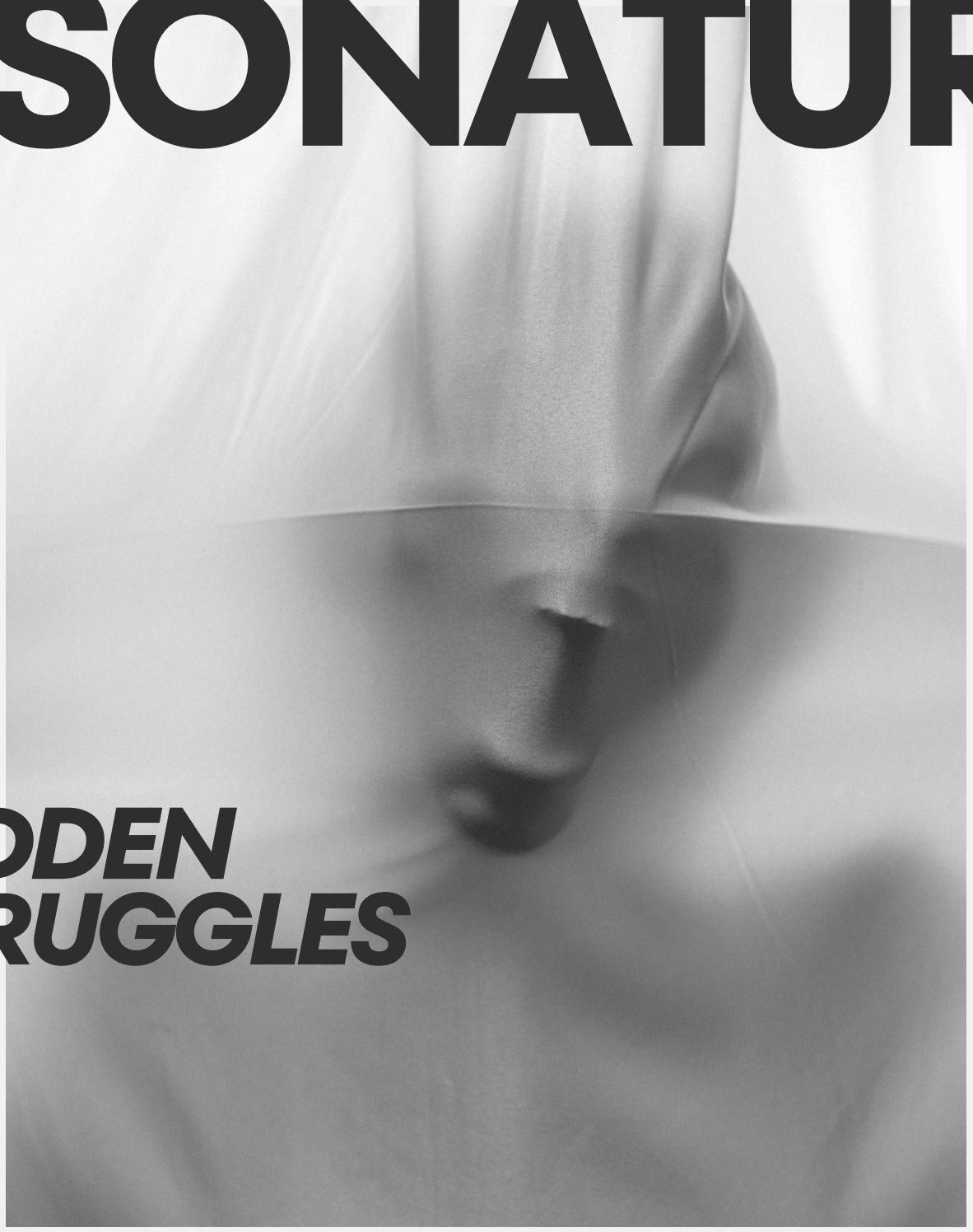
OCTOBER 2024

ALTUM SONATUR



HIDDEN STRUGGLES

VOLUME 16

University of Cape Town • iYunivesithi yaseKapa • Universiteit van Kaapstad

LAW MAGAZINE

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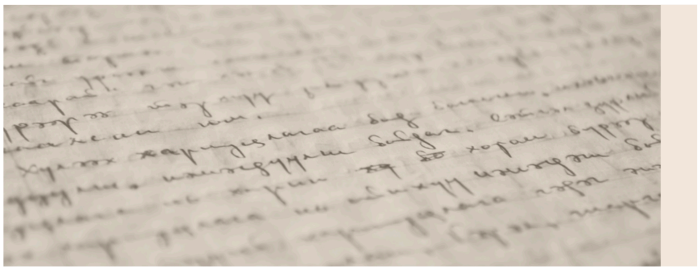


