEC, Adv Mc Caps Motimele SC titled "Political Party Funding Act: Lifting the secrecy veil in direct private funding of political parties and entrenching the culture of transparency in our multi-party democracy", on page 7, discusses the Political Party Funding Act. The Chairperson's column notes:

> "After intense pressure and years of litigation that sought to compel Parliament to enact legislation that regulates the private funding of political parties,[7] the Political Party Funding Act 6 of 2018 (the Act) was eventually enacted and came into operation on the 01 April 2021.[8] This important legislation was amongst others crafted to 'provide for, and regulate, the public and private funding of political parties', furthermore, 'to prohibit certain donations made directly to political parties; and to regulate disclosure of donations accepted".[9]

In the Chairperson's article, Advocate Motimele SC further notes that:

> "Through this Act, the insidious plague of corruption and its devastating impact may be mitigated significantly. If corruption and lawlessness are allowed to flourish through the funding of political parties, our constitutional democracy and other constitutional values such as the rule of law and transparency will be severely undermined. The destructive effects of corruption are well-known. Corruption disproportionately hurts the poor, through the diversion of funds that may be used for developmental purposes and the timeous delivery of basic services to the people. If this is allowed to happen through the infiltration of political parties, the inequality gap will continuously widen. The plague of corruption is a known supreme element in economic underperformance and a major obstacle to poverty alleviation and development."

"It is thus evident that culturally inspired posthumous interest in the body is a Nigerian phenomenon, particularly through the existential philosophy of ancestor-ship, which this Paper has thoroughly examined. controversies[10]."

This month's international article, on page 35, focuses on Nigeria's cultural values on organ donation. The article by Olusola Babatunde Adegbite from the Nigerian jurisdiction titled "Corpse mystification and Nigeria's cultural values on cadaveric organ donation*: Reflections on the shifting paradigms of culture, religion, and law*" argues that:

> "As it has been established in this Paper, a major resistance to cadaveric donation in Nigeria is that many do not want their body to be desecrated after their demise. This Paper has also established how this erroneous belief is deeply rooted in the people's cultural attitude, norms, and tradition. It is thus evident that culturally inspired posthumous interest in the body is a Nigerian phenomenon, particularly through the existential philosophy of ancestor-ship, which this Paper has thoroughly examined. As such, there is a need for more robust and comprehensive education, particularly one that can demystify this current regime of cultural apprehension and controversies[10]. For a region like Northern Nigeria where the philosophy governing cadaveric donation is a derivative of religion which is also the native law, it has been said that to increase organ yield, it is imperative to include religious leaders, namely, the Muslim Clerics as they exert great influence on their worshippers[11]."

This issue of the *African Law Review* contains an array of articles that would peak the interest of any discerning reader. We hope you will find this issue informative.

7 *Institute for Democracy in South Africa and Others v African National Congress and Others* [2005] ZAWCHC 30; 2005 (5) SA 39 (C) , see also *My Vote Counts NPC v Speaker of the National Assembly and Others* (CCT121/14) [2015] ZACC 31 (30 September 2015) *(My Vote Counts 1),* see also, My Vote Counts, Ibid, n 3

8 Available at <http://www.thepresidency.gov.za/press-statements/president-ramaphosa-signs-political-party-funding-act-operation>

9 Long tittle of the Political Party Funding Act 6 of 2018

10 R Oluyombo, et. Al "Knowledge regarding Organ Donation and Willingness to Donate Amongst Health Workers in South West Nigeria", 2016, 7(1), *International Journal of Organ Transplantation Medicine*, 1926.

11 *Ibid.*

Political Party Funding Act: Lifting the secrecy veil in direct private funding of major political parties and entrenching the culture of transparency in our multi-party democracy

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

Photos from wikipedia.com

Introduction

Political Parties play a crucial role in our multi-party system of democratic government ordained by the Constitution. This constitutional reality manifests itself more in the election of constitutional office-bearers in two arms of the state, the Legislative arm and the Executive arm. These include, inter alia, the Head of State, National Assembly Speaker, and her Deputy, Chairperson and Deputy Chairpersons of the National Council of Provinces, Speaker and Deputy Speaker of the Provincial Legislature, and the Premier. These leading constitutional office-bearers are elected in terms of the Constitution.[1] However, before ascending to their constitutional roles, these office-bearers have to be elected to those positions by members of their relevant legislative arms. Importantly, and consistent with the design of our multi-party constitutional democracy, the electorate needs to elect these office-bearers, through their political parties.[2] Cognisant of the fundamental role political parties play in our multi-party democratic system of government, the Constitutional Court has aptly characterised political parties as the "constitutionally-prescribed instrumentalities for rising to public office"[3]. Political Parties are the "veritable vehicles the Constitution has chosen for facilitating and entrenching democracy".[4] Furthermore, they are the "indispensable conduits for the enjoyment of the right given by section 19(3)(a) to vote in elections".[5]

After intense pressure and years of litigation that sought to compel Parliament to enact legislation that regulates the private funding of political parties,[6] the Political Party Funding Act 6 of 2018 (the Act) was eventually enacted and came into operation on 01 April 2021.[7] This important legislation was amongst others crafted to "provide for, and regulate, the public and private funding of political parties", furthermore, "to prohibit certain donations made directly to political parties; and to regulate disclosure of donations accepted".[8]

Before the enactment of this Act, private direct funding of individual political parties was wholly unregulated. As a result, Political Parties had no legal obligation to disclose the sources or amounts of private donations. The unfortunate consequence of this legislative/regulatory lacuna was that private donations were not regulated in the manner that public funding of political parties was regulated.[9] For decades,

> "For decades, information on the private funding of political parties has been placed beyond the reach of the electorate."

information on the private funding of political parties has been placed beyond the reach of the electorate. And this arguably made it extremely difficult for them to hold their elected representatives accountable. Arguably, the unregulated and undisclosed private funding came with strings attached. And the secrecy that prevailed before the enactment of the Act was antithetical to the constitutional values of openness, accountability, and the advancement of human rights and freedoms.[10] In the absence of a compelled legislative disclosure of political parties' private donors, a conducive ground for corrupt tendencies to take root in our democracy was cultivated.

1 Sections 86, 52, 64, 111 and 128 of the Constitution respectively read with schedule 3 to the Constitution
2 Section 19 of the Constitution
3 *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* (CCT249/17) [2018] ZACC 17; 2018 (8) BCLR 893 (CC); 2018 (5) SA 380 (CC) (21 June 2018),(*My Vote Counts 2*), para 2
4 *Ramakatsa and Others v Magashule and Others* [2012] ZACC 31; 2013 (2) BCLR 202 (CC), para 67
5 Id , para 68
6 *Institute for Democracy in South Africa and Others v African National Congress and Others* [2005] ZAWCHC 30; 2005 (5) SA 39 (C) , see also *My Vote Counts NPC v Speaker of the National Assembly and Others* (CCT121/14) [2015] ZACC 31 (30 September 2015) *(My Vote Counts 1),* see also, My Vote Counts, Ibid, n 3
7 Available at <http://www.thepresidency.gov.za/press-statements/president-ramaphosa-signs-political-party-funding-act-operation>
8 Long tittle of the Political Party Funding Act 6 of 2018
9 Public Funding of Represented Political Parties Act 103 of 1997
10 See the Preamble to the Constitution, see also section 1 of the Constitution

Section 236 of the Constitution

On the funding of political parties, section 236 of the Constitution provides as follows:

> "To enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis."

Section 236 is a specific and clear provision with regards to its intended purpose and the obligation it creates for the Legislature. Properly understood, the stated purpose of this section is to enhance our multi-party democratic system through the funding of political parties represented in the Legislature. The section further prescribes the formula in which such funding is to be allocated, thus the funding should be allocated on an "equitable and proportional basis". The question of whether or not this constitutionally prescribed formula practically enhances multi-party democracy remains controversial. Some have persuasively argued that the prescribed section 236 formula has consolidated the dominance of the ruling party at the expense of other parties.[11] In this article the author, however, does not endeavour to appraise and expose the shortcomings of section 236 of the Constitution.

It is, however, important to note that, pursuant to section 236 of the Constitution, Parliament enacted the Public Funding of Represented Political Parties Act 103 of 1997. In doing so, Parliament has fully discharged its constitutional obligation to craft legislation giving effect to section 236 of the Constitution. Unfortunately, the 1997 Act does not address the complex issue of private funding of political parties. This created an unfortunate lacuna in our statute books. The unfortunate and direct consequence of the 1997 Act is that private funders and political parties themselves can undermine the constitutional values of openness and transparency without consequences. This is so because the 1997 Act did not sanction the disclosure of private funders of political parties. This legislative lacuna lamentably placed all private funders (scrupulous and unscrupulous), firmly behind the mantle of secrecy.

International law.

The need for a firm and impeccable regulatory framework on the thorny issue of private funding of political parties has also attracted the attention of the international community. Through the adoption of the United Nations Convention against Corruption (UN Convention),[12] the international community demonstrated its resolve to also address the issue of corruption through a stringent regulatory framework of private funding of political parties. According to this UN Convention, state parties are urged amongst others to: "*consider* taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance *transparency* in the funding of candidatures for elected public office and, where applicable, the funding of political parties".[13]

Adv. Mc Caps Motimele SC: BLA-LEC Chairperson

> **"But it is important to note that the need to entrench the culture of transparency in the issue of political party funding is an issue of both domestic and international concern."**

Manifestly, the UN Convention does not explicitly impose an obligation on state parties to legislate in a manner that enhances the fundamental principle of transparency in the funding of political candidates or parties. All that the UN Convention does is to urge states to merely "consider" doing so. But it is important to note that the need to entrench the culture of transparency in the issue of political party funding is an issue of both domestic and international concern. And for South Africa, transparency and openness are key constitutional values, which means that we cannot hide behind the diplomatic and permissive language of Article 7(3) of the UN Convention. Our Constitution already impels us to ensure transparency in the funding of political parties.

11 Booysen, S & Masterson, G 2009 'Chapter 11: South Africa' IN Denis Kadima and Susan Booysen (eds) Compendium of Elections in Southern Africa 1989-2009: 20 Years of Multiparty Democracy, EISA, Johannesburg, 390-391.

12 <https://www.unodc.org/res/ji/import/international_standards/united_nations_convention_against_corruption/united_nations_convention_against_corruption.pdf>

13 Article 7(3) of the UN Convention

The essence of transparency on the issue of political party funding is fully explained in the UN Convention, which South Africa has ratified without reservation. [14] The primary goal of the Convention is amongst others, to combat corruption, prevent and combat corrupt practices, prevent and combat the transfer of funds of illicit origin, and money laundering.[15] The truth is that corruption is a devastating global plague, and if left unfettered, corruption threatens the stability of nations, undermines key democratic institutions, corruption subverts a myriad of democratic values, imperils sustainable development, and the rule of law. [16] A state party that fails to take legislative and administrative measures as required by the UN Convention arguably demonstrates its inclination to subverts or facilitates the subversion of the rule of law, and the values of clean governance and transparency.

Importantly, the UN Convention is not the only relevant international law instrument that South Africa has ratified. South Africa is also a state party to the African Union Convention on Preventing and Combating Corruption (AU Convention).[17] The AU Convention imposes an obligation on South Africa as a state party "to *adopt legislative and other measures* to:

a. Proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and
b. Incorporate the principle of transparency into the funding of political parties."[18]

> **"The truth is that corruption is a devastating global plague, and if left unfettered, corruption threatens the stability of nations, undermines key democratic institutions, corruption subverts a myriad of democratic values, imperils sustainable development, and the rule of law."**

The AU Convention differs from the UN Convention significantly in that, the former imposes an obligation on South Africa as a state party to adopt both "legislative and other measures" to prohibit the funding of political parties using money acquired illegally or through corrupt practises. Importantly, the two conventions recognise that transparency in the funding of political parties is of paramount importance. And failure to ensure transparency in private funding of political parties is one of the "root causes of corruption"[19].

Beyond the provisions and values of her acclaimed Constitution, South Africa has an international law obligation to regulate the funding of political parties in a manner that is consistent with the aforementioned Conventions.

Private funding of political parties: Judgments of the Constitutional Court

1. My Vote Counts NPC v Speaker of the National Assembly and Others (CCT121/14) [2015] ZACC 31 (30 September 2015), *(My Vote Counts 1).*

a. Minority judgment.

The minority judgment tersely characterised the central issue and question in the following terms:

> "At issue is whether Parliament has failed to fulfil an obligation the Constitution imposes on it. The specific question is whether information on private funding of political parties is information that is required to exercise the right to vote. If it is, the further question is whether Parliament has passed legislation that gives effect to the right of access to this information. If not, Parliament is in breach of its constitutional obligation, and the applicant asks this Court to require Parliament to remedy the breach."[20]

The applicant undergirded their claim on the right to access information provided under section 32 of the Constitution.[21] The underlying argument was that, in the absence of legislation that compels the disclosure of information on the private funding of political parties, the Legislature has failed to fulfil its obligations under section 32(2) of the Constitution. The minority judgment acknowledged that the right to vote under section 19 of the Constitution implies the right "to cast an informed vote". [22] A necessary pre-condition for the exercise of an informed right to vote is information, including information on the private funders of political parties. A proper reading of section 32(2) of the Constitution ought to lead to an inevitable conclusion that the Constitution does envisage legislation

14 *My vote Counts 2*, para 47
15 Preamble to the UN Convention
16 Id
17 *My vote Counts 2,* para 50
18 Article 10 of the AU Convention.
19 See the Preamble to the AU Convention

20 *My vote Count 1*, para 1
21 "Access to information.- (1) Everyone has the right of access to-
(a) any information held by the state; and
(b) any information that is held by another person and that is required for the exercise or protection of any rights.
(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state."
22 *My Vote Counts1*, para 38

that compels political parties to disclose their private funders. This information is crucial for the voting masses to make informed political choices. The minority judgment of the Constitutional Court correctly acknowledges this fact. The court correctly linked political rights under section 19 of the Constitution to the right to access information under section 32 of the Constitution. As a result, a proper exercise of political rights under section 19 requires adequate information, including that of private funders of political parties. This reality, therefore, necessitates the enactment of legislation making this crucial information disclosable and readily available to the electorate. This is mandated by section 32 and section 19 of the Constitution. Information on the private funders of political parties, therefore, qualifies as "information that is held by another person and that is required for the exercise or protection of any rights".[23] The Constitutional Court has found correctly that information on the private funding of political parties is crucial for the proper exercise of political rights under section 19 of the Constitution,[24] further, this information is also important for the proper exercise of the right or freedom of expression. [25] The constitutional right to have access to information, and the constitutional obligation to legislatively give effect to this right militates in favour of legislation compelling the disclosure of this information. In the absence of such an Act, the minority judgment correctly concluded that Parliament was in breach of its obligation.

> **"The importance of this type of information cannot be overstated. The Constitutional Court has previously made a crucial observation that 'the effective exercise of the right to vote also depends on the right of access to information."**

The importance of this type of information cannot be overstated. The Constitutional Court has previously made a crucial observation that 'the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined'.[26] This was a telling observation that correctly linked section 19 of the Constitution with the right to access information.[27] Borrowing from that observation, it is clear that information on the private funding of political parties in a multi-party political system can indeed enhance "the ability of citizens to make responsible political decisions and participate meaningfully in public life". This information is crucial and should be made public.

Information on private political party funding is crucial for the exercise of the right to vote. A voter certainly needs to know what she is choosing and that decision must not be tainted by lack of crucial information, it must not be a decision based on misinformation or insufficient information. [28] The truth about private political party funding is that such funding "is not made thoughtlessly, or without motive. They are made in the anticipation that the party will advance a particular social interest, policy or viewpoint".[29] The hidden motive behind direct private funding may also contribute to grand corruption and state capture. Therefore, this information is crucial for the electorate, not only for the proper exercise of their political rights but to also hold their elected representatives accountable. The minority judgment, in this case, found that parliament failed to fulfil its constitutional obligations under section 32(2) of the Constitution in that, it failed to enact legislation compelling access to information on private funding of political parties.[30] Thus, even though parliament enacted the Promotion of Access to Information Act 2 of 2000 (PAIA), to the extent that PAIA does not make such information accessible to the public, parliament breached its constitutional obligations. [31]

b. Majority judgment.

The majority judgment of the Constitutional Court decided the matter based on the principle of constitutional subsidiarity. This is the principle that the minority judgment found inapplicable for the compelling reasons it proffered.[32] But for the majority, the subsidiarity principle was applicable and certainly decisive. [33] The majority decision found that the

23 Section 32(1) (b) of the Constitution.
24 *My vote Counts 1* , para 42
25 *My Vote Counts NPC v Minister of Justice and Correctional Services and Another (*CCT249/17) [2018] ZACC 17; 2018 (8) BCLR 893 (CC); 2018 (5) SA 380 (CC) (21 June 2018), *(My Vote Counts 2), para 52-58*
26 *President of the Republic of South Africa and Others v M & G Media Ltd* [2011] ZACC 32; 2012 (2) SA 50 (CC); 2012 (2) BCLR 181 (CC) (*M & G Media Ltd*) at para 10.
27 Section 32 of the Constitution.
28 *My vote counts 1*, para 39
29 Id, para 42
30 Id, para 120
31 Id
32 Id, para 44-66
33 Id, para 193

Legislature has enacted PAIA to give effect to section 32 of the Constitution, and as a result, the applicant ought to have challenged PAIA's constitutional invalidity from the High Court. Further, because PAIA is the Act envisaged under section 32(2) of the Constitution, the principle of constitutional subsidiarity applies to this case. It was on the basis that the Legislature has enacted PAIA, that the majority decision dismissed the applicant's case. To the majority, it could not be correct that the Legislature failed to discharge its constitutional obligations under section 32(2) after it has enacted PAIA. Accordingly, the applicant ought to have challenged PAIA for being constitutionally invalid insofar as it does not compel political parties to disclose the identities of their private funders.

The majority judgment was received with stern disapproval by many. For example, Raisa Cachalia has argued that, in this case, the court has "botched procedure and avoided substance".[34] Professor Jonathan Klaaren characterised this case as "a democratic opportunity missed" by the court to 'deepen the character of the political conversation in our constitutional democracy".[35] It was a missed opportunity to make this crucial information disclosable and readily available to the electorate. In my view, these characterisations and critiques were justifiable and legally unassailable. The majority decision misapplied the subsidiarity principle and regrettably avoided the substantive constitutional issues that the case raised.

2. *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* (CCT249/17) [2018] ZACC 17; 2018 (8) BCLR 893 (CC); 2018 (5) SA 380 (CC) (21 June 2018), (*My Vote Counts 2*)

After the majority judgment in *My Vote Counts NPC v Speaker of the National Assembly and Others* (*My Vote Counts 1*), dismissed the application on the basis that, Parliament enacted PAIA to give effect to the right of access to information under section 32 of the Constitution, it found that the applicant ought to have launched a frontal challenge on the Constitutional validity of PAIA. Thus, the principle of constitutional subsidiarity impels the applicant to challenge the constitutional validity of PAIA insofar as it does not compel the disclosure of private funders of political parties. The applicant did not do so in *My Vote Counts 1*. Instead, the applicant sought an order declaring that parliament failed to discharge its constitutional obligations under Section 32 in that PAIA does not facilitates or compel the disclosure of the private funders of political parties.

In the present case (*My Vote Counts 2*), the applicant launched a constitutional challenge against PAIA in the Western Cape Division of the High Court.[36] In this case, the applicant contended that PAIA was deficient insofar as it does not compel the disclosure of the identities of private political party funders and those of independent candidates.[37] This frontal challenge on PAIA's constitutional validity certainly stems from the majority judgment in *My Vote Counts 1*.
In this case, the applicant succeeded in the High Court. The High Court made an order to the effect that PAIA is "constitutionally invalid to the extent of its failure to provide for the recordal and disclosure of information on the private funding of political parties and independent candidates".[38] This order was a triumph for our democracy, which is founded on the "advancement of human rights and freedoms" and the values of accountability and transparency.[39] It was an order that vindicated the constitutional right of access to information, and also, the High Court order reminded us as a sovereign state to honour our conventional international law obligations.

The advancement of human rights and freedoms is one of the foundational values of our Constitution. And the right to access information is one of the rights constitutionally enshrined under section 32. This right does not only grant entitlement to information held by the state, but it extends to information that is "held by another person and that is required for the exercise or protection of any right". [40] Indeed the right to vote under section 19 of the Constitution, does require that information on private funding of political parties is made public legislatively. [41] This information is necessary for voters to make an informed choice on whom they elect into public office. As a human rights-based multi-party democratic state, the need for heightened transparency in the funding of political parties cannot be over-emphasised. As the Constitutional Court noted: "The future of the nation largely stands or falls on how elections are conducted, who gets elected into public office, how and why they get voted in. Only when transparency and accountability occupy centre stage before, during and after the elections may hope for a better tomorrow be realistically entertained."[42]In the *My vote Counts 2* case, the Constitutional Court correctly confirmed the order of constitutional invalidity of PAIA as made by the High Court.[43]

34 Cachalia R, "Botching procedure, avoiding substance: a critique of the majority judgment in My Vote Counts" (2017) 33(1) SAJHR 138-153.
35 My Vote Counts and the Transparency of Political Party Funding in South Africa, Law Democracy & Development, Volume 22 (2018), page 11
36 *My vote counts 2*, para 6
37 Id, para 7
38 Id, para 14
39 Section 1 of the Constitution
40 Section 32(1) (b) of the Constitution
41 *My vote counts 2*, para 25
42 Id, para 32
43 Id, para 91

> "Corruption disproportionately hurts the poor, through the diversion of funds that may be used for developmental purposes and the timeous delivery of basic services to the people."

Transparency in the Political Party funding Act

The Preamble to this Act correctly reminds us of our constitutional values of openness and accountability.[44] These are constitutional values that must find expression in how our political parties are funded, both publicly and privately. Private funders of political parties must be disclosed for the electorate to know so that they can make informed choices when exercising their constitutional right to vote. In the preamble to our Constitution, we have declared our collective resolve to retake our "rightful place as a sovereign state in the family of nations".[45] This is the sovereignty that we must seriously protect by all means. The protection of our sovereignty may at times entail the adoption of stringent regulatory frameworks on private funding of political parties. For example, the prohibition of donations made to political parties by foreign governments, or their agencies, and also, the prohibition of contributions by foreign nationals may significantly protect our sovereignty.[46] If foreign governments are permitted to contribute or donate to our political parties, our sovereignty may be greatly compromised. Furthermore, to be able to stamp our authority as a sovereign state, we must be able to fulfil our international law obligations to ensure transparency in the funding of political parties. [47]

Transparency is a foundational value of our Constitution and political parties must be compelled to make information on their private funding and donations readily available to the electorate. This is necessary to give more content and strength to section 19 of the Constitution. Further, we do have an obligation under international law to take appropriate legislative and other measures necessary to entrench transparency in the funding of political parties. Our constitution also impels us to foster transparency in the private funding of political parties.