Ever since the new Constitutional order was ushered into the South African experience, the South African legal system has been slowly evolving with the overall goal of creating an accessible, simple and most importantly equal space for all those who find themselves within South African society. Despite the countless hours now dedicated to moulding the minds of the future of the South African legal system, accounts from the subjects of this moulding have been startlingly individualistic.

The Wilfred and Jules Kramer Law building sees hundreds of students bustling through its many corridors, classrooms, lecture theatres and sprawling staircases. Intuitively, these students must see each other, must eventually begin to even recognise each other. Yet despite this, we know precious little about each other.

Choosing the overarching theme of 'Hidden Struggles' was to invite students to speak on social justice issues to raise awareness for struggles close to their hearts, but I would posit that there is another, much humbler but perhaps most important, objective to this edition. The articles within these pages are more than just a reflection of the issues of modern constitutional South Africa, they reflect the issues fellow students wish our readers knew more on.

Ozzy Aromin and Thurston Geswindt have contributed to an insightful discussion surrounding international citizenship and its troubling connections with legacies of colonialism and human rights violations. In their articles, they not only contributed to the academic discussions but divulged their own personal connections with the subject to form articles as emotive as they are academic.

Thurston Geswindt was also kind enough to write another article reflecting on positivism and John Austin's contributions to South African jurisprudence. Roomaan Leach is another who has written a brilliant contribution analysing the norms of international law through their applicability to the global south. James Drummond has given so much of himself to the extremely worthy cause of assisting to eradicate resource poverty through the creation of Thuthukani, a non-profit which raises funds for children in the Masiphumelele township who would be unable to attend school due to overcrowding and under-resourced government schools. He has been kind enough to donate some of his very scarce free time to explain this issue and how readers can contribute.

Stay hydrated and look both ways before crossing the road,
Zahra Ally
Altum Sonatur Co-Editor in Chief

I myself have written two contributions relating to the fight against the criminalisation of sex work in South Africa. One of which articles the discussions and insight provided to us by the Sex Workers Education and Advocacy Taskforce in panel discussion hosted on our campus while the other chronicles the two centuries of human rights violations that can be attributed to the criminalisation of sex work.

Every page of this edition shows the hearts of our contributors. As law students we tend to get caught up in the struggles of others as presented in countless cases and articles, but we spend far too little time considering the lived experiences and cares of those we share our study tables with.

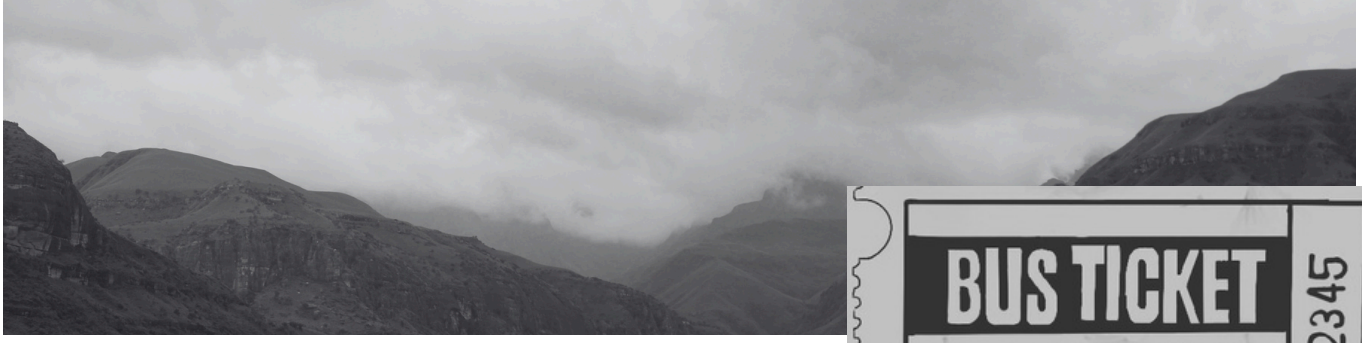
Our dedicated committee of editors, our treasury, our research committee, our graphic designers and our executive committee have poured all they have into ensuring a meaningful and long-lasting depiction of all who have contributed. We hope you enjoy what you find here, and perhaps even that it may inspire you to allow us the privilege of telling your story in a later edition.

The warmest of regards,
Shelby van der Watt
Altum Sonatur Co-Editor in Chief

Whilst nothing I say could measure up to my Co-Editor-in-Chief's heartfelt words, I would like to thank my small but mighty committee for the tremendous amounts of hard work, patience, and commitment throughout the year. It has been a privilege serving as Co-Editor-in-Chief, 2024.

Many members of the team will be returning. However, I am also thrilled to welcome **several new additions:** Anoshamisa Dube; Bonolo Boya; Jaypi Jordaan; Lola-May Dunn; Nokwanda Sithole; and Swaiba Kudia. Altum's very own Ozzy Aromin will be at the helm. He has thrilling plans for Altum Sonatur in 2025, so watch this space!

On behalf of the 2024 committee, I wish our fellow students success in their exams and the very best for the future. As the innominate proverb goes, you didn't get this far only to get this far, so keep moving forward.



UMUNTU NGUMUNTU NGABANTU

By Paula Scheder-Bieschin

Annelise is standing above the road leading north and can't stop laughing. Her nose is red, and she's carrying a leather briefcase.

That morning, she had finally reached the end of her tether. The moment of reckoning arrived as silently as the rest of the decade had unfolded, in dimly lit, smoke-filled rooms, unremarkable office buildings and libraries of varied laudability. She arrived at her office as she always did, mindlessly and as punctual as ever. Sitting down at her desk, still adorned with yesterday's half-finished peppermint tea (for her nerves) and a framed photograph of her mother, she decides to get up and leave.

'Enough,' she said — to no one in particular, for she was always sure to arrive before everyone else did, preferring the office when it was empty and not yet stifled with the usual atmosphere of battle.

Annelise walked out the door, up and along Keerom Street, toward the bus stop by the Castle. It was the first time she had physically walked through the town — it felt and looked very different from the other side of her chauffeur's backseat window. She felt a strange sense of affection for the people walking with and past her, eyes gleaming with focus and direction. They must all be going somewhere very important.

Annelise thought that her admiration for these strangers might come from the truth that she had once been just like them. A character with a purpose in their own story. Presently, she had no idea where to go, and her smartphone's Google Maps was leading her on a roundabout route that seemed to track back past the office (the wrong direction). Stumbling behind the crowds of hurried people, examining their backpacks and pondering what on earth could be inside them, she realised how ill-suited her heels were for walking. She handed them to the schoolboy shuffling next to her and didn't wait to observe the confusion she left him with.

Annelise walked to the bus station with bare feet. For years, she had only ever been without shoes in the comfort of her own small apartment, and the sensation of the hard, unfamiliar ground beneath her feet made her smile. She arrived, having followed a man who seemed to have one of those inconveniently strong moral compasses. She could tell because she watched him take care to avoid looking at her. The man led her to a ticket booth and bid her good morning. The cashier behind the smeared glass was an older woman with hair that someone had attempted to tame but which continued to defy any semblance of order. She tapped her long, chipped nails impatiently on the counter as Annelise approached. Her eyes, framed by smudged eyeliner and tattooed eyebrows, and fixed to the phone tucked not so slyly out of sight, flicked up only when she asked, 'Where to, ma'am?' in a tone that suggested a question asked a thousand times, with no care for the answer.

'I want to go to the Drakensberg.' The woman behind the counter rolled her eyes dramatically.

'Ma'am, our buses only go as far as Ceres,' she said, with a barely contained smirk. When Annelise replied with a simple, 'That's fine,' the cashier shrugged, typing up and printing out the ticket with slow and deliberate movements, as if the act itself was a favor. As she handed over the ticket, her scornful gaze flicked over the bare-footed yet well-dressed woman one last time, dismissing her just as easily as she had been addressed.