To the extent that the Political Party Funding Act compels political parties to disclose details of their private funding[48], This is essential in the fight against corruption and a major victory in the preservation of our constitutional democracy.

Conclusion.

Through this Act, the insidious plague of corruption and its devastating impact may be mitigated significantly. If corruption and lawlessness are allowed to flourish through the funding of political parties, our constitutional democracy and other constitutional values such as the rule of law and transparency will be severely undermined. The destructive effects of corruption are well-known. Corruption disproportionately hurts the poor, through the diversion of funds that may be used for developmental purposes and the timeous delivery of basic services to the people. If this is allowed to happen through the infiltration of political parties, the inequality gap will continuously widen. The plague of corruption is a known supreme element in economic underperformance and a major obstacle to poverty alleviation and development.

It is, therefore, necessary to entrench the culture of transparency in our multi-party political system by requiring political parties to disclose the identities of their private funders. This information is crucial in our fight against corruption and maladministration. It is also important in our quest to entrench and deepen the culture of transparency, accountability, and ethical leadership. The Political Party funding Act does demonstrate that we are a nation that abhors corruption, a nation that values ethical leadership, transparency, and clean governance. This Act will play a role in ensuring that political parties do not forgo their constitutional obligations, or undermine our sovereignty in favour of their benefactors. Lifting the veil of secrecy through the Political Party Funding Act is not only essential for the proper and informed exercise of the right to vote, but it is also essential in the fight against the plague of corruption. It is correct that: "Secrecy enables corruption and conduces more to a disposition by politicians that is favourable towards those who funded them privately once elected into public office."[49] It is therefore thrilling to note that we now have legislation that addresses the scourge of corruption from taking root through the funding of political parties. It is encouraging that we now have legislation that lifts the secrecy veil on the private funding of political parties, legislation that gives practical expression to the constitutional values of transparency and accountability.

Although this important legislation may have its shortcomings, it is a step in the right direction. This Act must be firmly enforced, and those who may act contrary to its prescripts must face severe consequences for their transgressions.

44 Preamble to the Political Party Funding Act
45 Preamble to the Constitution.
46 Section 9 of the Political Party Funding Act
47 See the preamble to the Political Party Funding Act 6 of 2018
48 Id, n 46

49 *My Vote Counts 2,* para 45.

BLA-Legal Education Centre - Training Programmes

By Andisiwe Sigonyela: Director-BLA-LEC

The following training programmes have been conducted from September 2020 to February 2021.

Commercial Law Programme (CLP) - 2020

PROGRAMME	DATE	AREA	NUMBER OF DELEGATES
Taxation and utilisation of Trust in Estate Planning	19 September 2020	Durban	19 legal practitioners
Contract Drafting and Negotiation Skills	28 November 2020	Johannesburg	15 legal practitioners

Continuing Legal Education (CLE) - 2020

PROGRAMME	DATE	AREA	NUMBER OF DELEGATES
Medical Negligence	19 September 2020	Johannesburg	26 legal practitioners
Bills of Cost	17 October 2020	Mthatha	18 legal practitioners
Bills of Cost	28 November 2020	Virtual	22 legal practitioners

Trial Advocacy Training (Schools for Legal Practice) - 2020

PLT SCHOOL	DATE	NUMBER OF DELEGATES
Johannesburg School for Legal Practice (day)	31 August – 04 September 2020	34 candidate legal practitioners
East London School for Legal Practice (day class)	12 – 16 October 2020	36 candidate legal practitioners
Johannesburg School for Legal Practice (night class)	12 – 16 October 2020	37 candidate legal practitioners
East London School for Legal Practice (night class)	19 – 23 October 2020	33 candidate legal practitioners
Pretoria School for Legal Practice (day class)	03 – 07 February 2020	29 candidate legal practitioners
Bloemfontein School for Legal Practice (night)	02 – 06 November 2020	27 candidate legal practitioners
Durban School for Legal Practice (night)	09 – 13 November 2020	35 candidate legal practitioners
Polokwane School for Legal Practice (day)	16 – 20 November 2020	35 candidate legal practitioners
Polokwane School for Legal Practice (night)	16 – 20 November 2020	45 candidate legal practitioners
Pretoria School for Legal Practice (night)	23 – 27 November 2020	30 candidate legal practitioners

Trial Advocacy Training (Schools for Legal Practice) - 2020 (continued)

PLT SCHOOL	DATE	NUMBER OF DELEGATES
Port Elizabeth School for Legal Practice (night)	23 – 27 November 2020	14 candidate legal practitioners
Durban School for Legal Practice (night)	23 – 27 November 2020	25 candidate legal practitioners
Cape Town School for Legal Practice (day)	07 – 08 December 2020	43 candidate legal practitioners
Cape Town School for Legal Practice (day)	07 December 2020	47 candidate legal practitioners

Trial Advocacy Training - Legal Practitioners

TRAINING	DATE	AREA	NUMBER OF DELEGATES
Advanced Trial Advocacy Training	21 – 26 September 2020	Johannesburg	64 legal practitioners
Advanced Trial Advocacy Training	30 November – 05 December 2020	Port Elizabeth	43 legal practitioners
Advanced Trial Advocacy Training	14 –19 December 2020	Polokwane	82 legal practitioners

Trial Advocacy Training (Schools for Legal Practice) – 2021

PLT SCHOOL	DATE	NUMBER OF DELEGATES
Unisa Cape Town School for Legal Practice (night class)	18 – 22 January 2021	11 candidate legal practitioners
Unisa Durban School for Legal Practice (night class)	18 – 22 January 2021	16 candidate legal practitioners
Unisa Johannesburg School for Legal Practice (night class)	18 – 22 January 2021	29 candidate legal practitioners
Unisa Mthatha School for Legal Practice (night class)	18 – 22 January 2021	06 candidate legal practitioners
Unisa Pretoria School for Legal Practice (night class)	18 – 22 January 2021	60 candidate legal practitioners
Cape Town School for Legal Practice (day)	25 – 27 January 2021	31 candidate legal practitioners
Cape Town School for Legal Practice (night)	25 – 28 January 2021	40 candidate legal practitioners

Trial Advocacy Training - Legal Practitioners

TRAINING	DATE	AREA	NUMBER OF DELEGATES
Advanced Trial Advocacy Training	01 -06 February 2021	Margate	23 legal practitioners

History of the BLA 6th series: When did the BLA go national?

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

The question may legitimately be asked about the BLA: Having been started in Johannesburg in 1977, when did it become a national organisation? This assumes that it started as a regional and then later became national. The subject requires patience, because not even the best informed of its old members, including the writer, will provide a simple definitive answer, like a date. The true history of BLA defies the assumption in the question.

The BLA found itself confronting this question, ten years after its formation, at the birth of its closest sister organisation, NADEL (the National Democratic Lawyers Association).

Meetings and the executive

As we have seen, the first meeting that eventually led to the formation of the BLA was held in Johannesburg. It was attended by attorneys practising in Johannesburg and Pretoria. As time went on meetings were held also in Pretoria with the two cities initially forming the hub of the organisation and interchanging to serve as venues. As more lawyers from areas outside the initial hub joined, the association venues for the meetings expanded and to the new areas where its new members emerged. The organisation was member driven and member directed. It became what its ordinary members shaped it to be.

The governance of the organisation lay in the hands of an executive committee that was elected at an annual general meeting of all members. The initial executive committee consisted of a chairperson, vice-chairperson, secretary and treasurer. From time to time, additional members of the executive were elected into the executive committee. The very first executive committee had a total of nine members. The first chairperson of the BLA was Godfrey Mokgonane Pitje (GM), the first secretary was "Ernest" Dikgang Moseneke, whilst the first treasurer was Tholi Vilakazi. Dimpheletse Seun Stanley Moshidi followed Dikgang Moseneke in the early years of the association as the next secretary. When that started the position of secretary was first split into minute secretary (which Dikgang occupied till he stepped down) and correspondence secretary (held by Dimpheletse). GM Pitje and DSS Moshidi were re-elected into their respective positions for a number of years, presumably because they volunteered and did a good job of their respective portfolios and members were thus satisfied with their service.

Initially meetings were held quite frequently, at times within a month of each other. For instance, meetings which are now formally referred to as general meetings were in 1979 held on 22 July, 26 August, 23 September and 28 October 1979. Similarly, in 1984 general meetings were held on 28 April and 27 May and so forth. Members of the executive who were assigned functions to execute at these general meetings had to work very hard and fast in order to keep pace with and report progress in the next general meeting. After a while, however, a practice developed where four ordinary general meetings were held each year, that is quarterly. This was only late in the second half of the 1980s. Quarterly general meetings

in due course came to be regulated by the constitution. In addition to these ordinary meetings, special general meetings were also held from time to time as the need arose. The last general meeting of the year was the annual general meeting (AGM) where elections of office bearers were conducted. Much later on, changes were introduced and the elections were held every second year. The number of executive committee meetings increased with the reduction in the number of general meetings.

There was initially rarely ever a contestation for positions. In an AGM, candidates for election to the executive committee were nominated from the floor; each nomination had to be seconded; and if the nominee did not decline then the nomination was taken to have been accepted and thus stood. Voting was conducted only in instances where there was more than one nominee for a position. Voting would then take place by a show of hands. Once elected into office, members of the executive would meet amongst themselves, often immediately after the AGM, to elect office bearers. Even in this meeting, there was hardly ever a contestation for positions. Serving in the executive or in a particular position was less of an honour. It was mostly a heavy duty for the service of the association.

> **“There were no privileges attached to the holding of an office, other than the incidental respect and recognition from colleagues.”**

There were no privileges attached to the holding of an office, other than the incidental respect and recognition from colleagues. Duties were numerous. Members had to pay their own way to meetings including for accommodation where required. Membership fees were then barely enough to cover stationery costs. So, in the end, the secretary bore most costs of the organisation out of their own funds. Serving in the executive committee implied increased expenses on one’s own law firm. There were no stipends whatsoever for executive committee members. It was public duty simple and perfect. Recognition from colleagues was the only reward and that came naturally only where membership was satisfied with the service. A motion of appreciation at a meeting was the only way in which appreciation would be expressed. Absolutely no material benefits. In addition to the financial burden, which the shouldered members of the executive also had to an annual membership like all other members. The silent expectation was in fact that they would pay the dues to the organisation in order to lead from the front.

The executive committee met between general meetings and was in charge of the affairs of the association between general meetings. A general meeting of the association was from onset the supreme decision-making body and the executive derived its authority from ordinary members of the association expressed at a general meeting. Ordinary members owned the association through general meetings and thus its decisions were binding on the executive.

As membership of the organisation increased, the BLA could virtually hold its meetings anywhere in South Africa where it had a member that could “host”. The BLA always regarded itself as a national organisation.

Going national, regional and forming International relations

In due course, already in the early 1980’s, the BLA allowed members in the far-flung areas to form branches. Branches could draft and adopt their own constitutions and take decisions at branch level, which however, had to comply with the constitution and principles formulated by the mother body (national level) in a general meeting. The branch executives had to report at the national general meetings of the mother body. Already at those early stages, the mother body had attributes of a national structure and was by and large regarded as such, though the footprint of the BLA was limited to some regions of the country.

Although its first meetings were held mainly in Johannesburg and Pretoria, the outlook of the association and its agenda was a national one. It is in fact correct to state that the BLA started off as a national body, which in due course allowed and recognised the formation of regional structures or branches. The question of whether it was a national or regional body simply did not arise at first. Though formed initially in Johannesburg, its focus and concerns and structures were always national in character.

By the beginning of 1981 the membership of the BLA was increasing at a fast rate. Talks started coming up about some kind of regional governance for out-flung areas. It was at a general meeting of the association held at Holiday Inn, Jan Smuts (now Southern Sun, International Hotel, OR Tambo International Airport) on 12 April 1981, that a first formal suggestion as made to reflect something towards that end. This came as a decision to form “circles” for the BLA. The idea was discussed but there was no formal resolution on the point at that meeting. The concept of “circles” reflected regional bodies of the statutory law societies, which had very little powers and generally functioned subject to some central structure. BLA members were also members of the statutory law societies and thus aware of circles. It is fair to suggest that the thinking about circles for the growing BLA was inspired by how those structures functioned in the statutory law societies, where every BLA member was by law a member.

The BLA of that time thus clearly saw itself as a unitary structure. In other words, circles were something like a regional structure or local body that was fully accountable to and subject to the mother body. By then meetings were regularly held outside the areas of Johannesburg and Pretoria. As we have seen, although the first meeting of the Black Attorneys Discussion Group (BADG) was held in Johannesburg in 1977, the first constitution was adopted at Seshego Hotel, in Seshego Township, near Polokwane, in November 1979 and the first executive committee was elected at a general meeting in Pretoria. What further evidence would any detractor require to accept that it was a national organisation from the beginning?

The suggestion and discussion around formation of circles is recorded as follows in the meeting of 12 April 1981:

> "Circles:
> Suggestion was made that it would be in the interest of the association that the activities of the association be regionalised. Mr Mojapelo suggested that the membership had not grown so large as to make it difficult to operate centrally. And therefore, there is no immediate need for regional administration. It was suggested that the matter be put on the agenda for the next meeting. Finally, Mr Mojapelo suggested that the annual general meetings have a fixed venue being Johannesburg or Pretoria and that (other) meetings be held quarterly at (other) venues to be decided by the executive. Suggestion was generally accepted."

An issue, which the reader will find to be of some interest, though having nothing to do with circles, is that shortly before the 12 April 1981 meeting a senior member of the BLA had been expelled from the then "independent" homeland of Bophuthatswana. He was not to put foot in that homeland again. This had implications for his ability to render services to his clients in that area, or to those of his clients in the broader South Africa, whose mandate required him to enter the area that was then known as Bophuthatswana. Although there were no formal boarders between Bophuthatswana and South Africa, the practical implications were that he could be arrested if he was found in the area. The BLA issued a press statement in support of its members. The issue was common knowledge amongst BLA members of that time. Although the writer could not lay a hand on the actual statement issued, evidence of that fact appears in item 4 of the minutes of 12 April 1981 under Matters Arising where Mr Pat Mathethebale Machaka raised the point that led to a short discussion. The minutes on the point reads:

> "Mr Machaka expressed concern over the ambit of the statement, which was released to the press relating to the expulsion of Mr GSS Maluleke out of Bophuthatswana. Mr Machaka went on to say that the statement included matters on which the meeting had not resolved. The secretary read out a newspaper cutting of the press statement and it was (then) generally agreed that the additional things found in the statement were not specifically attributed to the Black Lawyers Association nor were they quoted as part of the Black Lawyers Association statement."

"The concept of "circles" reflected regional bodies of the statutory law societies, which had very little powers and generally functioned subject to some central structure."

This is just a chilling reminder of how some homeland leaders at the time exercised their authority, once they were given the so-called independence. The BLA never recognised the independence of the homelands although it at all times accepted membership of lawyers from those territories. The so-called expulsion of their member, however, had direct implications for his ability to practise his profession and of the right of members of the public in that area to engage the services of Mr George Maluleke. The BLA thus condemned the expulsion.

The next time that the BLA considered the decentralisation of its leadership or representation in various regions to reflect correctly its national character was two years later at the Annual General meeting held on 23 October 1983 at Holiday Inn, Pietersburg (now Polokwane). It was still under the leadership of GM Pitje as the "chairman", JN Madikizela as "vice-chairman", ED Moseneke as secretary, DSS Moshidi as correspondence secretary and Tholi Vilakazi as treasurer. The additional executive members were NM Phosa, GSS Maluleke and DK Nkadimeng. The issue was this time raised by Lekgolo Richard Ramodipa, the first ever member of the BLA from Potgietersrus (now Mokopane), who was by then not a member of the executive committee, but, like the writer, an ordinary member of the association. He, however, at that same meeting, was elected into the executive committee and later rose to become the treasurer of the association. At the elections that were held at the annual general meeting of that day almost all the old executive committee members, were not re-elected into office. Only two members of the outgoing executive were re-elected, namely, GM Pitje and DK Nkadimeng, who to my recollection, became chairman and vice-chairman respectively. The new members that were elected that day to join Pitje and Nkadimeng were S Monyatsi, BM Ngoepe, AM Makume, TH Musi, LR Ramodipa, PM Mojapelo and RE Monama. However, as a result of certain amendments to the constitution that had to be made, the executive elected on 23 October 1983 had to resign en bloc on 27 November 1983 and fresh elections were held under the amended constitution.

By 23 October 1983, the BLA was clearly already flexing its muscle and character as a national association.

In item 9 of the minutes, it is reflected that Lekgolo Ramodipa "presented an oral report on the Zimbabwe trip undertaken by Messrs Pitje, Moshidi, Monama and Ramodipa at their own financial expense during September 1983". The four were by then already respected senior members of the association, including its long standing national chairman (GM) and correspondence secretary (DSSM). Contact had been made with black lawyers in Zimbabwe about which BLA was generally happy. Although they attended without express mandate of the association, it was clear that if they had sought the mandate of the association, they would have received it. Costs, is a different issue as Ramodipa soon learnt. As appeared later in the same meeting, the general membership was appreciative of these exploratory over the boarder initiatives and interactions. However, when Ramodipa took advantage of the favourable response and suggested that "his team be refunded by the BLA", the enthusiasm of the BLA did not go that far.

> **"By 23 October 1983, the BLA was clearly already flexing its muscle and character as a national association."**

Firstly, the funds of the association were quite limited by then; and it was not unheard of for senior members to incur personal expenses to advance the interests of the association. This is how the BLA was formed and grew in those formative years. After all its individual members had more money than the association, which depended entirely on subscriptions from members for its income. Secondly, the BLA was financially prudent. However, senior you may be you do not incur personal expenses and hope it will retrospectively approve the expenditure as its own. The funding was not approved with minutes recording simply that "this issue was left unresolved". However, "Mr Ramodipa was to render a written report on this trip to Zimbabwe".

Under item 14 some "External Relations" for the association were considered and the following is recorded:

"(i) ICJ - we should affiliate;
(ii) NBA - we should keep link;
(iii) Zimbabwe – we should invite the Chief Justice of Zimbabwe;
(vi) Lesotho – we should accept invitation and attend."

There could have been no doubt that the BLA saw itself then as a national association. It was considering its international relations carefully on the basis of its Policy Guidelines, which it was discussing developing.

On 27 November 1983, following amendments to the constitution of the BLA and the resignation en bloc of the executive elected the month before, those who resigned were again re-elected except for TH Musi who fell off and was replaced by ED Moseneke. For the writer, the 1983 elections marked the beginning of a 12-year continuous service on the executive of the BLA, which included a few terms on the secretariat and two terms as national president. Prior to November 1983, NM Phosa and the writer interchanged in taking positions on the executive committee of BLA so that our partnership, which carried expenses, would sponsor only one executive member instead of two. But that was the end of the last term of NMP on the executive of the BLA as shortly thereafter he went into exile. The firm he left behind never stopped sponsoring a member on the executive till after the demise of minority rule when the writer stepped down as national president in February 1995. Back to the general meeting of 23 November 1983.

The relevant part of the minutes records the issue raised as follows:

"Regionalisation: Mr Ramodipa suggested that the Executive Committee of the BLA be regionalised. Mr Mojapelo's suggestion that the new Executive Committee appoints representatives in various areas to represent the interests of the BLA effectively was accepted."

This time the idea was raised and accepted. There was no opposition. Only a suggestion as to how the agenda to project and reflect the national and regional character of the association was to be implemented.

The fact the two people who spoke on the issue of national character of the association were immediately elected onto the executive must reflect how popular the idea was at that time.

Two other topics that were raised at the particular general meeting demonstrate how the internal agenda of the association already had a high national flavour.

Firstly, the reader will recall that the year 1983, is known in the national politics of the country as the year in which the white only parliament some sort of power sharing deal by introducing two more lower houses of parliament, the House of Representatives for the so-called coloured people and the House of Delegates for the South African Indians. Effectively the national assembly was expanded by the addition of two more parallel assemblies one for each of what was coloureds and Indians. It suited the Apartheid agenda to see these as separate nations endowed with their own assemblies.

The move was roundly rejected by all liberation movements and progressive organisations because it still excluded the African indigenous population from representation in national politics. Together with the Bantustan system it was nothing but an extension of the national party divide and rule tactics. It would not escape the attention of this AGM that was held a week before a white only national referendum sought an endorsement of the deal from white

voters. Were they prepared to share power in the lowers house with the new "delegates" and "representatives"?

This is how the minutes of the meeting records how Pat Mathethebale Machaka raised the issue under General as item 20 (v) and how BLA reflected thereon:
"Referendum on 2nd November 1983: Mr Machaka called for the official stand-point of the BLA on the issue. Mr Mojapelo suggested that it was important for BLA to pronounce its official stand point on this issue that affects Blacks by excluding them from the new constitution. The issue was left unresolved by the meeting."

The second issue of some great national importance appears as item 20 (iii) raised by Dabula Z Thantsi:

> "Mr Thantsi raised plight of a colleague outside the RSA who wished to return. No mention of names was made and matter [was] left in the balance."

This issue concerned a possible return of a colleague from exile. There are obvious reasons why further recording about the issue would have been left out of the minutes for the benefit of both of the individual and of the continued safe survival of BLA as an organisation under the conditions that prevailed. A decision was taken to assist in some way but that decision could not be minuted as it would have exposed the actors to prosecution for contravening the Apartheid law. Many decisions that would have exposed the organisation or its members to criminal prosecution or harassment by security police were simply not minuted.

What is clear, however, from the two issues is that the BLA was engaging itself with issues of national importance already. The question of the organisation restructuring itself to reflect the national character was one of form. Gradually the organisation was warming up to the formalisation of its structure to reflect its national character. The only issue remaining was representation in parts of the country where it had no presence and where there were like minded lawyers.

When the issue of BLA going national or projecting its already national character was next raised in the general meeting of the BLA held at Riverside Holiday Inn, Vanderbijlpark on 22 July 1984, the focus was on implementation. The question whether the BLA should go national or not was no more open for discussion. By then, and as more and more members joined it, there were increasing sentiment that the BLA had to formally pronounce that it was a national body. Those who had been with the organisation for a long time held the view and argued that the BLA was already a national organisation as it could be joined by any lawyer who ascribed to its aims, objectives and constitution and was prepared to subject himself or herself to its policies and decisions. Sentiments also increased that the BLA should approach lawyers, particularly black lawyers, in areas where it was not represented, to promote and pilot the formation of a national organisation of black lawyers that could stand as an alternative to the statutory law societies and Bar council that were seen as collaborators with the Apartheid government.