On a normal day, Annelise would have sparred with the cashier. She had grown up invigorated by the thought of conflict, drawing calamity like iron to a magnet, irresistibly pulled to the fray. She had never spared a thought for others outside the battlefield of argument, having realised already at the tender age of six that no one cared for her in the way that she craved. She would find the right people, she had told herself, once she fulfilled her purpose — a purpose she defined early on as fighting. It wasn't until she was 13 that she understood that her thirst for conflict could be polished into something socially acceptable, even draped in respectability. After an arrest for public indecency, the law had become her sanctuary. By 18, she had declared her intent to become a lawyer and kept her glasses firmly on ever since. Her days played out in a world of her own inarticulate making — and with every passing year, the space around her grew tighter, like a room slowly shrinking without her noticing.

Darling Street was wreathed in an air pregnant with dread. The rain hadn't stopped for two days, and Annelise assumed it was natural for a people who flourish in the sun to dread its return. She was happy to have bought the ticket and didn't really think much further, looking across the street and resigning herself to the fact that it was time to leave. The bus driver was a guarded man and greeted his guests with a look up and down. A good thing Annelise was not in the mood for friendliness. The drive was long, and she slept the whole way to Ceres. Upon arrival she awoke to find herself covered by a thick jacket, the bus driver gently tapping her on the head. 'Lady, you need to get out, please. I have to go back,' he said. Nodding, she slipped on the jacket without questioning its origin — it was mid-July — and stepped off the bus, still barefoot. As the driver drove away, he threw something out the window. Looking down, she saw it was a pair of shoes.

Annelise had spent her life up until that point as an island. Although the courts have emphasised that man is not an island unto himself, she did not see herself as an extension of others. She saw herself as the narrator to a story as old as time, having happened across the age not out of her own volition. She knew it happened to everyone, that we all get brought into this world as a blessing to it and had to make do with who we are. She would look out the bedroom, car, classroom, any and all windows, and watch the people hurrying past her.

She lived with the knowledge that for them too, the only thought was love — and pain, the only feeling. Her mother was a doctor who wrote the board exam pregnant and read out of her anatomy books at bedtime, so Annelise was first and foremost imprinted with the knowledge that what made humans different from one another was what existed inside their minds. From observing people as a matter of primal instinct, she gathered that she preferred the warm yet convoluted embrace of her own mind to anything else and began to learn how to shield herself from ever being truly known or understood. She rebelled against authority because it had no place in her world, as if to say, 'I cannot bear to see myself through eyes that are not mine, no one will dare alter my reality.' And she said this, by spraying graffiti on church walls and sneaking through farm fences in the middle of the night to release the cattle.

Then came the arrest. Benoni's juvenile detention center was decidedly clear in sending the message that nothing is right or wrong and thinking just makes it so. This she took in her stride, and decided to learn the rules so she could know how and when to break them. On her first day of law school, she was told her reputation began now, and to look around her, because not all of them sitting there scared shitless in Lecture Theatre One would make it to graduation. She listened to the supposedly more learned people tell her to schedule five minutes out of her day to cry and then get on with it; to beware of people sending false notes in spite; to be strategic in who she befriended. Not one word about our visionary and meticulous attempt at measuring and accounting for human behavior the South African judiciaries' facilitation of a process that will allow a tapestried and varied people to live together in peace. She watched the corporate firms set up coffee stands outside the library during exams, gelato carts in the Quad in the summer, and thought it was all just incredibly perverted. 'What better way to prey on young, impressionable students than with coffee and ice-cream?' she laughed to herself in disbelief.

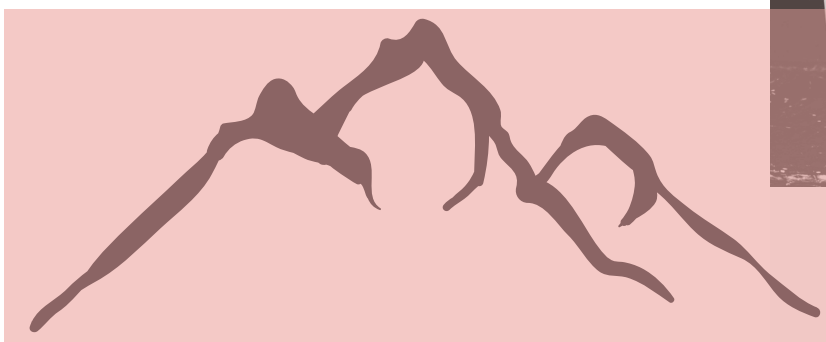
After a guest lecture on socio-economic inequality, she watched the suited, extravagant thinkers pore over refreshments whilst discussing impoverishment, and had a vision of an ivory tower. The sound of the thinkers talking blared out of its tall and hallowed windows, and the noise was unbearable. Annelise was enraged. The law is a thoroughly infuriating realm to be immersed in if you have a strong conscience. She thought the law existed as a promise to the people, and questioned whether it was being squandered in the tall *emprises* of office buildings or in the lofty conversations echoing through the bowels of middle campus, feigning revolution.

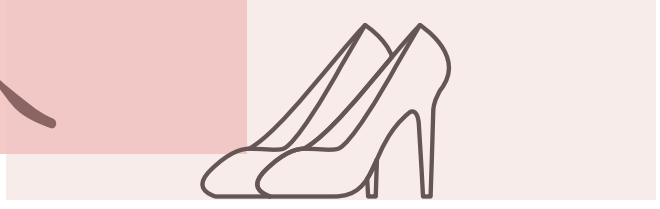
When Annelise was a child, she was often infuriated by older people who dismissed her idealism, claiming they had once been just like her but had become focused on money and achievement. She had vowed never to follow their path. Ten years later, staring at her desk, she saw that her conscience had been suffocated. Recognising a vital part of herself worth preserving, she rebelled, escaping back into the world in need of attention.

Annelise stands above the road leading north, laughing uncontrollably. She's climbed all the way up to the top of Gydo Pass and can't believe the mountains have been here all this time, waiting in their quiet, sentient stillness. They seem alive — bearing witness to her joy with a calm long forgotten in the grid-locked streets of city centers. She aches to return to the Drakensberg, to the silence, craving a reminder of what it feels like to be completely human. How wild can you feel when your days are spent behind desks, facing grumpy judges, frantic clients, and pompous seniors?

At 13, she ran away from home to find the Drakensberg sheep herders she'd read about in a newspaper – those who roamed the peaks with their woolen companions, living beside them. After wandering for a few days, she found them and spent the summer herding. The Underberg welcomed her into a vast solitude, and she was drawn to the tranquility, the sense of independence that life offered there. She listened to the herding boys talk of their work as a metaphor for guidance and care, their lives lived in partnership with the sheep and the land in a way that seemed sacred. Watching them, she came to see this relationship as a lesson in humility, an acknowledgment that, like the flock, they too were part of something larger — woven into a web of nature, fate, and the wisdom of those who came before.

Annelise is tired of certainty, weary of the endless battlefield of discourse. So, she begins walking up the road again. She is heading North.





The True State of sex Work in South Africa

coverage of the panel discussion

In Collaboration with

On Thursday, the 12th of September 2024, Altum Sonatur held a panel discussion in collaboration with Students for Law and Social Justice (SLSJ) and Women in Law (WIL) on the legalisation of sex work in South Africa. The panellists were all from the Sex Workers Education and Advocacy Taskforce (SWEAT). They shared insights on the current state of sex work in South Africa, efforts for legalisation, and the lived realities of South African sex workers.

Eugene van Rooyen, SWEAT's policy and legal advisor as well as the area manager for SWEAT's Community Advice Office in the Western Cape spoke, as did Pamela Ntshekula and Noxolo Katikati, two former sex workers who now work as advocates for sex workers' rights and the legalisation of sex work in South Africa.

As they answered questions from UCT students, an insightful, productive and at many times jarring conversation ensued. They shared their knowledge and experience, and provided a much-needed perspective shift for many of the students who attended. As law students, we often get waylaid with case precedent and legislation and forget that law is, at its core, a study and understanding of the community and its governance. By answering openly and honestly, the panellists opened the eyes of many to the on- the- ground realities of sex workers and the true state of the fight to legalise sex work.

At the end of the discussion, the panellists thanked us for giving them this opportunity to communicate with the future of the South African legal system. For many of us, this gratitude seemed misplaced – we were the ones who ought to have been thankful for their time and willingness to share their experiences.