"Sentiments also increased that the BLA should approach lawyers, particularly black lawyers, in areas where it was not represented, to promote and pilot the formation of a national organisation of black lawyers that could stand as an alternative to the statutory law societies and Bar council that were seen as collaborators with the Apartheid government."

Indeed, there were in fact lawyers in Natal, Eastern Cape and possibly Cape Town, who though not happy with the statutory governing structures had not joined the BLA. They were not opposed to it but had not joined either because of distance from the hub, or did not have enough information about it, waited invitation to join or had not done so for some other reasons. It behoved the BLA in its quest to project itself nationally and to reach out to them. There had in fact earlier been other organisations such as Democratic Lawyers Organisation (DLO)/ Democratic Lawyers Congress (DLC) based mainly in the Eastern Cape or Democratic Lawyers Association (DLA) that operated for a while in those areas but were not active at the time. The BLA was at the time either the only active body of lawyers or the strongest outside the statutory ones that was active and was keen to bring into its fold and make common course with as many likeminded lawyers as possible.

The BLA was ready to project itself nationally by then. It embraced the duty to extend a hand to other lawyers in that process. It had resolved to do that more than once already. It was to time for action; and now a multiprong strategy was adopted.

The minutes of the July 1984 Vanderbijlpark meeting records the sentiment and approach in paragraph 12.2:

> "Mr Moseneke suggested that the BLA embark on a project to execute its previous decision to go national. Various suggestions were made including that various Black Lawyers be invited to the opening of the Black Lawyers Association Legal Education Centre (which had just been formed) where an appeal would be made for people to join the BLA; that individual members of the BLA contact their colleagues in other provinces; that the next BLA general meeting in October 1984 be held in Durban

> and invitations be extended to black lawyers in other provinces to attend the meeting; the executive was also urged to continue with the campaign for membership on national level. All these suggestions were carried without counter suggestions."

As the reader will appreciate, the suggestions that were put forward represented the view that the BLA was already a national organisation in character and that it needed to project its national image. As many black lawyers as possible needed to be invited to join the association. The association was prepared to celebrate the opening of its prestigious Legal Education Centre with them and in a sense share the spirit of being co-owners of the Centre through the BLA. Membership recruitment drive had to be accelerated formally and informally and on a national scale and individual members were urged to use their contacts to recruit more members. The association needed to be seen by all as a national association and a recruitment drive had to be accelerated. In order to project this the next general meeting would be held in Durban, Natal. This would have taken the BLA as a body to three of the then four provinces of South Africa, namely Transvaal, Orange Free State and Natal, by holding meetings there. The next province would have been the Cape Province. A visible and tangible program to show the association as a national structure.

> **"So many young lawyers opted to ignore the Group Areas Act and its permit system, as long as they could find reasonable premises from where they could practice."**

Minutes from this meeting again, as from many others, show a divergent and broad range of issues that formed part of the agenda that confirmed the BLA as a national organisation and not restricted to particular districts within South Africa. I will restrict myself to only two or three issues on the agenda to demonstrate the point. The one concerned an issue around the notorious Group Areas Act 41 of 1950, the second the request for endorsement of a publication and the other was an invitation from and international organisation of lawyers. Without delving deep into any of these issues, we shall keep to the minutes of the meeting.

Under correspondence, at the meeting BLA dealt with a letter from attorneys Simelane & Simelane of Durban dated 9 July 1984 concerning their application for premises in the city. The letter came to the BLA because Mr Simelane from Durban was by then already a member of the BLA as were other lawyers from that city and province. The minutes of discussions on the letter and its contents are a bit long but they will be quoted in full because of the significance of the issue and its centrality to the life of black lawyers under Apartheid South Africa. The minutes show that Mr Simelane was given an opportunity and addressed the general meeting on the issue. Under item 11.2.1 of the minutes it is recorded:

> "He requested the BLA to formulate views on his application for a permit and state its support to lend weight to the application. The request engendered discussions of similar plight suffered by various members in various centres. It was agreed that BLA make representations directly to the Minister for Co-operation and Development calling for the total scrapping of the system by which black lawyers have to obtain permits in order to practise in the so-called white areas. The law society should be informed about these efforts and if the response of the ministry is not satisfactory the BLA should, if pushed to it, embark on a public campaign to expose the injustice.
>
> Mr Moshidi informed the house of a 1978 letter, which states that black lawyers should not be required to obtain permits. The contents of the letter appear to have become obsolete as members are still required to obtain permits. It was decided that the letter be followed up."

In response to Mr Simelane's request Mr Mojapelo moved and Mr Moseneke seconded that a letter be addressed to the Department of Community Development along the following lines:

> The Black Lawyers Association records that the need for Black Lawyers to obtain permits to practise in the so-called White Areas constitutes an unnecessary and unduly discriminatory huddle and stumbling block in their ability to render professional services for their clients effectively. We would thus fundamentally call for a total scrapping of this practice and attendant legislation.
> Having, however, need that an application by attorney Simelane of Durban obtain a permit as an ad hoc measure under present legislation, the BLA lends its total and unqualified support to the granting of such permit as urgently as practicable.

There being no counter the motion was unanimously carried and the Secretary was mandated to write the letter.
The reader needs to understand the tenuous situation in which the BLA was at the time and which informed the tactics behind the decision to write as they decided. As a matter of law, as pointed out earlier, black lawyers were not allowed the occupy offices in town without a permit in terms of the Group Areas Act. It was impractical for black attorneys to effectively practise law from any area other than the so-called white areas, namely the town, in the language of today. This is because the so-called black areas in urban areas were in fact residential settlements with no commercial or business activity except for a few grocery stores. Those areas were thus largely deserted during business hours and only became alive when residents came back home after a day's work in white areas or after 13h00 on Saturdays when most stores and businesses had

closed for the weekend. There were other reasons such as the need to practise in proximity with other lawyers that made it totally impractical to practice from black townships.
Black lawyers thus had to practise in the so-called white areas where they were unwanted in terms of the Group Areas Act unless the government granted a particular lawyer the permit to do so. A few older attorneys had applied for and been granted such a permit. Many, however, practised without it and risked being criminally charged and prosecuted, either because they had applied and had not been granted the permit or had decided defiantly to ignore the system as long as they could find a landlord, inevitably white, who would lease them premises in town. The BLA was totally opposed to the Group Areas Act and were daily protesting against it. An increasing number of younger black attorneys simply took up offices and continued to practice. The rationale was that they were qualified to practise law and that was the only way that they could earn a living. The law that they had learnt, and were to practise, was one in which neither they nor their communities had had a hand in making. It was the white man's law and an important instrument in maintaining relative peace and calm in society. If the white government would not even allow them to practise law, then let them persecute black lawyers just as they persecuted the rest of the black community. In any case how was the white only government going to maintain law and order if it would not even make it possible for the governed black community to operate and practise within such laws.

> **"The BLA...was formulating its policy position on a number of issues... It was prepared to be engaged fully in any program that was relevant to and would advance the interest of black people and their liberation but its policies were constantly refined to make sure that it was not abused."**

There was a realisation therefore that the system was not only unjust and unreasonable but also that it was unworkable. There was a realisation too that the Apartheid legal system, including the Group Areas Act did not meet the international human rights standard and were constantly being condemned internationally. So many young lawyers opted to ignore the Group Areas Act and its permit system, as long as they could find reasonable premises from where they could practice. They silently dared the Apartheid government to prosecute them and thus provide an opportunity to expose the inherent injustice in the courts. This is a strategy that many, including yours faithfully adopted. I opened offices in Nelspruit on 01 November 1980 and never applied for Group Areas permit and occupied premises without it and ignored threat to be prosecuted. In fact, awaited it.

So, when Mr Simelane from Durban seriously sought BLA support in his application for the permit, BLA general meeting was torn between its defiant stand and the need to support members who sought its support. That explains the stand taken with regard to the letter of support for Mr Simelane, which was to be sent to the Minister.

An item in the minutes show the second correspondence for consideration was a letter –

> "from Skotaville Publishers per Mr Mothobi Motoutse dated 19 July 1984. The BLA decided that the pledge be given as requested to enable the publication of the book, 'The Theory and Practice of Black Resistance to Apartheid' based on a doctoral thesis of Dr Mokgethi Motlhabi at the University of Chicago. The pledge was coupled with the request that the BLA be written about in the publication."

In the same meeting under General item 12.6 reads:

> "Mr Makume informed the house that there was an invitation from the International Commission of Jurists (ICJ) to send a representative to a meeting in Nigeria in August 1984 and the suggestion for the BLA to send a representative, if possible, was accepted."

The character and discussions within the BLA were not only at a national level, but the organisation was already forging international relations with bodies that were aligned to the realisation of its objectives. This was long before any talks about the establishment of its sister organisation, Nadel, which took place in the second half of the 1980's. One wonders whether BLA members of today are aware of the early relationship with the ICJ going back to 1984. One wonders what has happened to that relationship over time. The BLA was by then, as its records and minutes show, already co-operating at national level with bodies like the Azanian People's Organization (Azapo), the Congress of South African Trade Unions (COSATU) and the United Democratic Front (UDF). It was also already internally discussing its policy position and possible co-operation with bodies like the South African Council of Churches (SACC) and the South African Catholic Bishops Conference (SACBC) emanating from either correspondence with or internal initiatives concerning such co-operation. The program for going national was therefore a formality to confirm and project already existing status of the BLA.

In regard to the development and growth of the BLA, it was at this meeting that the organisation acknowledged that the business put from time to time before its general

meetings was just too big to be condensed within a Sunday discussion, despite the increase in the frequency and the early start for such meetings and despite the fact that the executive committee was meeting in between general meetings and disposed of other issues. It was Mr Jake Moloi from the then Orange Free State province who in the July 1984 general meeting, as the minutes record, "suggested that the BLA in future hold its meetings from Saturday afternoons continuing if necessary, on Sunday mornings. He motivated stating that this would mean for the majority of members who open offices on Saturdays sacrificing 4 Saturdays out of 52 Saturdays in a year. Messrs Moshidi and Moseneke simultaneously expressed support for the suggestion. The executive was requested to look into the suggestion".

Those in the executive had started making that sacrifice including the direct personal financial sacrifice much earlier in order to keep the organisation alive and relevant. The sacrifice was made in the broader interest without hesitation. In due course the meeting would start in the mornings on Saturdays increasing the "sacrifice". The need for BLA members to travel long distances for general meetings made the sacrifice inevitable and compelling. Time had been taken from clients and given to the nation. It was a worthwhile compromise that shaped the way BLA meetings are being held and conducted today, more than 35 years later.

With regard to its project of projecting and living up to its image as a national organisation at its general meeting held at Welkom on 30 June 1985, the BLA took a decision to co-operate with COSATU, quite clearly a national organisation. The minutes of the meeting on the issue reflects that: "A letter dated 07 February 1985 from this body was tabled and the meeting resolved that the BLA should co-operate."
The meeting also, typical of the time, dealt with an incident of outright racism committed by a lower court presiding officer against a BLA member. As the minutes record:

> "An incident in which attorney Moloto was called 'Kaffir Prokureur' by the Chief Magistrate of Groblersdal as well as an accompanying affidavit was tabled for discussion. The meeting resolved that a press statement should be released, supporting Mr Moloto and condemning the racist treatment meted out to a colleague. Messrs Tloubatla and Rampai were delegated to prepare the press statement. The Transvaal Law Society should also be approached to find out what has been done."

As will appear from the section or chapter dealing with the relationship between BLA and the statutory law society, this is a BLA general meeting that Mr Stan Treisman, a president of the Transvaal Law Society attended, having invited himself. The complaint had evidently been received by the statutory law society but Treisman did not care to inform the BLA general meeting about what his law society had done about a matter so serious and at the core of Apartheid and that relationship. When he addressed the BLA, he focussed only on the language of the affidavit drawing the ire of some BLA members.

The next general meeting of the association held at Ngwane Valley Inn, Nelspruit on 25 Aug 1985, also found itself dealing with a few matters, which were clearly at a national level, demonstrating the position of BLA at that level. In the chairman's opening remarks he referred, as it had become characteristic, to some of such issues.

At that level he referred to "a letter from Professor Albert Baustin dated June 04, 1985 regarding the proposed conference on the Future Constitution of South Africa – this was read together with a letter from Professor A Thomashausen of Unisa attaching a paper on a similar topic. It was decided that Advocate ED Moseneke and BM Ngoepe and another person to be co-opted by them from amongst the members of BLA be formed into a committee to set the ball rolling in regard to the proposed conference, which has already been accepted in principle by BLA at its previous meeting held at Welkom. The Committee shall have the power to give direction as to the nature and composition of the conference with the power to recommend to the general body of the Black Lawyers Association to opt out of the proposed conference if it should become necessary as a result of the clash on fundamental principles and outlooks of the BLA and the interest of other people involved".

The BLA was by this time already very busy with a multiplicity of issues of national significance and at national level. As evidenced by the type of invitations and correspondence it received it was from time to time called to participate in major discussions on issues at a national level. It was formulating its policy position on a number of issues and had to exercise caution not to be sucked into programs where other people or bodies sought its participation only to raise their own legitimacy and acceptance. It was prepared to be engaged fully in any program that was relevant to and would advance the interest of black people and their liberation but its policies were constantly refined to make sure that it was not abused.

The month of August 1985 was a sad one in the life of black lawyers. On the first day of that month Victoria Nonyamezelo Mxenge (1942 – 1985) was assassinated by agents of security police and her body was mutilated. Four men violently attacked and killed her in the drive way of her home in Umlazi next to Durban. Four years earlier, on 19 November 1981 her husband, Griffiths Mlungisi Mxenge, another prominent political lawyer, was also assassinated in a similar but more brutal manner. It was believed that both died at the hands of the death squad of the Apartheid government. In the case of Griffiths, the killers, five agents of the security forces (Dirk Coetzee, Almond Nofomela, Joe Mamasela, Brian Ngqulunka and David Tshikalanga) ultimately confessed at the TRC (the Truth and Reconciliation Commission) chaired by Arch Bishop Desmond Tutu, to have been his killers.

There was a sad and sombre mood amongst black lawyers in the month of August 1985. People were saddened by the killing of this great black woman lawyer. But somehow the manner in which she was killed brought back in the mind of many the extreme brutality in the killing of her husband. How brutal and callous could the Apartheid and its killing machine be, deciding to wipe off husband and wife in a such cruel and barbaric manner, and at the same time traumatising his children and rendering them orphans within a short time. BLA members came to the meeting of 25 August 1985 in that sombre mood and with heavy hearts. Some of them had in fact attended her funeral. There was a feeling that the nation had to mourn the death of a wife and husband at the same time. The meeting was affected. At the end of his opening remarks for the meeting, the chairperson and founder of the BLA, Godfrey Mokgonane Pitje, himself a stalwart of the liberation movement, called upon another stalwart of the BLA and the liberation movement, to make the necessary announcement and lead the response of the meeting. GM handed the chair temporarily to the younger Dikgang to lead on the issue. The issue must have been heavy to the chairperson too, and thus he needed support at the podium. The recording of the item in the minutes is brief but fully informative:

"At the request of the Chairman, ED Moseneke made some short introductory remarks to the late G Mnxenge and his wife, V Mnxenge and the meeting expressed sympathy with the bereaved and stood up to observe a moment of silence in respect of Mrs Mnxenge.

The word of appreciation was expressed in respect of the members who managed to attend the funeral and the meeting decided that each member and firm contribute an amount of at least R50.00 per member as condolence contribution from BLA."

The brutality and savagery of Apartheid was pulpable in the air. In the years that followed, especially after the fall of Apartheid, black lawyers, democratic formations throughout the country acknowledged their contribution and the supreme prize they paid for many South Africans to be free. In 2006 South Africa as a nation honoured both by awarding to each posthumously the national Order of Luthuli in Silver. The citation for Griffith M Mnxenge aptly records that "he paid the supreme price for defending the rights of the oppressed South Africans to exist in conditions of freedom, justice, peace and democracy".

> **"The national conscience of the BLA as a black organisation under Apartheid was raised to a high pitch in the general meeting of August 1985. That general meeting of the BLA was totally in sync with the conscience and pain of the nation."**

The minutes of the same meeting of 25 August 1985 also record that, "Mr A H Rampai raised and drew attention to the plight of Mrs Winnie Mandela and other Black leaders who are being harassed and suggested that the BLA consider expressing support". This was done. It was also resolved in the same meeting that: "The Centre (BLA – LEC) should inform the public and offer assistance to victims of the state of emergency."

The national conscience of the BLA as a black organisation under Apartheid was raised to a high pitch in the general meeting of August 1985. That general meeting of the BLA was totally in sync with the conscience and pain of the nation. That was the BLA under the stewardship of GM Pitje. Truly national as its minutes and issues it dealt with reflect. However, it had already started a program of going national that metamorphosed into the then upcoming formation of an umbrella national organisation of lawyers, Nadel, which in due course, developed its own rolling force. In three months' time, the new body was bound to be borne despite some concerns and debates that arose now and again in the BLA "national organisation".

At the first general meeting of the following year that was held at the President Hotel, Johannesburg, on 23 February 1986, the outgoing chairperson, Mr GM Pitje, introduced the new executive and the new chair, Mr DK (Donald Kgalaka) Nkadimeng, following the elections that would have taken place at the end of 1985, probably in October 1985. The chair of the BLA was changing hands for the first time since the BADG came together in 1977 to plant the seed of what later became the BLA. My recollections are that GM was then moving or had just moved on to take the position as the first Director of the Centre, which was launched in 1984 following the short term of Sello Monyatsi as the interim Director of the Centre.

At that meeting of February 1986, three main issues that reflected the fast expanding national character of the association were –

(a) the meeting of Inter-Africa Union of Lawyers that had been held in Lusaka, Zambia in November 1985, which BLA delegation had attended, as well as the coming conference of the same body that was to be held from 17 to 21 March 1986 – which BLA urged its members to attend; and

(b) the issue of Mr Nelson Mandela, as a lawyer in detention – BLA was urged to take a stand, as well as support for the Release Mandela Release Committee; and the national unrest that prevailed in the country and how BLA was to respond.

On the subject of the Inter Africa Union of Lawyers, item 8 of the minutes of the meeting reflect as follows:

> "Mr Nkadimeng reported on the meeting attended by the BLA delegation in Lusaka recently in November 1985 where the General Secretary of Inter Africa Union of Lawyers was met. Mr Pitje read a letter received from this Union, which invited (BLA) members to a conference starting from 17 March 1986 to the 21 March 1986. The letter was dated the 6 February from Advocate S Amos Wako in Nairobi. Members were urged to attend if possible and those interested should contact the BLA Centre."

On Mr Mandela, item 16 of the same minutes read:

> "Mr Mhinga introduces the position of Mr Mandela and the Release Mandela Committee, that Mandela was a colleague and the meeting was urged to take a stand on his release or detention. Mr Mhinga was asked to formulate ideas and specific proposals."

The meeting also dealt with the wide spread political unrest in the country at the time and strategised on how BLA and its members could be involved and assist the new executive. The political situation in the whole of South Africa was very tense with various segments of the community embarking on protest action. The BLA was concerned and affected as an organisation and through its membership as part of the oppressed community. The BLA had discussed the situation in several of its meetings and there was a strong feeling that for maximum effectiveness, the actions of BLA members needed to be coordinated. Whilst virtually every BLA member spoke on this point, Mr DK Nkadimeng was particularly outspoken and would from time to time passionately urge us to agree on a strategy. He had previously been mandated to prepare a report with specific suggestions. He, therefore, led discussions on the point. The unrest situation in the country was item 17 on the agenda of the meeting and the minutes sums out how the issue was dealt with:

> "Mr Nkadimeng refers to the current unrest conditions in Black areas and the Republic of South Africa as a whole. The following suggestions were made:
>
> - The BLA should take the lead and not remain silent.
> - The BLA should compile a report on the unrest situation and keep the data;
> - The BLA should defend (legally) unrest victims and use the memoranda prepared by Mr Nkadimeng on the topic;
> - The BLA should establish a revolving fund to pay bail for accused;
> - Members who are available to assist in the BLA Alexander (Law) Clinic should contact the Centre;
> - Mr Kgaka should prepare a written report on the unrest in the Vaal Triangle."

These suggestions came from various members during discussions of the item and were all accepted by the meeting without opposition. They are in a sense a synthesis of an agreed strategy for action. There was a particular focus on Alexander Township near Johannesburg, which at the time was a hot spot of unrest. The BLA had established a law clinic in that township and the Legal Education Centre was co-ordinating the involvement of BLA members in rendering assistance *pro bono* to community members who were arrested or otherwise victimised in the course of unrest. Similarly, the actions of the Apartheid security operators were heightened in those areas. The Vereeniging – Vandebijlpark area was also volatile and security police action also engulfed BLA members. The most senior BLA member in the Vaal Triangle Area was Michael Kgaka. The BLA as an organisation had to rally to assist the community as well at its own members that were affected. They (the members) were after all part of the community and could therefore not remain neutral. Item 18 of minutes focussed on Mr Kgaka. Arising from his involvement as an attorney, the police had targeted him. When they could not pin a case on him, they had served a subpoena on him to testify against his former clients and acquittances. He in turn brought the issue to the BLA through its senior members. Again, as the minutes reflect:

> "Mr Moshidi reports on the plight of colleague Michael Kgaka who was recently subpoenaed as a State Witness in the Delmas Trial. Advocate (Legwai) Pitje offered to accompany Mr Kgaka to the Delmas Trial on a *pro amico* basis. Mr Khosa (who was then employed at the Centre) mentioned that funds were available from the sponsors for such instances. Advocate Pitje also refers to a judgment of Ackerman J, which could assist in such cases. Mr Kgaka was represented by attorney Tloubatla (another BLA member) and suggestions were made that representations should be made to the Attorney-General (an equivalent of present day Director of Prosecutions) but guard against interference with State Witnesses."

The colleague therefore had availed to him with the support of the BLA, an attorney and counsel (both from BLA), possible funding through the BLA-Legal Education Centre and ideas from ordinary BLA members.

The question as to when did BLA become national since its formation, is not an easy one to answer. Some may say it was national from the word go and will have strong argument. Others will counter forcefully that it did at one stage discuss going national and therefore it would not have been national before that. Others will argue with equal force that it was a gradual and seamless development on which no one can fix a date when the national character was reached. Providing a definitive answer was not the object of this chapter. The commitment is to tell you the reader what happened. And you be the judge.

The Whitewash of the South African Laws and Regulations

By Sipho Mpho Moneoang

The Republic of South Africa has a vast number of laws and regulations, which purport to protect all South Africans, but in essence the opposite is seen in the implementation and application of these laws by law enforcement officers. For purposes of our topic we will only deal with a few of these laws which were immediately observable amid the National State of Disaster proclaimed due to outbreak of the Corona Virus (COVID-19).

Photo: Siphiwe Sibeko / Reuters / aljazeera.com

"There can never be peace and tranquility in a nation as long as the system of administration of justice is not of an acceptable standard….expressions like all persons being equal in the eyes of the law have come to mean equality before the law if you can afford it. There is, therefore, justice only for the very rich". These are the words of Don Nkadimeng over 3 decades ago.[1] These words are still relevant to date more so, the black Government through its legislature has ensured to enact laws, which purport equal treatment and equal opportunities.[2] However, in practice they favour the rich and the middle-class and are less favourable to the poor and downtrodden. This two distinct groups of people can be categorised as the "haves" and the "have-nots".

It is the "haves" who eventually find pleasure in the laws and regulations and not the "have-nots", who only find hostility in the enforcement of these laws. The haves who can afford and who are predominantly rich are primarily white people, at least a large portion of rich people in South Africa are white people. While the have-nots comprise of black people, the majority of which generally can afford only *pro bono* legal services in the sense that they can only manage the transportation costs locally around their respective communities. There are many laws in the Republic, which purport such treatment but for purposes of this paper we will be looking at section 9 of the Constitution, which provides for equality, and section 21, which provides for the freedom of movement and residence. We will also look at the current famous law, which is the Disaster Management Act 57 of 2002 (DMA). With regard to the regulations, however, we will mainly focus on the regulations promulgated for purposes of the DMA.

> **"It is the 'haves' who eventually find pleasure in the laws and regulations and not the 'have-nots', who only find hostility in the enforcement of these laws."**

The practicality of this "whitewash of the South African laws and regulations" was seen soon after the Corona Virus outbreak (COVID 19 Pandemic) presented itself in the Republic. Following the rise of this virus, President Cyril Ramaphosa announced that South Africa was in a State of Disaster, which saw the limitations of certain rights and freedoms within the country, one such right contained in chapter 2 of the Constitution is that enclosed in section 21(1) of the Constitution, which is the right to freedom of movement. This declaration meant the direct foundation of a nationwide lock-down, which was to commence immediately on midnight the 26 March 2020. This constitutional right[3] is primarily referred to because it is the most essential right to the poor black citizens of South Africa, its limitation also finds itself to be the direct genesis of acts of victimisation by the law enforcement officers[4] directed to poor South Africans.

Such conduct was imminent when Mr Collins Khosa[5] lost his life on 10 April 2020 by not violating any regulation and or any law that presented itself during and before the time of his conduct and the conduct of the law enforcement officers. A further understanding of the importance of this right can also be easily deduced by a comprehension of how the poor and marginalised South Africans make a living and by the lifestyles of poor South Africans, for example how they prepare their meals and so forth. Of course, one may be quick to dismiss the relevance of these statements particularly that which relates to the preparation of meals and how it relates to the section 21(1) right as contained in the Constitution. I will attempt to contextualise it so to fit properly the topic at hand and its relation to the said right.

Mona Sias and her family together with over 60 other households in KwaNoxolo, in the Eastern Cape were barred from collecting firewood[6] from nearby bushes which to them was a need in so that they can be able to cook their daily meals. This was so, plainly because firewood is unfortunately not classified as essential under the current regulations. It is an obvious understanding that indeed firewood for the haves is not essential, but if compared to its need by the have-nots, such as Mona Sias and her family, it is an essential element for their survival. To show this need for the wood and the need for the fire for meal preparations they had to resort to cooking their meals over a fire made from plastic bottles. One needs not explain the health risks of doing so. The Mona Sias incident is one other classic example of how the "whitewash of the South African laws and regulations" presents itself.

To expand this comprehension we further find ourselves in the understanding of the enabling nature of this right[7] were the poorest of the poor (have-nots) South African to make a living as the majority of them survive by or are living from what is termed "Hand to Mouth", which means that what they get from their daily struggle is what they use to buy their essentials for that specific time. This exposes the inequality which practically exists in the country. The most unfortunate part of these all is that all these incidents as outlined above, be it the Khosa matter or the Mona Sias matter, Regulation 4[8] of

1 Don Nkadimeng "The Plight of The Un-Represented Accused in the South African law" African Law Review Vol 1 (1987) 14-16.
2 Section 9 of the Constitution of the Republic of South Africa, 1996.
3 Section 21(1) of the Constitution
4 The South African Police Service (SAPS), Municipal Police Departments (MPD) and The South African National Defence Force (SANDF).
5 *Khosa and Others v the Minister of defence and Military Veterans and Others* (GP) (unreported case no 21512/2020, 15-5-2020) (Fabricius J)
6 Mkhuseli Sizani 2020 https://www.news24.com/SouthAfrica/News/lockdown-banned-from-collecting-wood-forced-to-use-plastic-bottles-to-make-fires-20200501 (accessed on the 10th of May 2020).
7 Section 21 (1) of the Constitution
8 Reg 4(5) in GN R318 in GG43107 of 18 March 2020


Photo:Bongani Shilubane/African News Agency (ANA) /www.da.org.za

the DMA provides that "No person is entitled to compensation for any loss or damage arising out of any bonafide action or omission by an enforcement officer under this regulation". Following this regulation, several abusive conducts by the law enforcers in the townships have been reported, and one such abuse is that which was referred to earlier on in this article namely that of Khosa. In *Khosa v Minister of Defence and Military Veterans and Others* 2020 (2) SACR 461 (GP) Fabricius J made strict directives to the relevant Ministers for compliance with the Constitution in enforcing the regulations under the DMA. He also ordered the Minister of Defence and Military Veterans to suspend four members of the South African National Defence Force (SANDF) pending an investigation into the death of Mr Khosa.

This then begs the question following regulation 4(5) of the Act, that, "was the killing of Mr Khosa in his own house and the torturous conduct or omissions by the law enforcement officers on that particular day, viewed in this circumstance as bonafide? This question, therefore, seems to require an in-depth investigation and or in-depth research or even a further debate into regulation 4(5) of the Act.

When all is said and done the have-nots find themselves eagerly awaiting the implementation of section 27(5)(a)[9] of the Act and hope that paragraph (c)[10] does not factor in.

9 A national state of disaster that has been declared in terms of subsection (1)—
(a) lapses three months after it has been declared

10 (5) A national state of disaster that has been declared in terms of subsection (1)—
(c) may be extended by the Minister by notice in the Gazette for one month at a time before it lapses in terms of paragraph (a) or the existing extension is due to expire.

Philosophical Theories and Perspectives on Health: Access to National Health Insurance

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Photo: Henry Brink/ ShoutAfrica.com

ABSTRACT

For millions of South Africans living in vulnerable rural and urban communities, their hospitals and clinics are important, and often their only source of health care. As transformation in the hospital and health care field continues, some communities may be at risk of losing access to health care services and the opportunities and resources they need to improve and maintain their health. The aim of the present study was to identify the specific challenges to access to healthcare and to substantiate why universal health care system is important in line with certain philosophical concepts. Adequate access to health helps patients enter the health care system. Lack of adequate access makes it difficult for people to get the health care they need and, when they do get care, burdens them with large medical bills, which is the current case for most South Africans. The inability to access quality health care has caused the public to lose trust in the healthcare system in South Africa and requires the government to implement the National Health Insurance sooner rather than later.

1. Introduction

The health of people in different socio-economic strata is disparate whether measured by education, type of employment, or income level. However, those living in poverty exhibit the worst health status.[1] Many societies and nearly all wealthy, developed countries, provide universal access to a broad range of public health and personal medical services.[2] Such countries include Germany, Switzerland, Singapore, and Canada, to mention a few. Is access to health care a requirement of social justice? Or is it simply a matter of social policy that some countries adopt, and others do not?[3] If it is a requirement of social justice, we should be clear about what kind of care we owe people and how that is determined. If we cannot possibly meet every health need, as arguably no society can, the criteria for which health needs are met should be clearly established.[4] Universally many countries, including South Africa, are striving for universal health care (UHC). In an ongoing effort to address persistent injustice and access barriers, South Africa is implementing a National Health Insurance system which is currently the National Health Insurance (NHI) Bill[5] (soon to be an Act) in which affordable, quality health care will be available for those who need it, regardless of "who" they are, "where" they live or their ability to pay.[6]

1 Papadimos "Healthcare access as a right, not a privilege: A construct of Western thought" Philosophy, Ethics, and Humanities in Medicine 2007 1.
2 Daniel "Justice and Access to Health Care" Stanford Encyclopedia of Philosophy 2008 1.
3 Ibid.
4 Ibid
5 National Health Insurance Bill Government Gazette No 42598
6 Maseko "People-centeredness in health system reform. Public perceptions of private and public hospitals in South Africa" South African Journal of Occupational Therapy 2018 22

2. What Societies Do About Access to Care

In the first instance, it is possible to seek guidance by exploring how different societies ensure access to care, keeping in mind that what societies actually do may not coincide with what they should do as a matter of justice. If, however, there is common belief that people owe each other access to certain kinds of care, and this belief is personified in institutions that attempt to do that, it may give us some evidence about what people think they owe each other.

Article 25 of the United Nations' 1948 Universal Declaration of Human Rights (UNDHR) states that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services".[7] The International Covenant on Economic, Social and Cultural Rights, (ICESCR) provides the most comprehensive article on the right to health in international human rights law. According to article 12.1 of the Covenant, state parties recognise "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health", while article 12.2 enumerates, by way of illustration, a number of "steps to be taken by the States parties to achieve the full realisation of this right".[8] The above international legislative instruments set the framework as well as the paths that enable each country to realise the right to health.

In order to discuss problems of inadequate public health services, escalating private healthcare costs and widening health inequalities, the South African government has launched a radical proposal to introduce a universal health system for all South Africans, namely, the NHI Bill. Access to health care for all South Africans remains a key challenge for the country's policy makers. Debates concerning the optimal reform path have increased in urgency in recent years and has led to the proposed introduction of a far-reaching and ambitious reform strategy of NHI.[9]

While there is agreement that universal health care is effective in improving coverage, health outcomes, and reducing the pervasiveness of catastrophic and impoverishing health expenditure for the poor, there remains debate about the best mix of financing and service delivery mechanisms.[10] These arguments, however, do not only concern procedural issues but reflect conflicts of interest between different stakeholders and are underpinned by philosophical and normative disagreements about the appropriate goals of reform.

When discussing the NHI and its health reforming drive, some authors tend to make a distinction between medicine and public health. Others are pessimistic about South Africa's potential as an emerging economy to implement a financing health system. The NHI intends to follow the WHO on its policies and objectives. These policies and objectives prove that it is very possible to implement a universal system.[11]

7 Universal Declaration of Human Rights, 1948.
8 The International Covenant on Economic, Social and Cultural Rights.
9 Department of Health (2010) 73.
10 Chopra "Achieving the health Millennium Development Goals for South Africa: challenges and priorities." The Lancet 2009 374.
11 Ibid.

The massive value of universal health coverage and what it offers to society is reflected by the fact that it is now included in the new Sustainable Development Goals, which aim to improve lives worldwide for a more inclusive and prosperous future for all.[12]

3. A Philosophical Examination of Theories of Health

In this section, I will examine three lines of argument that aim to show that universal access to health care is to some a requirement of justice. If one or more of these views confirm its claim, then the practice we have noted in many countries of financing institutions aimed at providing such access can be construed as an effort to meet, however imperfectly, the requirement for justice.[13]

However, this article shall not spend time assessing views that deny such claims, altogether noting only that some libertarian accounts of justice would reject redistributive efforts to promote health just as they would redistributive efforts to promote other social objectives.[14]

3.1 Health Opportunity and Universal Access

One line of argument in favour of universal access to some forms of health care, builds on the contribution made by health and derivatively by health care to the opportunities people can exercise.[15] The most explicit version of this argument extends Rawls's appeal to a principle assuring fair equality of opportunity.[16] Variants on that argument can be extrapolated from Sen's[17] work on capabilities or from Arneson's[18] and Cohen's[19] versions of "equal opportunity for welfare or advantage". It should be noted, however, that there will be differences among these variants in terms of what kinds of care are covered and under what conditions.

The fair equality of opportunity argument for universal access can be sketched as follows:

Assuming that health consists of functioning normally for some appropriate reference class (eg a gender-specific subgroup) of a species; in effect, health is the absence of significant pathology.[20]

Maintaining normal functioning, that is health makes a significant if limited contribution to protecting the range of opportunities individuals can reasonably exercise; departures from normal functioning decrease the range of plans of life we can reasonably choose among, to the extent that it diminishes the functioning(s) we can exercise in terms of our capabilities.[21]

Various socially controllable factors contribute to maintaining normal functioning in a population and distributing health fairly, including traditional public health and medical interventions, as well as the distribution of such social determinants of health as income and wealth, education, and control over life and work.[22]

If we have social obligations to protect the opportunity range open to individuals, as some general theories of justice (such as Rawls's justice as fairness claim) suggest, then we have obligations to promote and protect normal functioning for all.[23]

Providing universal access to a reasonable array of public health and medical interventions in part meets our social obligation to protect the opportunity range of individuals, though reasonable people may disagree about what is included within such an array of interventions, given resource and technological limits.[24]

This narrower concept of health avoids consolidating health with wellbeing more generally, which the WHO definition of health arguably does ("Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity") (WHO 1948).[25] Health remains a "limit" or "ceiling" concept, unlike income, for we cannot increase health indefinitely but must aim only for normal functioning for all.

3.2 Access to A Decent Health Care Through Universal Health Care

A different kind of argument in favour of universal access to a decent minimum of health care does not turn on support of general principles of justice (fair equality of opportunity, treating peoples as equals, or a right to a decent minimum of economic welfare), but rather on a pluralism of moral considerations plus an argument for state coordinated (coerced) beneficence.[26] In his discussion, Buchanan first dismisses various accounts that try to ground a universal right to a decent minimum of care, but here we shall concentrate on the positive argument supporting the idea of universal access through a legal entitlement to such care despite the absence of any moral right to it.[27]

12 Goolab " 5 advantages of universal healthcare coverage" https://www.bizcommunity com/Article/196/824/180724.html (Accessed 10/2/2018
13 Idem 3.
14 Ibid.
15 Ibid.
16 Daniels "Limits to health care: Fair procedures, democratic deliberation, and the legitimacy problem for insurers" Philosophy and Public Affairs, 1997 p 303, 1985, Just Health Care, 1991, "Is the Oregon rationing plan fair?", Journal of the American Medical Association, p 2232, 1993, "Rationing fairly: Programmatic considerations", Bioethics p 36–46, 2008, Just Health: Meeting Health Needs Fairly, 2009a, "Social and Individual Responsibility for Health", in Distributive Justice and Responsibility, C Knight and Z Stemplowska (eds.) 2010, "Capabilities, Opportunity, and Health", in Measuring Justice: Primary Goods and Capabilities, I. Robeyns and H. Brighouse (eds.) pp. 131–149.
17 Sen's "Equality of what?" in The Tanner Lectures on Human Values" 1980 p 197–220.
18 Arneson "Equality and equal opportunity for welfare" Philosophical Studies 1988 p 77–112.
19 Cohen "On the currency of egalitarian justice" Ethics 1989 p 906.
20 Ibid
21 Idem 3 p 3.
22 Ibid.
23 Ibid.
24 Ibid.
25 Idem 3 p 4.
26 Buchanan "The right to a decent minimum of health care", Philosophy and Public Affairs, 1984 55–78.
27 Ibid.

The argument can be sketched as follows:
There are a set of special rights to a decent minimum of care that are held by these groups: members of groups, such as African Americans and Native Americans, that are owed compensation for long-standing injustice done to them; individuals harmed in their health by private or corporate actions, such as polluting public spaces or exposing workers to toxins; members of groups that have made exceptional sacrifices for the good of society as a whole, such as wounded veterans.[28]

Access to preventive services derives from a Harm Prevention Principle that justifies the use of public funds for certain public health measures plus a constitutional argument that requires equal protection from harms that the public acts to prevent.[29]

Access to beneficial services is justified by such prudential considerations as the importance of health care to producing a productive workforce and a citizenry fit for national defense.[30] Together, these considerations would justify a legal entitlement to health care.[31]

In addition, there are two arguments for state-enforced beneficence that can be used to support a legal entitlement to a decent minimum of care: Assuming there is a duty of charity to assist those in need of health care.[32]

Enforcing contributions can lead to producing the public good of a decent minimum of health care for all whereas not enforcing contributions would lead many to choose alternative ways of maximising the good they can produce through individual actions, undermining the production of the public good.[33]

Enforcing contributions give an assurance that others will contribute to the decent basic minimum and that one's own contribution to it therefore is worth making since others will do the same.[34]

The above arguments for enforcing beneficence seem to imply that there is a collective duty to engage in beneficent actions, whereas the duty of the argument explicitly mentions an individual duty of beneficence.[35] The fact that individuals might fail to produce certain public goods through individual (unenforced) beneficence is a limitation that enforced coordination overcomes, but it is not a failure that results from their not discharging their duty. To treat it as if it seemingly presuppose a collective responsibility to do as much good as possible.[36]

> **"It means we must look beyond the medical system to traditional public health measures that profoundly affect risk levels and their distribution.[40]"**

3.3 Do We Owe Each Other Universal Access to Healthcare?

Justice requires that we protect people's shares of the normal opportunity range by treating illness when it occurs, by reducing the risk of disease and disability before they occur, and by distributing those risks equitably.[37] This is derived from an opportunity-based view.[38] Within the medical system, this means we must give all people access to a reasonable array of services that promote and restore normal functioning and we must not neglect preventive measures in favour of curative ones.[39] It means we must look beyond the medical system to traditional public health measures that profoundly affect risk levels and their distribution.[40] We must also look beyond the health sector to the broader social determinants of health and their distribution. Since we cannot meet all the health needs that arise inside or outside the health sector, we must be accountable for the reasonableness of the resource allocation decisions we make.[41] This resembles and aligns with the principle of progressive realisation that is construed within our legal jurisprudence.

Dworkin's prudential insurance approach might have the same scope as the opportunity-based view if the insurance policy that most prudent buyers purchase includes protections against health risks that go beyond treatments for illness.[42] Dworkin is not explicit about how that broader policy might be designed.[43] What can be purchased in any case is constrained by the level of resources available in the equality of resources approach, and Dworkin is sensitive to the fact that some purchasers may disagree about what prudence requires.[44] Gibbard's prudent insurance buyers presumably work with

28 Idem 3 p 5.
29 Ibid.
30 Ibid.
31 Ibid.
32 Ibid.
33 Ibid p 6.
34 Ibid.
35 Ibid.
36 Ibid.
37 Sreenivasan "Health care and equality of opportunity" Hastings Center Report 2007 p 21–31
38 Ibid.
39 Ibid.
40 Ibid.
41 Ibid.
42 Dworkin "What is Equality? Part 2: Equality of resources" Philosophy and Public Affairs 1981 p 185–246.
43 Ibid.
44 Ibid.

smaller premiums unless a decent economic minimum is equal to what we get on the equal resources view.[45] Gibbard is more explicitly talking only about insurance for medical services, and it might be harder to expand his account to one that meets health needs more broadly. Buchanan's decent minimum quite deliberately meets fewer health needs than the opportunity-based view.[46]

4. Lessons About Rationale for Universal Access

Several lessons can be derived from the above lines of justification for universal access to care. One such lesson is that rationale for universal access derives from more general considerations of justice.[47] As such, they borrow their justificatory force from the arguments for those general considerations. They also bring with them, from those general theories, specific considerations that may affect the content of the claim to universal access.[48] Thus, a family of egalitarian theories that speak about equality of opportunity in different ways might thus all support universal access to health care because of its impact on opportunity, but they justify different kinds of access because they view the obligation to promote opportunity in somewhat different ways.[49]

A second lesson is that some rationale depends on highly idealised assumptions and might provide less clarity about the design of benefit packages than might be hoped.[50] For example, the arguments from prudential insurance, despite their different ethical presuppositions, give less guidance to institutional design and design of a benefit package than might have been hoped, since they presuppose extrapolating from consumer behavior in a truly competitive and ideally informed insurance market.[51] Similarly, both lines of argument make it impossible to be specific about what prudent insurance would include because it is not known what level of purchasing is possible at either the "equal resources" or "decent economic minimum" that the two views posit. In contrast, the deliberative fair process that supplements the fair equality of opportunity account does not require such a hypothetical context to yield results.[52] The primary common obligation is to assure everyone has access to a tier of services that effectively promotes normal functioning and thus protects equality of opportunity within the health sector. Since health care is not the only important right, resources to be invested in the basic tier are appropriately and reasonably limited.

5. Conclusion

There are many philosophical theories that support the idea of universal health coverage. Under the sphere of NHI, the fundamental values of human dignity and self-worth, pave the way for a re-conception of ways in which justice and equity may become part of the human experience if these principles are applied.

The right to health must be a system relative for another reason that is implied by a deeper feature of the opportunity-based account. What is special about meeting health needs, for purposes of justice, is that it contributes to protecting individuals' fair share of the normal opportunity range for their society. That range, to emphasise the point, is society-relative. This relativity, however, then also infects claims about what we are entitled to when a health system is designed for a specific society. The relativisation of the normal range to a society captures an important requirement for a theory of just health care. It is not a feature we should lightly abandon. The importance of meeting specific health needs will vary depending on facts about a society, and a distributive principle must leave room for such variation. It is clear that the quest for universal health care for all remains an on-going dream aimed at improving the health of their respective citizens. It is also clear that these efforts are not free of problems and are not the alpha and omega in terms of their health.

> **"What is special about meeting health needs, for purposes of justice, is that it contributes to protecting individuals' fair share of the normal opportunity range for their society."**

Regardless of whether a nation is developing, developed or practices constitutional democracy, the debate on the pros and cons of universal health care (UHC) is not about to whittle down as it is ancient. These theories and perspectives on health perhaps remain relevant in assisting the course, construction and the path of health for all humanity irrespective of class or social standing.

It becomes vital to consider various theories on health and scholarly arguments on the advantages and disadvantages of universal health coverage. While it is clear that South Africa has taken the path of UHC and will attempt to implement it through the NHI, the arguments against NHI remain relevant in assisting the considerations for implementation of this course. It has been contended that healthcare is not a right or a privilege, but a moral duty of all members of society. However, this approach cannot be constitutionally viable as the government has a fundamental duty to assist those who do not have access to healthcare.