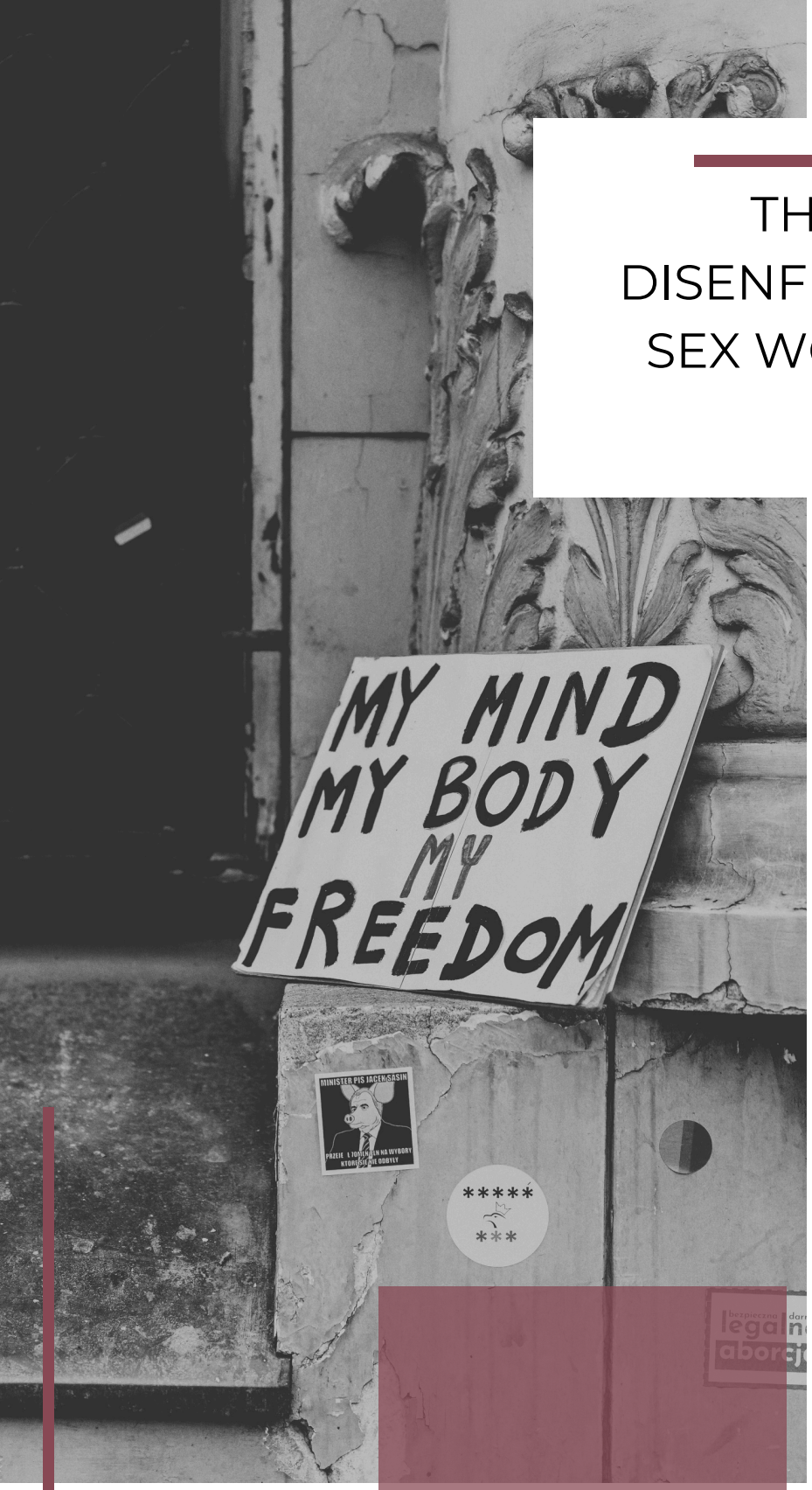
That is, until Pamela Ntshekula, when asked about the future of the fight for the rights of sex workers in South Africa, explained her position further. 'What do I see in the future?' She repeated, 'It will be better. I have never dealt with lawyers or politicians who had heard from real sex workers before, who knew we were people. It will be better because now I know a room full of future lawyers will have spoken with us.'

Most students who read this edition will not have attended that panel discussion, and so would not have heard from real sex workers in the way those who did had. It is for this reason that the following article details the centuries-long history of human rights violations experienced by sex workers in South Africa.

SWEAT worked hard for years with legislators to draft a Bill that proposed the decriminalisation of sex work. The Bill got far into the drafting process before being dropped at the eleventh hour due to the 2024 election and fears of losing votes from conservative South Africans. Since then, SWEAT has and continues to put the full force of their power behind a new challenge to the criminalisation of sex work in the High Court. The application was launched in May and could finally be the judgment that ends the criminalisation of sex work in South Africa.