45 Gibbard "The prospective pareto principle and its application to questions of equity of access to health care: a philosophical examination" Milbank Memorial Fund Quarterly/Health and Society 1982 p 60
46 Ibid.
47 Idem 3 p 9
48 Ibid.
49 Ibid.
50 Idem 3 p 10
51 Ibid.
52 Ibid.

Corpse mystification and Nigeria's cultural values on cadaveric organ donation: reflections on the shifting paradigms of culture, religion, and law

*By Olusola Babatunde Adegbite**

Abstract
Nigeria's cadaveric donation framework is in a parlous state, and this unenviable position is a manifestation of one key factor ie the society's heavily saturated environment of culture and tradition, as well as the role of religion. Prior to the law, matters of cadaveric donation was hampered by centuries old customary practices, norms, and traditions connected to corpse mystification and ancestors' worship, most of which regarded the act as a serious taboo. The boldest attempt at regulating cadaveric donation took place with the signing into law of the National Health Act 2014. However, even though this law has come to stay, it has also been largely criticised as overly western in substance, and totally disconnected from those it was meant to govern.

It is against this background, that this paper explores the contests and conflicts between these age-long customs/traditions, religion, and the law, with a view to highlighting the underlying flashpoints. This paper makes the argument that the current law should be celebrated as a major departure from these harsh practices and further advocates the need for it to be embraced by all and sundry. This paper reaches the conclusion that if the potentials in the current law are properly appropriated, it offers a historic opportunity for further gains in the near future.

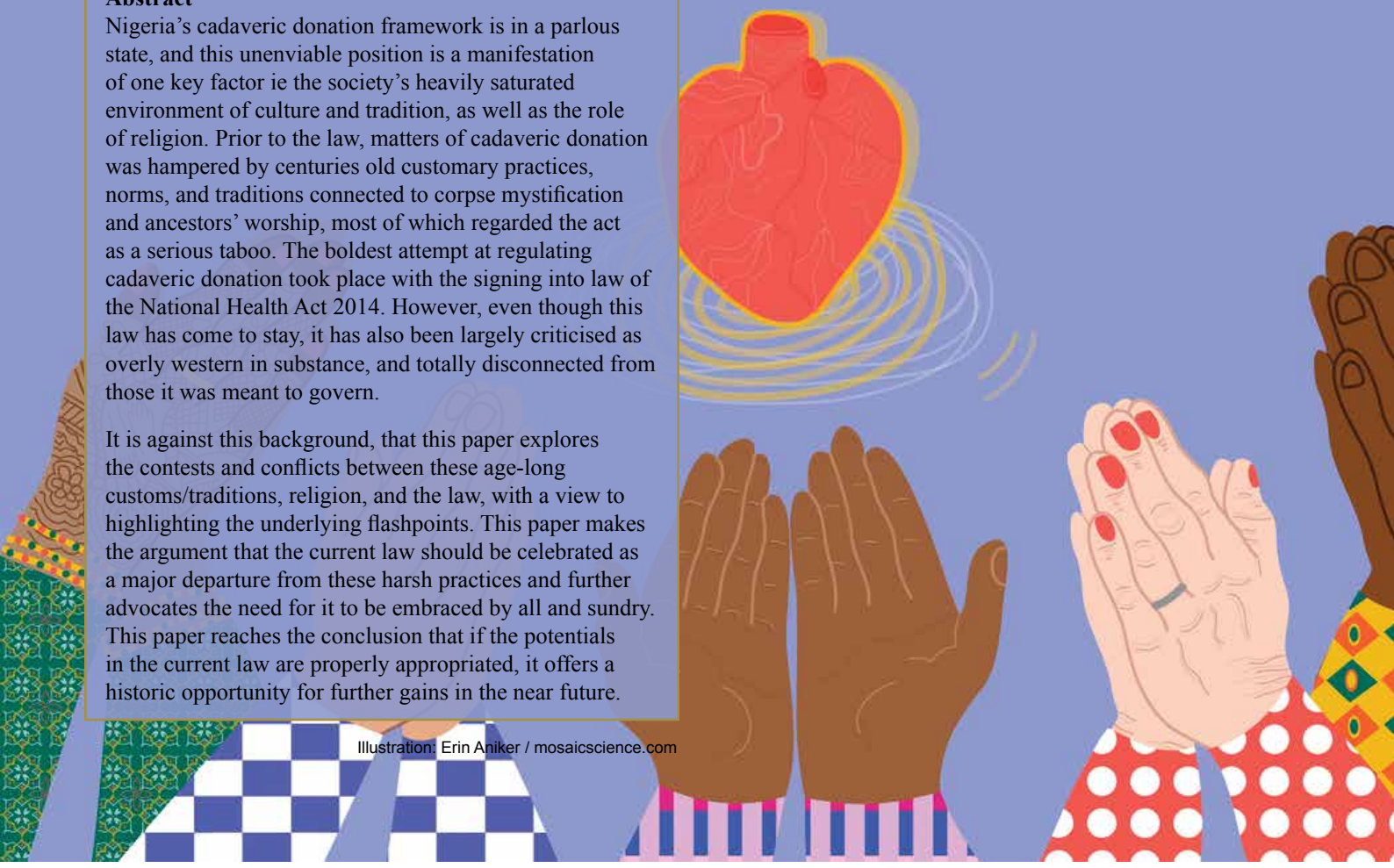

Illustration: Erin Aniker / mosaicscience.com

1. Introduction

Nigerians like other members of the global community carry their body with delicateness, and guards its parts with extreme jealousy. This perception is rooted in the general doctrine of sanctity of the human body and a corresponding duty to protect same from any type of invasion. The attitude of the Nigerian therefore is one in which no part of his/her body is seen as dispensable. Even where the body's metabolism and other life functions can still go on unhindered, the ordinary Nigerian prefers to keep his/her organ such than benefit neighbour[1]. The matter is made worse where the organ in question is that of a deceased person. In such instances, the matter transcends the realm of the donor and becomes a complex web in which relatives and family members begin to invoke cultural, traditional, as well as religious norms, presenting the norms as a matter of life and death for all concerned. It is in this battle of wits that esoteric practices such as corpse mystification and Ancestors Worship come to the fore, with the result that more often than not, these cultural/religious prohibitions end up trumping existing legal norms, with the law consistently having to contend with age-long values that the people consider inalienable. This has been the Nigerian experience so far, such that matters regarding cadaveric donations have remained a pipe dream.

> **"The attitude of the Nigerian therefore is one in which no part of his/her body is seen as dispensable."**

2. Cadaveric Organ Donation – A Brief Overview

Cadaveric donation comprises organ donation, which involves the taking of organs such as heart, lungs, kidneys, liver, pancreas from brain dead people, as well as tissue donation, which is taking tissues like skin, corneas, tendons, bone from brain dead, as well as heart dead people[2]. Cadaveric donation is regarded as part of end of life choices, which an individual may make about what happens to his/her body after death[3]. It can be for therapeutic purposes, which as mentioned above would involve donating non-regenerative organs like the heart, kidney, liver, etcetera towards benefiting another individual who is in desperate need for transplantation, or can be for educational purposes or clinical/scientific research, where the rest of the parts/tissues are donated to medical schools or research laboratories[4]. These tissues are donated in collaboration with pathologists, who in most countries are responsible for the body after death. Such tissues can be harvested several hours after death, as they undergo slow degradation[5].

In matters of cadaveric organ donation, the question of determination of death is an important factor. General medical practice and sound legal doctrines provides that the donor be certified dead in line with acceptable medical standards before parts are removed. Currently the standard for determination of death is the brain stem death. Simply put, cadaveric organ donation requires that donors must have suffered an irreversible damage to the brain or brain-stem[6]. Some Scholars appear to suggest that the brain stem death as a standard for certifying biological or somatic death, may not really be valid as the supposedly dead person may just be incipiently dying[7]. This is accentuated by the argument that brain-dead individuals are simply in state of irreversible coma, and may be able to survive on some form life support for years[8], and so brain death should not be equated with biological or somatic death[9]. Despite the argument about the uncertainty in the brain death criteria, there is an understanding that in medical practice, there exists a multiplicity of procedures in definitively determining death, and for the purpose of definitive death they can all be applied with the brain stem criteria at the tail end. This way, there would be a margin for error and death of the donor, which will be unequivocal and absolute.

Sometimes after death is certified, organs/tissues removal may first be preceded by an autopsy where it is demanded to ascertain the cause of dead[10]. After completing the usual diagnostic procedures within the autopsy chain, there is usually a rather large volume of leftover material comprising sections, paraffin blocks, and wet material, namely, organs and tissue samples kept in formalin[11]. It is common practice

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1 This attitude for instance can be gleaned from simple altruistic acts like blood donation, it is not uncommon to find the average Nigerian expressing reservations about donating his/her blood on the ground that, the remaining blood may not be enough for proper living, even where such claim may have no medical or evidentiary proof.

2 *PJ Van Diest, NWJ Lopes Cardoso, and J Niesing,* "Cadaveric Tissue Donation: A Pathologist's Perspective", *(2003), 29 (3), Journal of Medical Ethics, 135 – 136.*

3 C Sharp and G Randhawa, "Cultural Attitudes Towards Death Practices, the Body after Death, and Life after Death in Deceased Organ Donation - A UK Polish Migrant Perspective", (2016), 6 (3), *Journal of Palliative Care & Medicine, 3-7.*

4 PA Bhusari, DP Kathe, KB Khairnar, K Shukla, & VB Chormunge, "Whole Body Donation: An Attitude and Perception in North Maharashtra", (2012), 2 (2), *International Journal of Health Sciences*, 15-19.

5 *PJ Van Diest, NWJ Lopes Cardoso, and J Niesing*, supra, n. 2.

6 M Vokovic, et al, "Cadaveric Organ Transplantation and Religion", (2010), 63 (8), Medicinski Pregled, 575- 578.

7 The Idea of "Incipiently dying" in medical practice refers to those who may not be deemed to be clearly dead, but who are notwithstanding seen has destined to die as the can be no way for them to return to life. For more critical review in this respect, see generally, RD Truog, "Brain death – Too Flawed to Endure, Too Ingrained to Abandon", (2007), 35(2), *Journal of Law Medicine & Ethics*, 273-281; KG Karakatsanis, "Brain Death: Should It Be Reconsidered? (2008), 46(6), Spinal Cord, 396-401; A.R. Joffe, "The Ethics of Donation and Transplantation: Are Definitions of Death Being Distorted for Organ Transplantation? (2007), 2(1), *Philosophy, Ethics, and Humanities in Medicine*; 1 – 7; R.M. Veatch, "Donating Hearts After Cardiac Death – Reversing the Irreversible", (2008), 359 (2), *The New England Journal of Medicine*, 672-673; D.A. Shewmon, "Chronic Brain Death: Meta-Analysis and Conceptual Consequences", (1998), 51 (6), *Neurology*, 1538-1545.

8 *N Zamperetti, R Bellomo, & CA Defanti, et al. "Irreversible Apnoeic Coma 35 Years Later", (2004), 30 (9), Intensive Care Medicine, 1715-1722.*

9 AM Capron, "Brain death – Well Settled Yet Still Unresolved", (2001), 344 (16), *The New England Journal of Medicine,* 1244-1246.

10 PJ Van Diest, NWJ Lopes Cardoso, and J Niesing, *supra*, n. 2.

11 Ibid.

to keep paraffin blocks and sections for reasons of quality control, and for future diagnostic procedures requested by family members such as for hereditary diseases[12].

Where no autopsy is demanded, and consent has been given for the removal of organs/tissues, the procedure can be commenced. The procedure is rather intrusive to the cadaver, except perhaps for the cornea so it is proper to have the consent of the patient given while still alive, which is a major principle of biomedical ethics[13]. Remarkably, the issue of consent is usually the first line of challenge with cadaveric donations, given that it is principally entrenched in the long-established principle of bodily autonomy[14]. Where express consent is given, most often evidenced by a valid document like a Will or any other legal instruments, such is respected as part of the last wishes of the donor. However, where there is no such document, the position is to ask for the consent of the next of kin, and where there is none, it can also be a decision that the family as proxy makes about a loved one or relative, as to whether his or her organs/tissues can be harvested after death[15]. In most instances where there is no express consent by the deceased, it is always difficult getting the consent of the next of kin or relatives, given their emotional state and the kinship/attachment to the body of the deceased. It is a different situation when cadaveric tissue sampling or organ harvesting is specifically done (outside the framework of the regular autopsy) for scientific or educational purposes[16]. This procedure concerns a highly intrusive access to the body such as cutting the body into several pieces, which is beyond regular donations, and as such with its exceptional nature it is important that the deceased himself/herself grants such permission[17].

> **“Culture today is a major determinant particularly amongst the developing societies of sub-Sahara Africa in issues surrounding the post-humous use of the human body.”**

Generally, the world over the embodiment of mortality shapes ambivalent perceptions towards the donating of body parts[18]. As such cadaveric donation, as a part of the organ donation framework, is largely tied to the concept of death, which itself is influenced by culture and religion[19]. Principally, perceptions on matters like the need for the body after death, as a mark of honour and dignity, funeral rites and practices, and the notion of the connectivity between the body and the owner’s spirit after passing on in a sort of spiritual transition of the whole, greatly impact upon cadaveric donation decisions[20].

3. Cultural landscape of Nigeria and its relationship with cadaveric donation

Culture bound theories of the human body views the etiology of cadaveric organ donation as rooted in socio – cultural factors, historical values, norms, and the overall mystical perceptions of distinct social groups[21]. In the anthropological understanding of the body, less attention has been given to the philosophical as well as cultural underpinnings of post-humous use of the body and its parts, as against the kind of focus yielded to matters like class and nationality[22]. A striking example is the idea of “physical capital”, which represents in a way, the symbolic value of the body and how physical characteristics of the body can be improved to promote one’s social status and class[23]. It is also based on this understanding that scholars have argued that even posthumously, the body is a thing of intrinsic value and must be accorded the appropriate treatment given the living[24].

The above notwithstanding, scholarly interest in the role of culture, tradition, and religion in relation to the body has been upped in recent times, such that today it is a medley of norms namely, legal, socio-cultural, as well as ontological. Culture today is a major determinant particularly amongst

12 Ibid.

13 The Principle of Consent, which is foundational in all aspects of contract, is also a major pillar in the medical procedure value chain. In this context, absence of consent or fraudulently procured consent renders legally void or morally unacceptable any use of human bodily material.

14 The rule regarding consent as a foundation of any interaction with the human body was long established following the landmark decision in *Schloendorff v Society of New York Hospital*, 105 NE, 92, 93 (1914), where Justice Benjamin Cardozo, brilliantly opined that, “*Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient’s consent commits an assault for which he is liable in damages. This is true except in cases of emergency where the patient is unconscious and where it is necessary to operate before consent can be obtained*”. The court in this case, held that the surgery performed by the doctor to remove a tumor which Mrs Mary Schloendorff did not consent to, constitutes medical battery. Some scholars have disagreed with the rule, stating that the consent requirement where necessary, can be displaced by compelling moral considerations. See TL Beauchamp and JF Childress, “Respect for Autonomy”, in *Principles of Biomedical Ethics*, (New York: Oxford University Press, 4th Edition, 1994), 126.

15 Ibid; Elucidating quite brilliantly on this point, Jonsen said, *“consent is ethically important because it manifests and protects the moral autonomy of persons and it is a barrier to exploitation and harm. These purposes are no longer relevant to the cadaver which has no autonomy and cannot be harmed”*. See AR Jonsen, “Transplantation of Fetal Tissue: An Ethicist’s Viewpoint”, (1988), 36, *Clinical Research*, 215-219.

16 *Ibid*.

17 *Ibid*.

18 L Ai-Ling, J Dermody CeRes, and S Hanmer-Lloyd CeRes, “Exploring Cadaveric Organ Donation: A Mortal Embodiment Perspective”, (2007), 23 (5), *Journal of Marketing Management,* 559 – 585.

19 C Sharp and G Randhawa, *supra*, n. 3.

20 *Ibid*.

21 KT Woo, “Social and Cultural Aspects of Organ Donation in Asia”, (1992), 21 (3), *Annals of the Academy of Medicine Singapore*, 421 – 427; P Bruzzone, “Religious Aspects of Organ Transplantation”, (2008), 40 (4), *Transplantation Proceedings*, 1064 – 1067.

22 Bryan S Turner, *The Body and Society: Explorations in Social Theory*, (Oxford: Basil Blackwell, 1984). It must be noted that the above scholarly work, published in 1984 is deemed the first contemporary book to focus entirely on the body as a theme of research. See further, Bryan S Turner, “The Body in Western Society: Social Theory and its Perspectives”, in Sarah Coakley (Ed.) *Religion and the Body*, (Cambridge: Cambridge University Press, 1997) 15-41.

23 P Bourdieu, “Sport and Social Class”, (1978), 6, *Social science information*, 819-840.

24 In this regard, a South African Scholar Satyapal argues that a cadaver possesses both intrinsic and instrumental values, and as such, the treatment of the living should influence our treatment of the dead. He further posits that the instrumental value of the cadaver invokes values when it is recognised as the source of the deceased’s memories and responses. See K S Satyapal, The Treatment of Human Remains, (2012), 5(1), *South African Journal of Bioethics & Law*, 55 – 60.

the developing societies of sub-Sahara Africa in issues surrounding the post-humous use of the human body. In this area, the leading cultural societies that make up modern Nigeria are of great interest. But first, how is culture viewed generally and in particular as it concerns Nigeria's legal literature?

Culture is generally referred to as the sum total of attitudes, beliefs, experience, knowledge, meanings, material objects, hierarchies, religion, spatial relations, and values of a group of people, that has come to be recognised as their common bond[25]. It a collection of their existence, handed down from generation to generation. Black's Law Dictionary defines custom as, "*a usage or practice of the people which by common adoption and acquiescence and by long and unvarying habit, has become compulsory and has acquired the force of a law with respect to the place or subject matter to which it relates*"[26]. In the Nigerian case of *Eshugbayi Eleko v The Officer Administering the Government of Nigeria*[27], the court in a bid to define culture referred to customary law as "*unwritten customs and traditions, which have been accepted as obligatory by members of a community*". Similarly, Justice AG Karibi-Whyte, JSC, (as he then was), defined customary law as, "*a body of unwritten customs and traditions accepted as obligatory by members of the community for the regulation of the relations between its members*". In *Lewis v Bankole*[28], Osborne CJ, in his observation on culture remarked that, "*one of the most striking features of West African native custom is its flexibility, as it appears to have been always subject to motives of expediency, and shows unquestionable adaptability to altered circumstances without entirely losing its character …*"[29].

In Nigeria, culture enjoys a pride of place amongst the more than 250 ethnic groups that make up the modern nation-state, particularly the three leading tribes, namely, the *Yorùbá* of the South-West, the Igbo of the South-East, and the Hausa/Fulani of the Northern region[30]. The *Yorùbá* People of South-West Nigeria for instance are well renowned for their rich cultural and traditional lifestyle[31]. Yorùbá culture is deeply rooted in the people's rich history that has for generations being the subject of deep scholarly inquisition[32]. The beauty of Yorùbá culture has seen it spread as far as the lower River Niger into Nupe-land[33], other African countries such as Republic of Benin, Togo, Ghana, with its influences also felt as far as Brazil in South America[34]. Yorùbá culture is the way of life of the Yorùbá People, consisting of their language, ideas, beliefs, customs, taboos, rituals ceremonies, and symbols that have been handed down several generations through mediums like arts, craft, festivals, folklores, myths, stories, songs, proverbs and wise sayings[35]. The Igbos or Ibo People occupy the South-East region of Nigeria, situated between the lower part of the Niger River, extending to parts of the Niger-Delta largely Delta and River states, and moving all the way down to some

"In Nigeria, culture enjoys a pride of place amongst the more than 250 ethnic groups that make up the modern nation-state..."

25 G Hofstede, *Cultures and Organizations: Software of the Mind*, (New York: McGraw Hill, 1997).

26 Blacks' Law Dictionary, 2nd Edtn. See also the following English cases, *Adams v Insurance Co,* 95 Pa. 355. 40 Am. Rep. 602; *Hursh v. North,* 40 Pa. 241; *Lindsay v Cusiuiano,* (C. C.), 12 Fed. 504; *Strother v Lucas, 12 Pet.* 445, 9 L Ed 1137; *Panaud v. Jones,* 1 Cal. 49S.

27 (1928) NILR 19, Customary Law.

28 (1908), 1 Nigerian Law Report 81, 100.

29 *Ibid.*

30 The Fulanis or Fulbe, as a distinct ethnic group from the Hausas are generally pastoral in nature constituting about 95% of the nomadic herders in Nigeria. They are today colloquially referred to as "Fulani Herdsmen". Significantly, the cultural identity and distinctiveness of the Fulani nation is that of cattle ownership/rearing in a migratory pattern. History has it that the Fulani pastoralists emigrated to Northern Nigeria, from the Senegambia in the western Sudan at the beginning of the 14th century, in a generational immigration that spanned several centuries moving in small units of compound families. They make a living from cattle herding based on unrestricted grazing and movement of their ruminant livestock searching for better conditions such as the availability of water, and grazing farmlands, while residing in tents as they migrate. As a result of their nomadic way of life, the Fulanis are today in about 31 out of the 36 states of Nigeria.

31 ED Babatunde, Culture, Religion and the Self: A Critical Study of Bini and *Yorùbá* Value Systems in Change, (New York: Edwin Mallen Press, 1992). *Though the Yorùbás dwell mostly in the South-West of Nigeria, comprising of the States of Ekiti, Ogun, Ondo, Osun, Oyo, and Lagos, they are also found in small parts of Delta, Edo, Kwara, and Kogi States.*

32 For a comprehensive read on the history of the *Yorùbá People, see generally,* JA Atanda, A Comprehensive History of the *Yorùbá* People up to 1800, GO Oguntomisin (Ed.) (Ibadan: John Archers, 2007); IA Akinjogbin, & EA Ayandele, "*Yorùbá*land up to 1800", in O Ikime (Ed.), Groundwork of Nigerian History, (Ibadan: Historical Society of Nigeria, 2000), 121-143; B. Davidson, The Growth of African Civilization: A History of West Africa 1000-1800, (London: Longman Publishers, 1965); CO Osasona, & ADC Hyland, Colonial Architecture in Ile-Ife, Nigeria, (Ibadan: Book-builders Editions Africa, 2006); E Isichei, History of West Africa since 1800, (London: Macmillan Publishers, 1999); KH Basso, Wisdom Sits in Places: Landscape and Language Among the Western Apache, (Albuquerque: University of New Mexico Press, 1996); O.I. Obateru, The *Yorùbá* City in History: 11th Century to the Present, (Ibadan: Penthouse Publishers, 2006); S Biobaku, Origins of the *Yorùbá*, (Lagos: Federal Information Service, 1995); S. Johnson, The History of the *Yorùbás*: From the Earliest Times to the Beginning of the British Protectorate, (Cambridge: Cambridge University Press, 2010); W Bascom, The *Yorùbá* of Southwestern Nigeria, (New York: Holt, Rinehart & Winston, 1969); W Fagg and J Pemberton, *Yorùbá*: Sculpture of West Africa, (London: Collins, 1982).