The fight for the legalisation of sex work is backed by over two centuries worth of continual human rights violations against sex workers in South Africa. and as we peer over the precipice of a historic shift in South African jurisprudence, it is of extreme importance to remember those that came before us.

Take a moment, read the subsequent article and become someone to whom future activists will not need to convince of their humanity.



THE PERSISTENT DISENFRANCHISEMENT OF SEX WORKERS IN SOUTH AFRICA

By Shelby Van Der Watt

From Colonialism to Democracy and Back Again!

Between 1864 and 1869 a series of three laws known as the 'Contagious Disease Acts' were enacted in England with the intention of application in England's colonies to lower the spread of sexually transmitted infections among the British Armed Forces. The law makers, like the military authorities, understood where these diseases were coming from and how they were being spread. With most army men being unmarried and homosexuality being outlawed, impoverished women from all over the colonies flocked to army towns to partake in what is widely considered to be the oldest profession in the world.

These women were seen not only as sources of the infections but as their creators, seen as though their very existence offended the clean. To combat these infections, the Contagious Disease Acts allowed any man to accuse any woman of being a prostitute before a magistrate of the high court. The magistrate, after hearing the man's evidence, could order the woman to be examined for sexually transmitted diseases. Should the woman be found to have an infection, she would be ordered to confinement to a state hospital for up to 6 months. She was not entitled to defend herself, nor was she entitled to inform the magistrate of her clients, who likely also had the infections. The soldiers were not examined, nor were they confined to wards in state hospitals nor considered unclean. They were merely the helpless victims of Eve's ambition.

It has been over 150 years since the aforementioned legislation, and while much has changed, much more has remained the same. Sex workers in modern South Africa might not be being dragged before magistrates for an investigation into their sin, but they are most certainly the receivers of judgement and mistrust from those who deem themselves superior. Their work is still criminalised. Their desperate attempts to claw themselves out of the pits of poverty are still viewed as immoral. It has been over 150 years since the aforementioned legislation, but the women who will walk the streets tonight know the same fear as those over a century before them.

There are 15 decades between the enactment of the Contagious Disease Acts and the still criminalised status of sex work in South Africa. During that time, sex workers have been continually abused, stigmatised, violated and above all else, ignored. While countless organisations have campaigned for the legalisation of sex work and the protection of sex workers, men and women have continued to earn a living in any way they could and, as a result, have continued to face discrimination from all facets of South African society.

The legalisation of sex work in South Africa has been the topic of much debate ever since the Contagious Disease Acts were enforced in the colonies, and by now, the arguments for and against are well known. Repeating the same arguments once again would only amount to preaching to the converted or a refusal to engage by the other side. Rather than allowing these pages to become a rerun of the age-old rhetoric, in the nature of exposing hidden struggles, the lived realities of sex workers throughout South African history will be brought to light. There is no greater argument for the decriminalisation of sex work than the history of human rights violations its criminalisation has caused.

THE OLD SOUTH AFRICA (1910-1947)

Within 1 year of the unionisation of South Africa, the newly formed Parliament passed their first legislative attack on sex workers. Act No 41 of 1911 was aimed at brothel owners and criminalised living off the earnings of sex work.

Despite the clear targeting of brothel owners, the courts were extremely reluctant to trust the testimony of sex workers who worked for the brothel owners. In 1913, the court in *Rex v Weinberg* was startlingly explicit in their distrust of a sex worker's testimony that she was paying part of her earnings to the accused in return for a room in a building he owned. The court openly stated that when the evidence for a charge is solely the testimony of a sex worker, extreme caution must be taken to ensure the validity of the testimony. Sex workers were assumed to be deceitful from the outset, with no such caution advised against the man denying her allegations.

The same sentiment can be seen just 4 years later, in 1917, with the court in *Rex v Christo*. The court stated very clearly that when hearing the testimony of sex workers, one must assume them to be untrustworthy, deceitful and self-interested from the outset.

The perception surrounding sex workers of them being immoral, deceitful and untrustworthy had become so entrenched in South African society that the judges of the time did not even deem it necessary to veil their hatred but rather proclaimed it boldly for all. This level of animosity can be traced back to the first Contagious Disease Acts, when sex workers were seen as the cause of sexually transmitted infections.