33 NA Fadipe,The Sociology of the *Yorùbá*, (Ibadan: Ibadan University Press, 1970).

34 JS Eades, The *Yorùbá* Today, (Cambridge: Cambridge University Press, 1980). *Outside Nigeria, Yorùbá people are also scattered in places like Jamaica and the Caribbean Islands generally.*

35 *JO Awolalu and PA Dopamu, West African Traditional Religion, (Nigeria: Macmillan Nigeria Publishers Ltd, 2005).*

parts of the coast in Cross River[36]. The Hausa People occupy largely Nigeria's northern region close to the Sahel desert, and some parts of the North-central around the upper Niger River. The religion of Islam is central to Hausa/Fulani culture and tradition, codified in a body of law known as Sharia law, though as a People, they are also well known for their great attachment to culture and tradition and great history[37].

All of these three ethnic groups, are not only deeply cultural, a significant part of their culture relates to issues of cadaveric donation, erecting automatic barriers on the way of accessing non-regenerative organs[38]. Amongst the three, there is a variety of taboos surrounding contact with dead bodies, a belief that is accentuated by the multi-layered differences in funeral rituals and superstitions about what happens after an individual dies. In most cultures, respect for the human body being intact upon the death of the owner, is based on the presumption that the body belongs to the almighty maker of all – God and that failing to secure the body in one piece, will not only jeopardize the entry of the departed into the new world but would also cause unimaginable calamities and misfortunes to befall the community[39]. The belief therefore is that cutting open a dead body to harvest an organ, or burying same without some parts intact, is a bad omen that offends custom and diminishes the value to be accorded the deceased and his/her family[40]. For example, in order to gain post-mortem value, families in some part of Africa decorate the body of the deceased in order to conceal certain bodily distortions, so it is not carried into the next world, which they believe may affect the deceased's place as an ancestor[41]. In the end, there is a cultural belief system that the interest of the deceased, including interest in his body and the constituents, is not attenuated upon death. Scholars have also argued that by such post-humous organ/tissue removal, the deceased suffers harm with the harm in question being that of assault on the bodily interest that he/she would have wanted preserved[42].

"The belief therefore is that cutting open a dead body to harvest an organ, or burying same without some parts intact, is a bad omen that offends custom and diminishes the value to be accorded the deceased and his/her family."

4. Corpse mystification, ancestors worship, and cultural/traditional attitudes towards cadaveric donation in Nigeria

Culturally, there is the view that when an individual dies his/her existence is not automatically extinguished[43]. In the socio-cultural conception of the "being", amongst most of the ethnic groups in Nigeria while living organ donation appears generally accepted, there is serious objection to cadaveric donation majorly because of the underpinnings that it represents nothing but a denigration of the dead[44]. The above view is dominant amongst the *Yorùbá* and Ibo ethnic groups. For the Hausa/Fulani, their way of life is entirely a matter of religion in which the Sharia law is regarded as native law and custom, and this regulates the general way of life, as well as what is permitted and what is forbidden. The same law covers the cultural attitudes towards cadaveric donation among the Hausa/Fulani people. Sharia law enjoins the Muslim faith to be benevolent and one of the ways of expressing such benevolence may be through sustaining the life of another

36 The Ibo language has several dialects, given that the Ibos traditionally live in autonomous villages, and self-contained towns, organising themselves into patri lineages namely, lineage groups along lines of descent and ascendancy. Each lineage has a head, who is a regarded as a representative of the departed ancestors. Thus, although their customs and values were closely related, each still considered itself a distinct society usually made up of few villages.

37 Records has it that a reference to Hausa kingdoms emerged with Arab geographer in the 9th century, while the first Hausa/Fulani states are known to developed in the Sahel region around 500-700 AD, with seven principal city-states emerging notably Biram, Daura, Gobir, Katsina, Kano, Rano, and Zaria, largely for the purpose of trade and commerce. At this time, the initial seat of government for these seven city-states was Biram, while Gobir provided the Military force protecting the group from rival empires. In the same vein, Katsina and Daura provided access to trans-Saharan trade routes bring goods into the city-states. In terms of culture, the Hausa/Fulani were known for their beautiful indigo dye, used for art and textiles materials.

38 AK Eziyi, et al, "Determinants of Acceptance of Organ Donation among Medical Students Nigeria", (2014), 1(8), *International Journal of Medicine and Medical Sciences*, 116-121.

39 JS Mbiti, *African Religions and Philosophy,* (Oxford: Heinemann Educational Books Ltd, 1990), 83.

40 *Ibid*.

41 R Lee, "Death on the Move: Funerals, Entrepreneurs, and the Rural Urban Nexus in South Africa", (2011), 81, *The Journal of the International African Institute*, 226-247.

42 W Glannon, "Do the Sick have a Right to Cadaveric Organs?", (2003), 29, Journal of Medical Ethics, 153-156; CL Hamer and MM Rivlin, "A Stronger policy of Organ Retrieval from Cadaveric Donors: Some Ethical Considerations", (2003), 29, *Journal of Medical Ethics*, 196-200. On this point, Harris, however, disagrees with the argument that the deceased suffers harm by reason of such removal. He said, *"rights or interests would have to be extremely powerful to warrant upholding such rights or interests at the cost of the lives of others … the interests involved after death, be there any, are simply nowhere near strong enough to maintain the consent requirement for cadaveric organ recovery while potential recipients continue to die"*. For a deeper exposition see generally, J Harris, "Organ procurement: Dead Interests, Living Needs", (2003), 29, *Journal of Medical Ethics*, 130-134.

43 S McGuinness and M Brazier, "Respecting the Living Means Respecting the Dead Too" (2008), 28, *Oxford Journal of Legal Studies*, 297-316; M. Brazier, "Retained Organs: Ethics and Humanity" (2002), 22, Legal Studies, 550-569."

44 II Ulasi, and CK Ijoma: "The Enormity of Chronic Kidney Disease in Nigeria: The Situation in a Teaching Hospital in South-East Nigeria", (2010), 6, *Journal of Tropical Medicine,* 1 – 6. *Ibid*. For instance in African Philosophical understanding death, which is seen as a natural transition from the visible world, to the invisible spiritual ontology is often accompanied during the funeral rites, by a series of rituals, which in the belief system of those involved, helps to connect the living with the dead. There is also the fact that culture dictates what is right and what is wrong when it comes to dealing with the disposal of the remains of the dead. See O Daramola, A Ojo, and S Joel, "Environmental Sanitation Perception and Practices of the Disposal of the Dead in Ile-Ife City, Nigeria", (2016), 3(1), *International Journal of Academic Research in Environment and Geography*, 15-23.

through organ donation[45]. Thus, for the Hausa/Fulani people there is not much restriction as regards cadaveric donation, leaving most of the prohibitions to the cultural practice of the Yorùbás and the Ibos.

The strict cultural prohibition of cadaveric donation amongst the Yorùbás and the Ibos, is rooted in what is known as Ancestor Worship a belief system based on the jurisprudence that life's course is cyclical and not linear, such that those who are dead, though not physically seen are alive in a different world and can reincarnate[46], in a circular pattern of multiple deaths and rebirths[47]. Thus, in a sort of immortal continuum, an individual is deemed as sent into this world by natural birth, and at the completion of his/her task, returns through death to continue as a being in the other realm[48]. Adherents of this cultural belief boldly claim that to be in this other world, namely, the world of the dead is to have supernatural powers over those in the world of the living, with such powers including the ability to bless or curse, and when death occurs, divination as to reasons behind the death is sought from the ancestors with such attributed more to spiritual forces than medical factors[49].

For instance, in Yorùbá traditional belief the concept of the visible world of the living and the spiritual enclave of the ancestors and spirits, represent two distinct but acceptable realms[50]. The Yorùbá belief in the body as a vehicle of reincarnation is symbolised most eloquently in the "Egúngún" masquerade, a most rambunctious fellow and notable social figure, believed to be adorned with rare supernatural powers, sometimes manifested in extreme acrobatic displays and commemorated most lavishly with high celebrations[51]. Further to this, given the claim that harmony among the living is sustained by a relationship between the ancestors dynamically engaging in connectedness with the living as well as those who have passed, the dead body in most instances is highly venerated[52]. In African belief generally, the ancestors are believed to have a beneficent relationship with the living members of their erstwhile communities[53]. In this epistemological paradigm, the dead is posthumously regarded as now as having taken up residence with spirits in a world of collective immortality[54].

An interesting demonstration of this, is what happens during a typical Tiv burial ceremony in Nigeria, where the rites of passage begins with a message to the great ancestor (Takuruku), intimating him of the death and requesting his presence to come and wait and receive the person into the ancestral world[55]. On the day of the burial, elderly women wash the deceased in order to enable him/her to enter the spirit world neatly and well dressed in the traditional attire all within twenty-four hours[56]. This tradition of exaggerated ceremonies, which is common in most cultures is also a phenomenon that

45 Z. Iliyasu, IS Abubakar, and UM Lawan, et al. "Predictors of Public Attitude Toward Living Organ Donation in Kano, Northern Nigeria", (2014), 25, *Saudi Journal of Kidney Disease and Transplantation*, 196-205.

46 F Eyetsemitan, "Cultural Interpretation of Dying and Death in a Non-Western Society: The Case of Nigeria", (2002), 3 (2), *Online Readings in Psychology y and Culture*, 1-10.

47 J Gire, "How Death Imitates Life: Cultural Influences on Conceptions of Death and Dying", (2014), 6 (2), *Online Readings in Psychology and Culture*, 1-22.

48 RK Barrett and KS Heller, "Death and Dying in the Black Experience", (2002), 5, *Journal of Palliative Medicine*, 793-799.

49 Ibid; For instance, while interpreting life empirically may result in preparing for death based on a medical doctor's report and other medical evidence, for those who see death from a cultural perspective consideration will be given to other factors as being responsible for death, which in this context may be linked to things like enemies deploying the use spiritual powers to cause misfortune and activities of other dark forces at work. In most cultural groups in Nigeria, the idea of acceptability of death revolves round the logic of utility and liability. Thus, while utility value makes the society categorise certain individuals as useful, the liability perspective sees others as of little important. Within this context, it is no surprising for the society to see a young successful person as viable and useful to the community, as against an old man who is likely to be regarded as having used up his time or overstaying his welcome. Given the belief that a child having being nurtured from birth is expected after attaining a particular age, to contribute in the economic wellbeing of the family and society, and consequently live up to old age, if such a child eventually dies without fulfilling this expectation by the family members and other relations, it is seen as a great loss, both to the family and the community. In such instances, the bereavement is more of a communal thing and evokes so much pain and anguish.
To this end, an instructive rule is that which posits that when it comes to matters of death, only elders are permitted to procure this commodity, as they are assumed to have finished their assignment on earth and due to go home to their ancestors. Where it involves a younger person, it is deemed as the handiwork of evil doers. An interesting *Yorùbá* adage, is that which says that, "*Omo ta bi leni, to ku lola, o kanju ku ni*", meaning, "*The child that was born today, only to die tomorrow, as only died in a hurry*". This is based on the fact that one will still die, except that as a child, the time is not ripe.

50 JH Drewel, "The *Yorùbá* World", in Simon Gikandi (Ed.), *Death and the Kings Horseman: Authoritative Text, Background, Contexts, and Criticism*, (New York: WW Norton & Company, 2003), 69.

51 In *Yorùbá*land the "Egúngún" meaning "a masked ancestral spirit", is a notable social figure. The *Yorùbá* Egúngún as purveyor of reincarnated disembodied soul, represents the spirit of a deceased ancestor returning from the After-life (Èhìn-Ìwà) ie, another realm, to visit his people and in the course of the visit transfer certain things to them, such as a message, admonition, or fortune. For some cultures, the Egúngún is elevated to the status of a periodic festival in which the return of the so-called ancestor is heralded by heavy wining and dining, which is followed by a diviner's summon, and upon the appearance of the spirit, sacrifices are offered as parts of the rites of his passage from the other realm to this realm and back. While the Egúngún job appears to be largely one of traditional religion, in some climes it is also called upon to perform quasi-judicial functions, by adjudicating over disputes and may in some instance deliver severe punishments.

52 Ibid; See LM King, "In Discourse Towards a Pan-African Psychology: Drum Rolls for a Psychology of Emancipation, (2013), 39, Journal of Black Psychology, 223 - 231.

53 C Agulanna, "Community and Human Wellbeing in an African Culture", (2010), 14(3), Trames, 282-298; It has been noted that a major importance of such belief is that it helps serve as motivation for people to live socially responsible lives, so they can die a "good death" at the end of their life. For instance, in *Yorùbá*-land, where an elder attain a strikingly old age and has very successful children, such funeral is only attended by a brief period of mourning, which later climaxes into loud partying and merry-making. Such is deemed as a socially acceptable way of celebrating "a life well spent". Also, the belief in an after-life has both social as well as moral functions. For one, the expectation of an "other life" in which people will be rewarded for virtuous living is an encouragement for good conduct and social responsibility among those who make up the community. For another, the hope of attaining the enviable status of an ancestor could inspire people with the spirit of hard work, industry, and integrity. In other words, apart from whatever spiritual values it may have, the belief in an after-life has its social significance as well. It is equally a socially remunerative system, in the sense that anyone one who is deemed to have died a good death, as established above, is buried in a class of its own, which is usually inside the house where his/her kiths and kins, namely, the living still resides. For an in-depth understanding of the deconstruction of the dead in *Yorùbá* Culture, see generally, A Ojo, *Yorùbá* Culture: A Geographical Analysis, (Ile-Ife: Ife University Press, 1966), 192.

54 JS Mbiti, African Religions and Philosophies, (Oxford, UK: Heinemann Educational, 1990); WW Nobles, Seeking the Sakhu: Foundational Writings for an African Psychology, (Chicago: Third World Press, 2006).

55 OF Agbo, "Tiv Traditional Conception of the Human Person", (2016),7(6), Arts and Social Science Journal, 235.

56 *Ibid.*

has attracted scholarly interest[57]. Sharing similar understanding with the Tiv system is the Igbo traditional belief that a single person may reincarnate contemporaneously showing up in two or more physical bodies[58]. There is additionally the Igbo belief that a part of a deceased person may thereafter continue to exist in the discarnate realm, following which such is elevated to the status of an ancestor by those who are still living[59]. The cultural interpretation to this is that though life and death are physically viewed as two distinct phenomena, in cosmic ontological unity both represent one interdependent unit, existing as the two forces shaping the life and after-life of the human being[60].

Another dimension to this cyclical spiritual cosmic system is to be seen in the *Abiku phenomenon*. The Abiku conception is a major cultural signpost amongst the Yorùbá and the Ibo nations both of Southern Nigeria[61]. The Abiku in Yorùbá culture represents a recalcitrant child seen as having come from the spirit world, belonging to a group of discarnate, who are destined to eventually return to the same world after a short sojourn here on earth, unless certain rituals take place[62]. It is seen as a problem of the spirit world, which must be addressed, lest the same child surfaces again[63]. In Igbo jurisprudence, the Abiku also referred to as *"Ogbanje"*, is regarded quite disapprovingly as a mischievous brat frequenting between the world of the living and the dead without any identifiable purpose[64]. Literally, the term in Igbo language means, *"to make several trips, to and from a place"*[65]. By way of characterisation, such naughty children are given special names at birth, apparently to conjure the idea surrounding the frustration of their parents, and also depicting their attempt at labeling the child in terms of the circumstances of his/her cyclical journey[66]. Examples of such names among the Yorùbá people include Kokumo (he will not die again) or Malomo (do not die again)[67]. All these names are so crafted at appealing to the child's emotion persuading him/her to abandon the traumatic back and forth, and stay put[68].

Where this fails and the child succeeds in entering another cycle of death, the dead body is handed over to a traditional health practitioner who mutilates it on the belief that his/her kindred spirits would reject him due to the scarification and ugliness that would result from the mutilation, and by this rejection, the child is then forced to stay in the physical world, when next he is reborn[69]. A Yorùbá Scholar Oluwole trying to capture the child in this ontological framework, posits that Yorùbá cultural belief in reincarnation is strengthened by three justifications which are, family resemblance in which newly born children are said to look like their dead forebears, the ability of some children to tell true stories of their dead ancestors almost in a form of telepathy, and the abiku phenomenon earlier discussed in which, some of the incisions made on the dead child, is seen when another is born[70]. Though, this practice which is rife among the different cultural groups in southern Nigeria may be analysed as myth, it is nonetheless rooted in the peoples' way of life and ultimately shape their cosmology and cultural attitudes[71]. It is within this jurisprudence that cadaveric organ donation and death in Nigeria's cultural landscape is intrinsically viewed as two sides of the same coin, heavily shadowed by a coterie of existential cultural, religious, and social beliefs, alongside traditional medical practices[72].

57 Such scholarly inquisition can be found in the extensive works of renowned body Scholar, Arnold Van Gennep. Van Gennep in his analysis on these ceremonies captures the theme fiercely where he said, *"The life of an individual in any society is a series of passages from one age to another and from one occupation to another. Transitions from group to group and from one social situation to the next are looked on as implicit in the very fact of existence, so that a man's life comes to be made up of a succession of stages with similar ends and beginnings: birth, social puberty, marriage, fatherhood, advancement to the higher class, occupational specialisation and death. For every one of these events there are ceremonies whose essential purpose is to enable the individual to pass from one defined position to another which is equally well de-fined. Thus, we encounter a wide degree of general similarity among ceremonies of birth, childhood, social puberty, betrothal, marriage, pregnancy, fatherhood, initiation into religious societies and funerals. In this respect, man's life resembles nature, from which neither the individual nor the society stands independent".* For a more comprehensive analysis, see generally, A Van Gennep, *The Rites of Passage*, (Chicago: University of Chicago Press, 1960), 3.

58 MEN Njaka, *Igbo Political Culture*, (Evaston: Northwestern University Press, 1974), 39; C.K. Meek, *Law and Authority in a Nigerian Tribe*, (New York: Barnes & Noble, 1970), 54; NW Thomas, *Anthropological Report on the Ibo-Speaking People of Nigeria, Part 1 – Law & Custom of the Ibo of the Awka Neighbourhood*, S Nigeria (New York: Negro Universities Press, 1969), 31; For example, most cultures believe that the old identities of the bereaved do not die with the deceased, but are resurrected with every commemorative service of the loved one. See M Kagawa-Singer, "The Cultural Context of Death Rituals and Mourning Practices", (1998), 25(1)), *Oncology Nursing Forum*, 1752-1756.

59 FA Arinze, Sacrifice in Ibo Religion, (Ibadan: Ibadan University Press, 1970), 17-18.

60 B Bujo, *The Ethical Dimension of Community: The African Model and the Dialogue between North and South*, (Nairobi: Pauline Publications Africa, 1998); MB Ramose, *African Philosophy though Ubuntu*, (Harare: Mond Books Publishers, 2002).

61 W Bascom, *The Yorùbá of Southwestern Nigeria*, (New York: Holt, Rinehart, and Winston, 1969); EG Parrinder, West African Psychology, (London: Lutterworth Press, 1051); W Soyinka, Ake: The Years of Childhood, (London: Rex Collings, 1981).

62 B Okri, "Spirit-Child: Abiku Migration and Post-modernity", (1995), 26 (1), *Research in Africa Literature,* 20-29; CO Ogunyemi, *African Woman Palava: The Nigerian Novel by Women*, (Chicago: University of Chicago Press, 1996).

63 OS Okechi, "Culture, Perception/Belief about Death and their Implication to the Awareness and Control of the Socio-Economic, Environmental and Health Factors Surrounding Lower Life Expectancy in Nigeria", (2017), 3(5), *Acta Psychopathol*, 56. Notably, some religious and cultural traditions such as Hinduism belief in a circular pattern of life and death where a person is thought to die and is reborn with a new identity, with this exit and reentry into life capable of occurring multiple times.

64 See C Achebe, *Things Fall Apart*, (London: Heinemann Books, 1958); C Achebe, *The World of the Ogbanje*, (Enugu: Fourth Dimension, 1986); A Quayson, *Strategic Transformations in Nigeria Writing: Orality and History* in the *Work of Rev Samuel Johnson, Amos Tutuola, Wole Soyinka, and Ben Okri*, (Bloomington: Indiana University Press, 1997).

65 K Williamson, *Igbo-English Dictionary*, (Benin City: Ethiope Publishing Corporation, 1972), 404.

66 *YD Ogunyemi, Introduction to Yorùbá Philosophy, Religion and Literature, (New York: Athelia Henrietta Press, 1998).*

67 Some other similar names given in *Yorùbá*-land to such *Abikus* include Banjoko (*sit with me*), Durotimi or Rotimi (*stay with me*) Durojaiye (*stay and enjoy life*), Kashimawo *(let us wait and see*), Kosoko (*there is no hoe anymore*), Orukotan (*all names have been exhausted*), and Yemiitan (*stop deceiving me*). Amongst Igbo people, a name like Onwubiko (*death, I implore you*) is common, and for the Urhobo people, Akpoyoma (*the world is good*) is a familiar name.

68 AE Asakitikpi, "Born to Die: The Ogbanje Phenomenon and its Implication on Childhood Mortality in Southern Nigeria", (2008), 10(1), *Anthropologist*, 59 – 63.

69 Ibid; MO Okonji, "Ogbanje: An African Conception of Predestination", (1970), 1(4), The African Scholar, 1-2; MM Khaing, *Burmese Family*, (Bloomington: Indiana University Press, 1972).

70 SB Oluwole, "Reincarnation: An Issue in African Philosophy", in SB Oluwole (ed.), *Witchcraft, Reincarnation and the God-Head,* (Lagos: Excel Publishers, 1996).

71 Ibid.

72 II Ulasi and CK Ijoma, *supra*, n. 44.

Thus, when it comes to cadaveric organ donation the reasoning is that the owner of the body namely, the deceased is not yet dead given that he has only transited to another realm. As such, it becomes a taboo to seek to dismember any part of such a being, as such scarification not only reduces the wholeness of the being, but constitute theft of what belongs to the deceased. In another light, to seek to harvest an organ/tissue of the deceased is regarded as dishonor.

The above discussed web of practices comprehensively mirrors perhaps in a very vivid manner, the mass of conservative values often permeating most cultural/traditional discourse in relation to whether organs should or should not be donated in Nigeria, and the influence of the norms on the general framework of cadaveric organ donation. This is, however, custom and tradition, what does the law have to say? Is there a union between the law and custom on the same matter? Given the largely unbridled influence of these practices on the peoples' way of life, has it had the same effect on the law? Laconically, how much did these practices shape the current law, if at all it did? The next discussion sets the cadence for an unraveling of these difficult questions.

5. The law governing cadaveric donation in Nigeria

Generally, two separate criminal legislations govern cadaveric donations in the country. While in the south the Criminal Code Act[73] operates in the 17 predominantly Christian states, the Penal Code Act holds sway in the Northern region.

5.1. Prohibition of Cadaveric Donation in Southern Nigeria

Prior to the enactment of the National Health Act 8 of 2014, issues of cadaveric in the states making up southern Nigeria was governed by the Criminal Code Act. The Act does not specifically address issues of organ donation, rather the closest provision in the Act that appears to deal with the use of cadavers comes under the heading "Misconduct with regards to Corpses" and in this regard Section 242[74] provides that:

> *"Any person who -*
> *(1) without lawful justification or excuse, the proof of which lies on him,*
> *(a) neglects to perform any duty imposed upon him by law, or undertaken by him, whether for reward or otherwise, touching the burial or other disposition of human body or human remains; or*
> *(b) improperly or indecently interferes with, or offers any indignity to, any dead human body or human remains, whether buried or not;*
> *(2) eats or receives for the purpose of eating any part of a dead human body; is guilty of a misdemeanor, and is liable to imprisonment for two years."*

The above provisions show that Nigeria had never paid serious thoughts to matters of cadaveric donation. Given this lack of an abiding legislation, matter of cadaveric donations remained shrouded in so much secrecy with most concluded in an underground black-market system that did not help the development of the system.

With the enactment of the National Health Act, cadaveric donation became legalised for the first time in Nigeria. In this regard, the Act provides that:

> *"(1) Human organs obtained from deceased persons for the purpose of transplantation or treatment, or medical or dental training or research, shall only be used in the prescribed manner.*
> *(2) Human organs obtained under subsection (1) shall be allocated as prescribed.*
> *(3) The National Tertiary Health Institutions Standards Committee shall prescribe: - (a) criteria for the approval of organ transplant facilities; and*
> *(b) procedural measures to be applied for such approval.*
> *(4) A person who contravenes a provision of this section or fails to comply therewith or who charges a fee for a human organ is guilty of an offence and shall be liable to imprisonment for a minimum of five years without option of fine"*[75].

The Act further provides that:

> *"(a) A person who is competent to make a will may –*
> *(i) in the will,*
> *(ii) in a document signed by him and at least two witnesses, or*
> *(iii) in a written statement made in the presence of at least two competent witnesses, donate his or her body or any specified tissue thereof to be used after his or her death, or give consent to the post mortem examination of his or her body, for any purpose provided for in this Act.*
> *(b) A person who makes a donation as stated in paragraph (a) of this section may nominate an institution or a person as done"*[76]

Furthermore, contextualising the above provision, the Act provides for the purpose of such donation of body or other tissues as follows:

> *"(1) A donation under Section 55 of this Act may only be made for the purposes of –*
> *(a) training of students in health sciences;*
> *(b) Health research;*
> *(c) Advancement of health sciences;*
> *(d) therapy, including the use of tissue in any living person; or*
> *(e) production of a therapeutic, diagnostic, or prophylactic substance.*
> *(2) This Act does not apply to the preparation of the body of a deceased person for the purposes of embalming it, whether or not such preparation involves –*
> *(a) making of incisions in the body for the withdrawal of blood and the replacement by a preservative; or*
> *(b) restoration of any disfigurement or mutilation of the body before its burial"*[77]

73 Criminal Code Act, Cap C 38, LFN 2004.
74 Criminal Code Act, Cap C 38, LFN 2004.
75 Section 54, National Health Act, 2014.
76 Section 55, National Health Act, 2014.
77 Section 56, National Health Act, 2014.

> **"For some scholars, cadaveric donation is un-Islamic because it violates fundamental Islamic principles...[82]."**

Lastly, the Act provides for the "procedure for revocation of any donation" so made above. In this wise, it says:

> *"A donor may, prior to the removal for transplantation of the relevant organ into the donee, revoke a donation in the same way in which it was made or, in the case of a donation by way of will or other document, also by the intentional revocation of that will or codicil or document"*[78].

The above provisions of the Act clearly make cadaveric donation an act permitted under Nigerian law. The twin clauses, "*in a written statement made in the presence of at least two competent witnesses, donate his or her body or any specified tissue thereof to be used after his or her death",* and "*A person who makes a donation as stated in paragraph (a) of this section may nominate an institution or a person as donee*", manifestly shows that it is lawful to donate cadaveric organs before the passing of the owner, and the uses to which such donated organ or tissue can be put, have been clearly outlined under the Act. Under Nigerian law a person under the age of eighteen may not have legal capacity to give valid consent with respect to cadaveric donation, while the physician establishing death is required to state in a dated and signed report the method used and the deceased donor has a legal right to object to such donation before his death and the decision may not be overridden by the relatives[79].

5. 2. Northern Nigeria, Cadaveric Donation, and the nexus between law and religion

In the North of Nigeria, the Penal Code Act is the principal criminal legislation. It deals with all matters of crimes and criminality and serves the same function as the Criminal Code Act serves in the south of the country. The Penal Code Act, however, does not have any provision dealing with organ donation or dealings in human corpses as is the case under the Criminal Code Act. The reason for that is not strange. Even though the Penal Code is the principal criminal legislation in the Northern region, issues related to cadaveric donation remain largely governed by Islamic codes under the Shari'ah law. Given that b*oth social and religious issues play dominant roles in Nigeria's multi-cultural and multi-religious north,* the Shari'ah is regarded as the customary law of the region. It is what the people look up to for direction.

The operation of the Sharia'h law amongst Northern Nigeria Muslims is not different from its well-established norms and principles amongst other Muslims globally. It is a complete code of life prescribing both the secular and spiritual standards for all Muslims[80]. All religious and cultural norms stipulating these standards come from the Quran and the Sunnah, and both remain the source of guidance on any matter related to the lives of Muslims, and cadaveric organ donation related matters is not an exception. The world over the Shari'ah law as a body of religious codes is applied to deep and complex bioethical issues regarding medico-legal issues[81]. However, it is important to first establish that matters related to cadaveric organ donation, remains as controversial as ever amongst Islamic Scholars. Largely, the opposition to cadaveric donation amongst Muslims scholars is predicated on the controversy surrounding the determination of death. For some scholars, cadaveric donation is un-Islamic because it violates fundamental Islamic principles, which posits that the determination of death should be based on the traditional view of death, which is based on the cessation of heartbeat and breathing function resulting ultimately in coldness of the body[82]. Scholars who support cadaveric donation, however, do so on the ground that the currently accepted standard of death, namely, that the brain stem death is valid, as it lends credence to the fact that death can only be deemed to have occurred when all of the body's biological units that are interconnected have indeed ceased functioning[83].

Also, the divergence of views amongst Muslim Scholars on whether or not Islam prohibits cadaveric organ donation appears to be a sectarian matter. While scholars from the Indian subcontinent comprising largely Pakistan, Bangladesh, and the Muslim population of India hold that Islam forbids the removal of organs from dead individuals, their counterparts from the Middle East made up of most Arab Scholars hold otherwise, opining that Islam permits such organ removal as long as it is a voluntary act of charity[84]. Those who argue against cadaveric donation hinge their position on the sacredness of the human body and the fact the body belongs to God[85]. Thus, while autopsies are seen as acceptable in Islam, there remains reservations regarding matters like the

78 Section 57, National Health Act, 2014.

79 AA Bakari, UA Jimeta, MA Abubakar, SU Alhassan, and EA Nwankwo, "Organ Transplantation: Legal, Ethical and Islamic Perspective in Nigeria", (2012), 18(2), *National Journal of Surgery*, 53-60.

80 YIM El-Shahat, "Islamic Viewpoint of Organ Transplantation", (1999), 31 (8), *Transplantation Proceedings*, 3271.

81 H Hathout, "Islamic Basis for Biomedical Ethics", in Edmund D Pellegrino, P Mazzarella, and P Corsi (Eds.), *Transcultural Dimensions in Medical Ethics,* (Maryland: University Publishing, 1992), 57-72.

82 M Al-Mousawi, T Hamed, and H Al-Matouk, "Views of Muslim Scholars on Organ Donation and Brain Death", (1997), 29 (8), *Transplantation Proceedings*, 3217.

83 AM Hassaballah, "Definition of Death, Organ Donation and Interruption of Treatment in Islam", (1996), 11(6), *Nephrology Dialysis Transplantation*, 964-965.

84 RH Kuddus, "Islamic Founding Principles on Organ Transplantation and the Evolution of Islamic Scholarly Opinions on the Subject", (2014), 46 (6), *Transplantation Proceedings,* 2033-2045.

85 J Syed, Islamic View on Organ Donation, 1998, 8(3), *Journal of Transplant Coordination, Journal of Transplant Coordination,* 157-160

postponement of burials, transferring the body from place to place before burial, and any violations of the sanctity of the human body[86]. It is for this reason that Muslims are instructed to conduct funeral rites immediately after death occurs[87]. They assert that God alone can give direction on the use of the body[88]. However, majority of Muslim scholars both Sunni and Shia advocate the importance of saving human life based on injunctions of the Shari'ah[89]. Based on these injunctions, there is the general view that the Shari'ah does not entirely frown at organ donation.

However, where both the Quran and Sunnah offers no clear-cut position on the controversy in question, Islamic Scholars are known to delve into what is known as *Ijtihad*, which is basically the academic exercise of giving their opinion from the stand-point of Islamic Jurisprudence known in the Muslim faith as *usulal-fiqh*[90]. Islamic Scholars argue that the Quran does not explicitly speak on matters of cadaveric organ donation[91]. This, however, appears as taking a narrow and restricted view of quranic injunctions. Why is this so? By way of inference, it appears plausible to say that the Quran deals with matters of cadaveric organ donation through some of its injunctions. What then does the Quran say in this regard?

The position of the Shari'ah as regards cadaveric donation is better viewed from how Muslim faith upholds the sanctity of human life. Under the Sharia'h it is provided that, *"if anyone killed a person – not in retaliation of murder, or (and) to spread mischief in the land – it would be as if he killed all mankind, and if anyone saved a life, it would be as if he saved the life of all mankind"*[92]. Additionally, it is provided that, *"And kill not anyone whom God has forbidden, except for a just cause (according to Islamic law). This he has commanded you that you may understand"*[93]. It is thus clear that the Sharia'h cherishes human life. Flowing from this, notwithstanding the general prohibition of organ donation in Islam, there exists an exception to the rule, and that is that Islamic codes recognises as permissible, and even worthy of reward where one person willingly go all out to save the life of another[94]. This position was clarified by one of the highest-ranking organisations in the Islamic faith, the Islamic Council of Saudi Arabia stating that Islam does not forbid cadaveric organ donation where it is specifically to save life[95]. The same position is said to have been the consensus of several leading Muslim Scholars who approved the resolution of the Pan-Islamic Council Jurisprudence on Resuscitation Apparatus in the Jordanian capital, Amman. Therefore, in Islam any transplantation that would sustain human life and all attached to it is permitted[96].

> **"The position of the Shari'ah as regards cadaveric donation is better viewed from how Muslim faith upholds the sanctity of human life."**

Most of what is today agreed as the Shari'ah's position on organ donation came out of the works of Islamic scholars trying to put forward the context in which quranic codes deals with the subject[97]. Generally, the Shari'ah permits the transplant of organs from one person, whether dead or living to another, but subject to certain conditions:[98]

1. The donation must be the only possible medical means of treating or saving the life of the donee[99]. The closest to this is the Shari'ah injunction of the use of carcasses[100]. The idea is that though the Shari'ah clearly forbids the eating, consumption or receiving of dead meat, blood, and the flesh of swine, but where it is necessary as a matter of life and death such as where a sick person needs an organ transplantation because his life/her is under the threat of death, such a person will be deemed as guiltless[101]. The further understanding is that in allowing organ donation there is the seeking of ease for human beings, pity for the sick and sharing of pain, which is all in line with sound Shari'ah doctrines[102]. This position is backed up by several portions of the Shari'ah such as those which says, *"the more harmful detriment is removable by the less harmful one"*, *"when facing two evils, choose the less harmful one"*, *"when comparing between two ill deeds, consider which is the greater in harm and do the other"*[103]

86 V Rispler-Chaim, The Ethics of Post-mortem Examinations in Contemporary Islam, (1993), 19 (3), *Journal of Medical Ethics,* 164-168.
87 Ibid.
88 Ibid.
89 Ibid.
90 AR Gatrad and A. Sheikh, "Medical Ethics and Islam: Principles and Practice", (2001), 84 (1), Archives of Disease in Childhood, 72-75.
91 AA Al-Khader, F A Shaheen, and MS Al-Jondeby, "Important Social Factors that affect Organ Transplantation in Islamic Countries", (2003), 1(2), *Experimental and Clinical Transplantation, 96-101.*
92 (5:32) (Quran).
93 (6:151) (Quran).
94 YIM El-Shahat, *supra*, n.81.
95 Ibid.
96 Ibid.
97 E Uskin and M Ozturk, "Attitudes of Islamic Religious Officials towards Organ Transplant and Donation", (2013), 27(1), *The Journal of Clinical and Translational,* 37-41.
98 AA Bakari, et al. *supra, n. 80.*
99 Ibid; Blood and Organ Donation: What Does Islamic Law say? Health24, available online at https://www.health24.com/Lifestyle/Your-Blood/Blood-and-organ-donation-What-does-Islamic-law-say-20150120, accessed 05/03/2018.
100 Ibid.
101 Ibid.
102 Ibid.
103 Ibid; AA Sirajudeen, *Organ Transplant in Islamic Perspectives,* (Germany: Lamber Academic Publishing, 2011), 26.

2. Such donation is also allowed where it is towards providing welfare[104]. It must be considered as solely a humanitarian act and one of mercy[105]. This position is based on the fact that since human nature is what the Shari'ah regulates, whenever welfare of a man is in issue, it becomes legal and permissible in Islamic law[106]. It is held that Islamic law is established particularly for welfare of humanity and thus, any action, which brings about human welfare is permissible in Shari'ah[107].
3. Organ removal should not endanger donor's life[108]. This is predicated on the fact that Shari'ah provides that a disease should not be cured through a means that will cause a similar or worse harm than the disease itself[109]. If the donation is done at the end of life, the Shari'ah prescribes that painful procedures are avoided[110]. For instance, where the organ donation is likely to procure or hasten the death of the deceased, it would be clearly forbidden. This is so because the Quran forbids a Muslim taking his/her life[111]. In this regards it provides that, *"And whoever kills a believer intentionally, his recompense is hell to abide therein, and the wrath and the curse of God are upon him, and a great punishment is prepared for him"*.[112]
4. The donor must willingly consent to the procedure and it must not be by duress[113]. Consent is generally a basis for cadaveric donation in Islam, and not just consent but one predicated on full disclosure leading to a validly made decision by the deceased[114]. This is because any consent procured without adequate information coming to either the donor or the family acting as proxy violates elementary Islamic principles on truth-telling and honesty[115]. It has, however, been argued that the consent rule regarding cadaveric donation should extended to presumed consent, to the end that there would be an implied agreement and understanding to remove organs from the deceased person unless such individual expressly declines[116]. Muslims have, however, objected to this position as one prone to abuse and may open the door to other unethical behaviours such as commercialisation of such removed organs[117].

"Consent is generally a basis for cadaveric donation in Islam, and not just consent but one predicated on full disclosure leading to a validly made decision by the deceased.[114]"

5. The Principles of human dignity and self-worth must also be adhered to as provided for under Shari'h injunctions[118]. As a matter of fact, Islam prescribes that when a Muslim is suffering from a terminal disease and death is a certainty, such should be allowed to die in peace and not subjected to further torture[119]. This is given Islam's recognition of the right to dignity of the Muslim. In the same vein, cadaveric organ donation must not be such that will violate the donor's dignity.
6. Lastly, it is required that the proposed recipient must be a Muslim, particularly where the donor is a Muslim[120]. However, a challenge of cadaveric donation is that Muslims are enjoined by the Shari' ah to bury their dead immediately, particularly if the death occurs before 4.00pm and so the entire transplantation procedure can generally conflict with the funeral rites except if such organs are removed almost immediately[121]. Based on the above injunctions, there is the general view that the Shari'ah does not entirely frown at cadaveric donation, as the above conditions are seen as widely accepted positions in Islamic jurisprudence[122].

Generally, it appears settled that cadaveric donation is permitted in Islam and this is the same rule that operates in the Northern part of Nigeria. Given the fact that Muslims in the North are deeply religious, it was not difficult for these codes to be adhered to. Thus, prior to the National Health Act, Muslims in the North were generally guided by these provisions. The only issue was about resolving issues about the desecration of the body of the Muslim given the underlying belief that that the body must be presented intact at death for the life hereafter. The enactment of the National Health Act, however, put the adherence to Islamic codes to the background

104 *Ibid.*
105 S Athar, "A Gift of Life: An Islamic Perspective in Organ Donation and Transplantation", (2015), 5(1), *Journal of Transplantation Technologies & Research*, 1-4.
106 AA Bakari, et. al, *supra,* n. 80.
107 Ibid.
108 Ibid.
109 Ibid; YIM El-Shahat, supra, n. 81.
110 RD Truog, "End-of-life Decision-Making in the United States", (2008), 25, *European Journal of Anaesthesiology Supplement,* 43-50.
111 The Quran forbids all forms of Euthanasia, whether voluntary, involuntary, or non-voluntary. See generally, A. Sachedina, "End-of-life: The Islamic View", (2005), 366(9487), *The Lancet*, 774-779.
112 (4:93) (Quran).
113 Ibid.
114 S Aksoy, "A Critical Approach to the Current Understanding of Islamic Scholars on using Cadaver Organs without Prior Permission", (2001), 15, *Bioethics*, 461-472.
115 Ibid; V Choo, "UK Shari'ah Council Approves Organ Transplants", (1995), *The Lancet*, 303.
116 D Hamm and J Tizzard, "Presumed Consent for Organ Donation", (2008), 336 (7638), *British Medical Journal,* 230.
117 FS AlKhawari, GV Stimson, & AN Warrens, "Attitudes Toward Transplantation in U.K: Muslim Indo-Asians in West London", (2005), 5(6), *American Journal of Transplantation, 1326-1331.*
118 Ibid.
119 N Sarhill, et al. "The Terminally ill Muslim: Death and Dying from the Muslim Perspective", (2001) 18 (4), *The American Journal of Hospice & Palliative Care,* 251-255.
120 Ibid.
121 K Hedayat, "When the Spirit Leaves: Childhood Death, Grieving, and Bereavement in Islam", (2006), 9(6), *Journal of Palliative Medicine*, 1282-1291.
122 Ibid.

and contemporary educated Muslim physicians and scholars must now make decisions based on provisions of the Act and where Islamic injunctions conflict with the Act, the Act overrides.

6. Conflict between cultural/religious norms and the law on cadaveric donation

In a practical sense, it has been a challenge for the law as established above to work successfully and fulfil its full potentials as envisaged by the drafters, given the overbearing influence of cultural/religious norms in this regard. This has also stifled the development of the law, due to paucity of disputes arising out of issues of cadaveric donation. Where organs/tissues from dead bodies are not donated due to taboos across different ethnic groups prohibiting same, the result can only be one thing – stagnation in the abiding legal framework.

> **"A close examination of the current law shows that any mistake to have hinged the Act on some of the cultural practices discussed above is primed to expose the dangerousness in Nigeria's multifaceted cultural controversies."**

However, one position argument that has remained at the background of the non-workability of the law is the argument that the current law is foreign in outlook, and does not take into consideration the age-long cultural practices of the people it was to govern, so as to robustly reflect them in key provisions. The argument is that if the current Act has been a blend of extant common law principles and aspects of customary law, it would have enjoyed a wider acceptability. This has been the subject of diverse views, but this Paper takes a contrary view.

To start with, one tries to imagine how it would have been workable for the Act to go around the intricacies in the cultural practices of the three leading ethnic groups, the Yoruba, Igbo and Hausa/Fulani, and create a convergence of some sort. It would have been a case of "too many cooks spoiling the broth". If for instance a provision in the Act appears to be hinge on Yoruba culture leaving out that of the Ibos and Hausa/Fulanis, or perhaps it betrays a suspicion that Huasa/Fulani cultural norms makes more sense than that of the Yorubas and the Ibos, there is certain to be a legal conflagration, resulting in endless litigation and regional acrimony.

Again, considering another scenario, if the Act had been prepared on the basis of norms in all of the cultures, there is also likely to be a clash of will as the underlinings of the cultures are not the same. Even for the Yorubas and Ibos who both believe in Ancestors Worship, in a final analysis their idea of the specifics is not exactly the same. Of course, many of these clashes would undoubtedly be the extended corollaries of an outburst of anger along the familiar fault-lines. The potential for clashes becomes more frightening, when one considers the fact that most Nigerian cultural practices are regarded as antiquated, and with their endless list of taboos offering a regime of rigid and suffocating ethos, if the Act had been modeled on these practices, not only would there have been a total breakdown in terms of inapplicability, the law itself would have been too harsh to achieve anything meaningful. A close examination of the current law shows that any mistake to have hinged the Act on some of the cultural practices discussed above is primed to expose the dangerousness in Nigeria's multifaceted cultural controversies.

Also, in the evolution of Nigerian customary practices, one key condition is that every cultural practice must pass the "Repugnancy and Incompatibility Test", which requires that a culture would be deemed unacceptable and unfit for application in Nigerian courts, except such is not "*repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any law for the time being in force*"[123]. Specifically, the Law provides that;

> *"The High Court shall observe, and enforce the observance of every, native law and custom which is not repugnant to natural justice, equity, and good conscience nor incompatible either directly or by implication with any law for the time being in force, and nothing in this law shall deprive any person of the benefit of any such native law or custom."*[124]

Thus, for years the application of matters of custom and tradition has always met a brick wall in the regular courts, particularly where it comes to establishing guilt or innocence, or rights and liabilities, based on the accepted standards of rules of evidence. Where such custom is deemed "repugnant to natural justice, equity, and good conscience", or ruled to be

123 For an extensive review of the applicability of the Repugnancy Test and the evolution of Customary Law particularly in sub-Sahara Africa, see generally, ME Kiye, "The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon", (2015), 15(2), *Africa Studies Quarterly*, 85-106; *WC Ekow Daniels, "The Interaction of English Law with Customary Law in West Africa", (1964), 13(2), The International and Comparative Law Quarterly, 574-616; WC Ekow Daniels, "The Influence of Equity in West Africa", (1962), 11(1), The International and Comparative Law Quarterly, 31-58;* OW Igwe and MD Ogolo, "Repugnancy Test and Customary Criminal Law in Nigeria: A Time for Re-assessing Content and Relevance", (2017), 3(3), *Donnish Journal of Law and Conflict Resolution*, 35-39; HA Amankwah, "Ghanaian Law: Its Evolution and Interaction with English Law", (1970), 4 (1), *Cornell International Law Journal*, 37-57. See also *Abi Zacharia Ajong v Nji Micheal Ajong*, Suit No. BCA/4CC/2000: reported in CCLR 2002, Part 9, pp. 67- 72, where the court held that a particular custom that excluded girl-children from the administration of their father's estate was not repugnant to natural justice. In the opinion of the court, the custom in question does not permit women to engage in the business of the running of the estate, thereby upholding a highly discriminatory custom.

124 See section 34(1), of the High Court Law of Northern Nigeria, 1963, and section 2 of the Elese of Irese (Confirmation of Declaration) Edict, 1987 of Kwara State.

> **"The law is a major departure from the iron curtain that these cultural practices represents, and that must be generally commended."**

in conflict with an existing law, it loses validity and no claim can be made pursuant to it. This is also made worse by the fact that such customs are not subject to the rules of evidence, so proving a claim or right becomes impossible. For example, if a cadaveric donation matter where to go to court and the some provisions of the Act is in issue, how does a next of kin or relative prove that the deceased had given, or not given consent for his/her organ to be harvested where there is no document to back such claim up, except to say that it is simply a part of their tradition that once an individual dies a certain kind of death, his body part is forbidden from being donated. Certainly, it was in a bid to avoid this sort of problematic situation that the drafters wisely enacted the Act outside the complicated system of culture and tradition. Unfortunately, given the heavy cultural attitudes that pervade the land, many still consider most of the rules of their custom as abiding authority, in disregard to what the law says. It is, however, important to say that the Act and it current provisions still remains a good law and quite promising.

7. Conclusion

Cadaveric donation as a form of medical procedure helps to make the most of body parts that would otherwise have been wasted, to prolong the life of others and generally make for a happier human society[125]. *As it is said life is sacred, a reality that compels a craving in all humans to utilise every available means to sustain living*[126]. Thus, generally the problem of access to cadaveric organs in Nigeria is not one of ignorance. It is, however, important to state that there is a wide margin between knowledge of donation and the willingness to donate. As such while the people cannot be said to be unfamiliar with the altruistic side of donation, their will to accordingly act is hamstrung by an environment heavily shaped by culture and tradition.

As it has been established in this Paper, a major resistance to cadaveric donation in Nigeria is that many do not want their body to be desecrated after their demise. This Paper has also established how this erroneous belief is deeply rooted in the people's cultural attitude, norms, and tradition. It is thus evident that culturally inspired posthumous interest in the body is a Nigerian phenomenon, particularly through the existential philosophy of ancestor-ship, which this Paper has thoroughly examined. As such, there is a need for more robust and comprehensive education, particularly one that can demystify this current regime of cultural apprehension and controversies[127]. For a region like Northern Nigeria where the philosophy governing cadaveric donation is a derivative of religion which is also the native law, it has been said that to increase organ yield, it is imperative to include religious leaders, namely, the Muslim Clerics as they exert great influence on their worshippers[128].

In a final analysis, it must be stated that, the fact that the current law is not fashioned after the Peoples' cultural practices is the best thing to happen to Nigeria's cadaveric donation framework. The law is a major departure from the iron curtain that these cultural practices represents, and that must be generally commended. With the enactment of the law, the cultural environment is beginning to come under intense pressure to shed most of its dark practices, especially given that most of the norms suffer from problem of believability, and the fact that cultural identities are themselves products of behaviour, which is susceptible to changes where there are better alternatives, such that where cultures interact and intermix, changes occur[129]. This Paper submits that the current law is a better alternative and the only way to go is to embrace it, consequent upon which desired changes can be made in future to reflect the needed cultural flavor. ●

125 Commenting quite illuminatingly on the legitimacy of this approach, Harris opined as follows, *"If we can save or prolong the lives of living people and can only do so at the expense of the sensibilities of others, it seems clear to me that we should. For the alternative involves the equivalent of sacrificing people's lives so that others will simply feel better or not feel so bad, and this seems nothing short of outrageous"*. See J Harris, "Human Resources", in *Wonderwoman and Superman: The Ethics of Human Biotechnology*, (Oxford: Oxford University Press, 1992), 100-103.

126 OO Olusegun, "Challenges of Organ Transplantation in Nigeria", (2017), 8(3), *International Journal of Private Law, 205 – 218.*

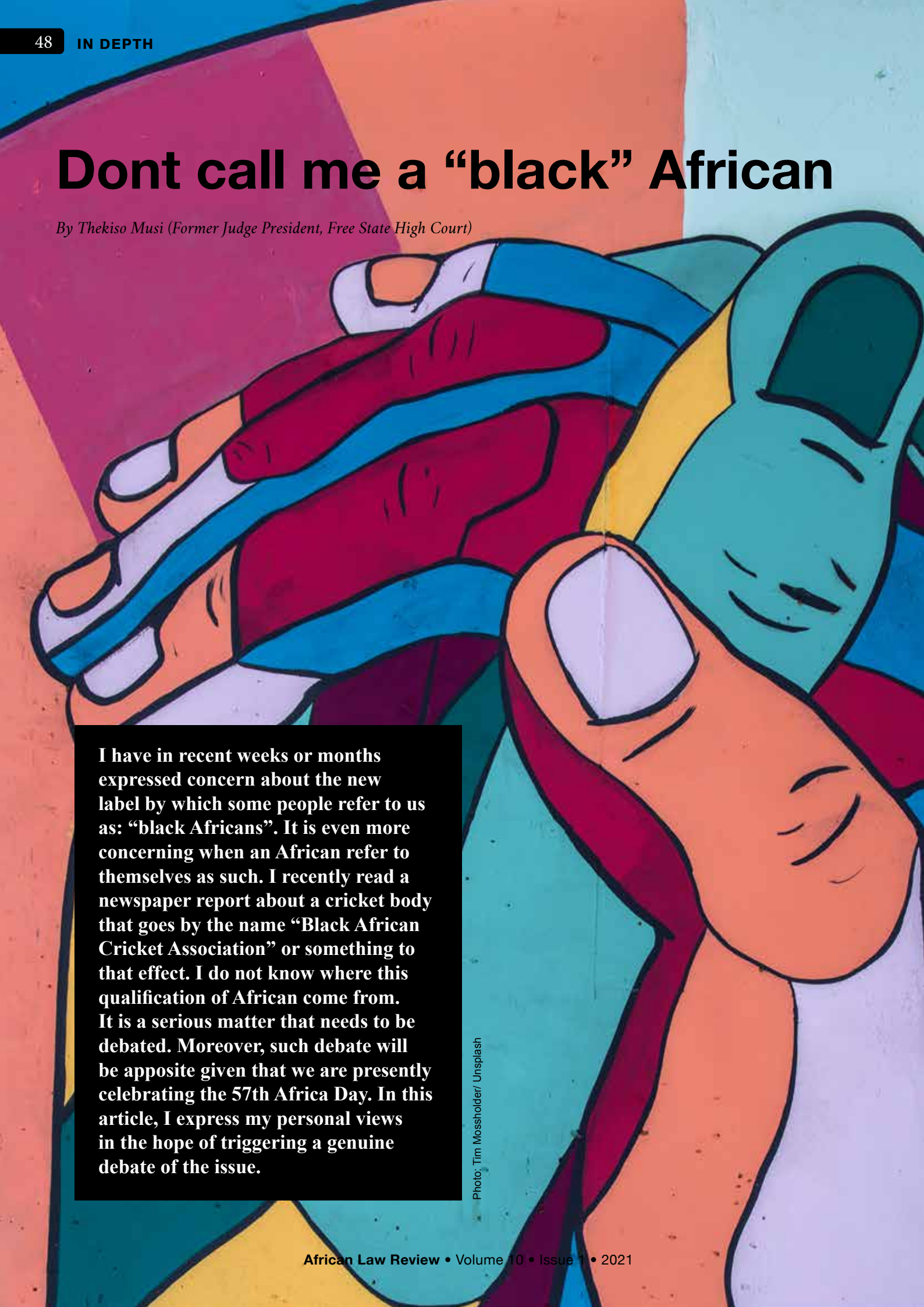
127 R Oluyombo, et. Al "Knowledge regarding Organ Donation and Willingness to Donate Amongst Health Workers in South West Nigeria", 2016, 7(1), *International Journal of Organ Transplantation Medicine,* 19-26.

128 Ibid.

129 M Eseyin and SE Udoh, "Cultural Re-Engineering: The Way-out of Human Rights Subversion in Sub-Sahara Africa, Nigeria a Case-Study", (2015), 3(4), *Global Journal of Politics and Law Research*, 71-84.

Dont call me a “black” African

By Thekiso Musi (Former Judge President, Free State High Court)



I have in recent weeks or months expressed concern about the new label by which some people refer to us as: “black Africans”. It is even more concerning when an African refer to themselves as such. I recently read a newspaper report about a cricket body that goes by the name “Black African Cricket Association” or something to that effect. I do not know where this qualification of African come from. It is a serious matter that needs to be debated. Moreover, such debate will be apposite given that we are presently celebrating the 57th Africa Day. In this article, I express my personal views in the hope of triggering a genuine debate of the issue.

Photo: Tim Mossholder/ Unsplash

Over the years, from the days of colonialism through to the era of Apartheid, we were called different names by our rulers. Under colonialism we were classified as Natives, falling under the Department of Native Affairs. This was changed after the Nationalists came to power in 1948; they did not like the idea of us being called Natives because they considered themselves to also be the natives of Africa (hence Afrikaners, which translates to Africans – they are now an established, distinct language community within the South African demographics). They renamed us Bantu and later even attempted to bestow another name (Plurals) when they renamed the department that controlled our lives as the Department of Plural Affairs and Development.

Throughout these years, we consistently insisted on calling ourselves Africans; hence you have the African National Congress (ANC) that was formed by the oppressed Africans in 1912, followed later by the Pan Africanist Congress of Azania (PAC). It is a definition of ourselves, which we embraced with pride and even converted it into some kind of praise song in the indigenous languages, like "*bana ba thari e ntsho, bana ba sebilo*" (children of the black shawl, children of the soil). It is noteworthy that in his seminal speech to Parliament on the occasion of the passing of the Constitution on 8 May 1996, the then Deputy President Thabo Mbeki said of himself, "I am an African". He did not qualify his Africanism.

Now the black consciousness philosophy laid emphasis on "black" but this did not detract from the fact that we remained known as Africans because the term "black" referred collectively to Africans, Indians and Coloureds and it replaced (with some qualifications) the negative, discredited name by which they had hitherto been collectively known, "non-Whites". The term "black" was used as a clarion call to unite all these disenfranchised South Africans in a common cause to liberate themselves. And, of course, they are all of a darker shade and fitted the description, although some amongst those of a lighter pigmentation baulked at the notion of being called black, lest they be confused with Africans.

This is because Africans are also loosely referred to as blacks or black people; and there can be no problem with this as long as it can clearly be assessed from the context whether one is using "black" in its composite form as including Indians and Coloureds or as referring to Africans only. The distinction has a historical significance: Under Apartheid, the African majority were the real underdogs; they occupied the lowest level of the social ladder and were at the sharpest edge of the knife of oppression. For example, the influx control laws applied only to Africans and only they were required to carry a "dompas" at all times and to produce it on demand, failing which they were liable to be arrested. This led to many Africans finding ways of acquiring Coloured status classification in order to escape the reach of the notorious pass laws and improve their chances of a better life.

> **"The designation "African" refers to the native of Africa, the original inhabitants of Africa – the people who originated in Africa."**

Former and long-standing ANC President, OR Tambo, who led the ANC throughout its difficult years of exile, is quoted by Emeka Anyaoku, former Secretary General of the Commonwealth, to have described the life of an African in the 1960s as follows in a speech to the United Nation's Special Political Committee in 1963:

"No one can doubt any longer now that life for the African in South Africa is not life. If it is, it is worth nothing. But we promise in that event that no other life in South Africa is worth anything – white or non-white. Let the United Nations and the world, therefore save what it can – what it cannot, will either be destroyed or destroy itself." ("Oliver Tambo Remembered" – edited by Z Pallo Jordan p264). It is noteworthy that OR Tambo did not say "black" African.

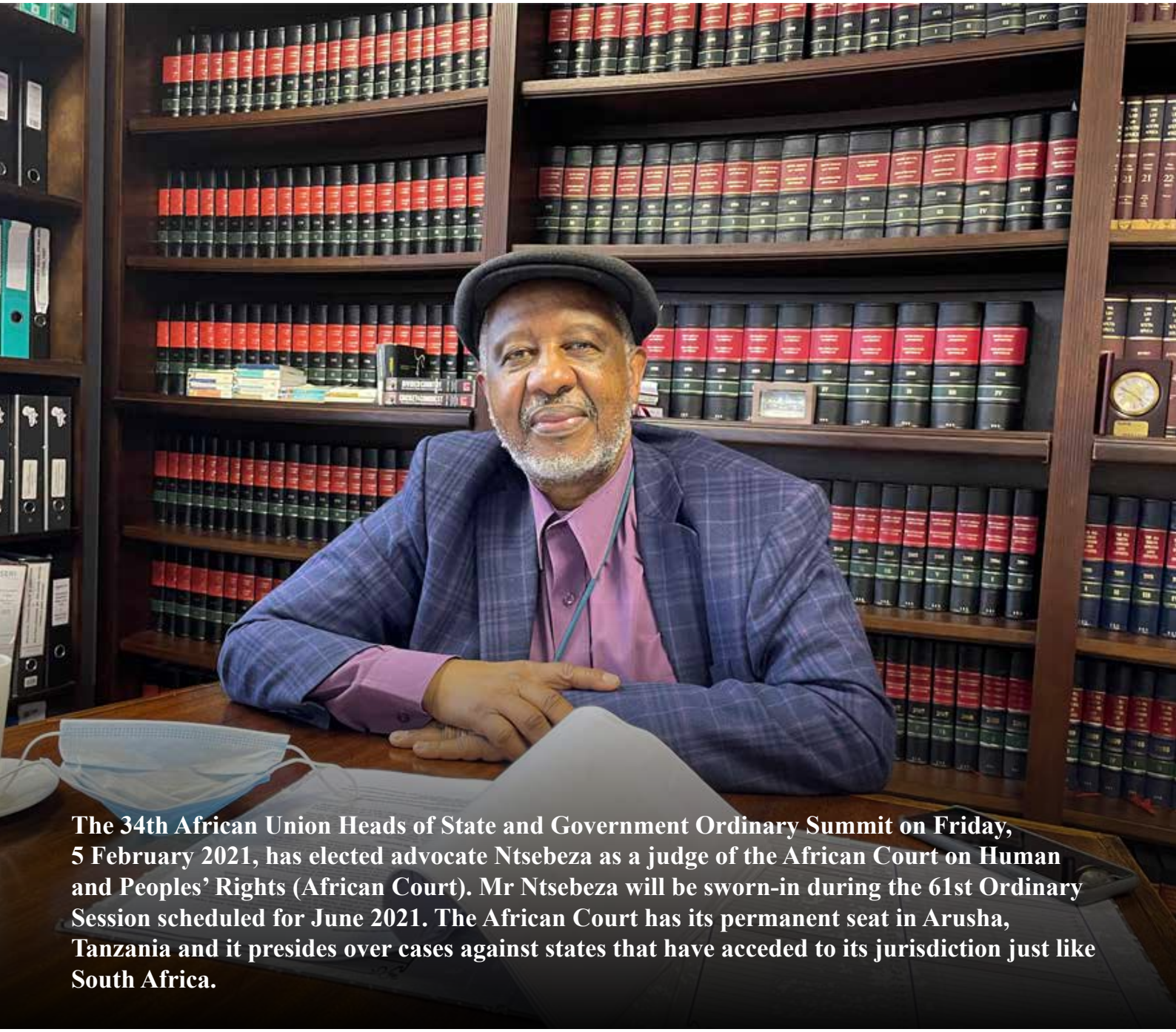
The designation "African" refers to the native of Africa, the original inhabitants of Africa – the people who originated in Africa. People are identified by their country or continent of origin. A typical example is the United States of America. Although its citizens are all Americans, different components of the population are identified by their countries or continents of origin; hence Native Americans, Italian Americans, Hispanic American etcetera. "African" is the name by which the indigenous peoples of Africa are identified. That is why black Americans call themselves African-Americans, meaning Americans of African descent, Americans who originally came from Africa. If we Africans in Africa are now to be called "black" Africans, what would the African-Americans call themselves? Black African-Americans? That would be absurd.

I suspect that this "black African" concept arises from the fact that we now have white people who have permanently settled in Africa and who for that reason consider themselves also African, leading to the notion of white Africans as distinct from black Africans. This is probably why "African" is being qualified; and we Africans find it acceptable to dilute our identity in order to accommodate other people! It is an identity that distinguishes us from other ethnic groupings within the South African population. It is an identity that is common to all Africans across the continent and transcends the borders of the different African countries.

By way of analogy, an African who has permanently settled in Europe may acquire the citizenship of whatever European country they settle in but they cannot be called European. If they have the citizenship of, say France, they are a French citizen and may be referred to as French but that does not make them European. And it will be ridiculous to refer to Europeans as white Europeans simply because they have black citizens amongst them. In South Africa, we share a common citizenship with our white compatriots (and others) and we can, therefore, talk of white South Africans and black South Africans. But Africans should not get confused and call themselves "black" Africans. So you can call me a black South African or simply black, but black African – NO! ●

Black Excellence:
Adv Dumisa Buhle Ntsebeza SC

By Andisiwe Sigonyela: Director-BLA-LEC



The 34th African Union Heads of State and Government Ordinary Summit on Friday, 5 February 2021, has elected advocate Ntsebeza as a judge of the African Court on Human and Peoples' Rights (African Court). Mr Ntsebeza will be sworn-in during the 61st Ordinary Session scheduled for June 2021. The African Court has its permanent seat in Arusha, Tanzania and it presides over cases against states that have acceded to its jurisdiction just like South Africa.

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Mr Ntsebeza holds a BA degree, a BProc, and an LLB degree from the University of Transkei. He also holds an LLM (International Law) degree from the University of Cape Town. He is the current Chancellor of the University of Fort Hare. Mr Ntsebeza is a well-known human rights lawyer in South Africa. And he will ascend to his new role as the second South African to be appointed to serve as a judge of the African Court after another BLA stalwart Judge Bernard Ngoepe (2006-2014).

Mr Ntsebeza served as the non-executive chairman of Barloworld since June 2007 and also served on the board of that company. Ntsebeza also served as the Chairperson of Equillore Limited, an alternative dispute resolution public company that used to be called the Arbitration Forum.
He completed his studies for a law degree while serving a long prison term for political activism in the mid-1970s and early 1980s. He rose to prominence in the 1990s as Commissioner and head of the Truth and Reconciliation Commission's investigative unit.

Ntsebeza, on several short term periods, has been appointed as acting judge of the High Court of South Africa, and the Labour Court, and has written several judgments, which have been reported widely in the South African Criminal Law Reports, the South African Law Reports, the All South African Law Reports, the Butterworth's Constitutional Law Reports, the Butterworth's Labour Law Reports, and the Industrial Law Journal.

Some of his judgments have been a subject of extensive reviews in such academic law journals as the South African Law Journal. In 2002, Ntsebeza was a Distinguished Visiting Professor of Politics and Law at the University of Connecticut, USA, where he taught a credit course in Politics at Storrs, and was a co-professor for a Graduate Course in Human Rights Law at Hartford. During that period, Ntsebeza remained a practising advocate, and held Chambers in Sandton, Johannesburg, as a member of the Victoria Mxenge Group of Advocates. He is also a trained and accredited Arbitrator and Commercial Mediator.

He is an erstwhile trustee of the Nelson Mandela Foundation since 2000 and has also served as the Chairman of the Desmond Tutu Peace Trust. He also held the chairmanship of several other organisations and companies, private and public, and serves in others as an ordinary Board member. In 2004, he was appointed by the United Nations then Secretary-General, Kofi Annan, to serve as a Commissioner on the UN International Commission of Inquiry into human rights violations in Darfur, Sudan.

He has held several leadership positions in the legal profession, including being the founder member, and first President of the National Association of Democratic Lawyers (NADEL), the President, and subsequently the Deputy President of the Black Lawyers Association, a member of the Cape and Johannesburg Bar Councils, and he also served as the National Chairman of the Advocates For Transformation (AFT). He also served as the chairperson of the Cape Town branch of the Black Lawyers Association, and National Chairman of the Advocates for Transformation. Mr Ntsebeza also served as the Chairperson of the Board at Black Lawyers Association-Legal Education Centre (BLA-LEC). Mr Ntsebeza was appointed to the Judicial Service Commission (JSC), having been nominated to that position by the then President of the Republic of South Africa, President Jacob Gedleyihlekisa Zuma. During that period, he also served as the JSC's official spokesperson.

Mr Ntsebeza became a member of the Board of Directors of the Socio-Economic Rights Institute (SERI) in June 2016. Before he was called to the Bar, Mr Ntsebeza was admitted as an attorney in 1984, and practised in the Eastern Cape, mainly in the area of human rights. He represented several political prisoners throughout the 1980s and early 1990s. In 1995 he was appointed one of the Commissioners in the Truth and Reconciliation Commission (TRC).

In 2000, advocate Ntsebeza was called to the Bar in Cape Town, where he took Silk in 2005, becoming the first African to be conferred Silk status in the history of the Cape Bar. He has also practised in the Johannesburg Bar since 2008. Over the years, he has demonstrated a deep passion for Constitutional and Administrative Law, Human Rights Law Labour Law, Mining Law, and Land Law.
After the Marikana tragedy in 2012, Mr Ntsebeza represented families of the striking miners who were killed by the Police before the Marikana Commission of Inquiry.

BLA-LEC conveys hearty congratulations to Mr Ntsebeza in his new role as a Judge of the African Court on Human and Peoples' Rights. Mr Ntsebeza has immense experience as a human rights lawyer, and an Acting Judge in South Africa, and this undoubtedly makes him an immensely qualified and experienced judge for African Court. Mr Ntsebeza will be a real asset to the African Court and BLA-LEC wishes him the very best in his new role. ●

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