This assignment of sex work as immoral was only further solidified with the Immorality Act No 5 of 1927. This Act prohibited interracial relationships in general while also making special provisions for sex workers and their clients. White men were prohibited from 'procuring' any 'African prostitutes.' The Act also made provision for African women to be jailed for up to 6 years for 'provoking' a white man into a sexual relationship. No such provision was in place for the jailing of white men who may attempt the same with African women.

For many police officers, 'provoking' white men into sexual relations included any transactions between them and women of colour sex workers. This resulted in female sex workers of colour being targeted far more in the enforcement of this legislation than any other group. Though the Act sought to curb interracial sexual relations in general, almost all those charged under it were women of colour who also had charges of solicitation.

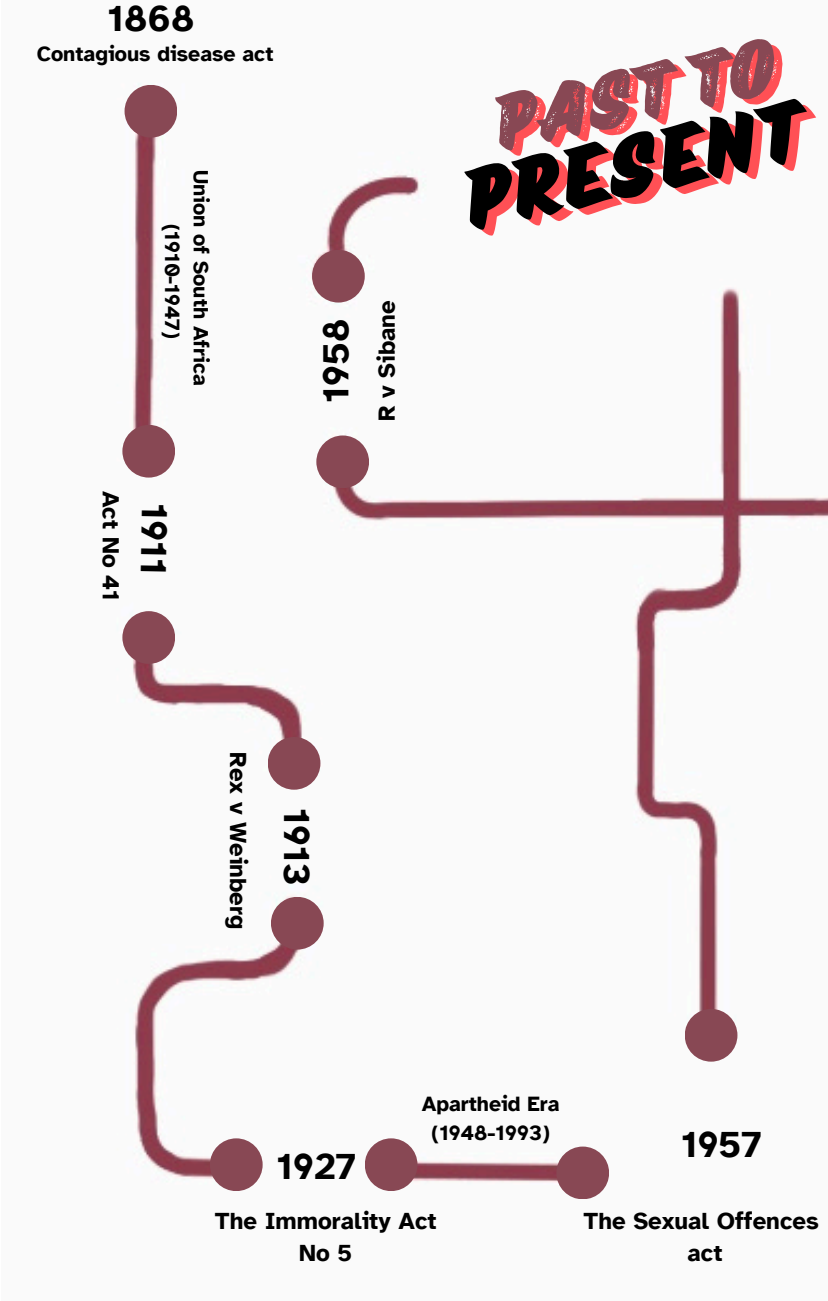
South Africa's independence did nothing to stop the criminalisation and stigmatisation of sex workers. Conversely, the years of the Union of South Africa only further entrenched the continual abuse of sex workers.

THE PAST SOUTH AFRICA (1948-1993)

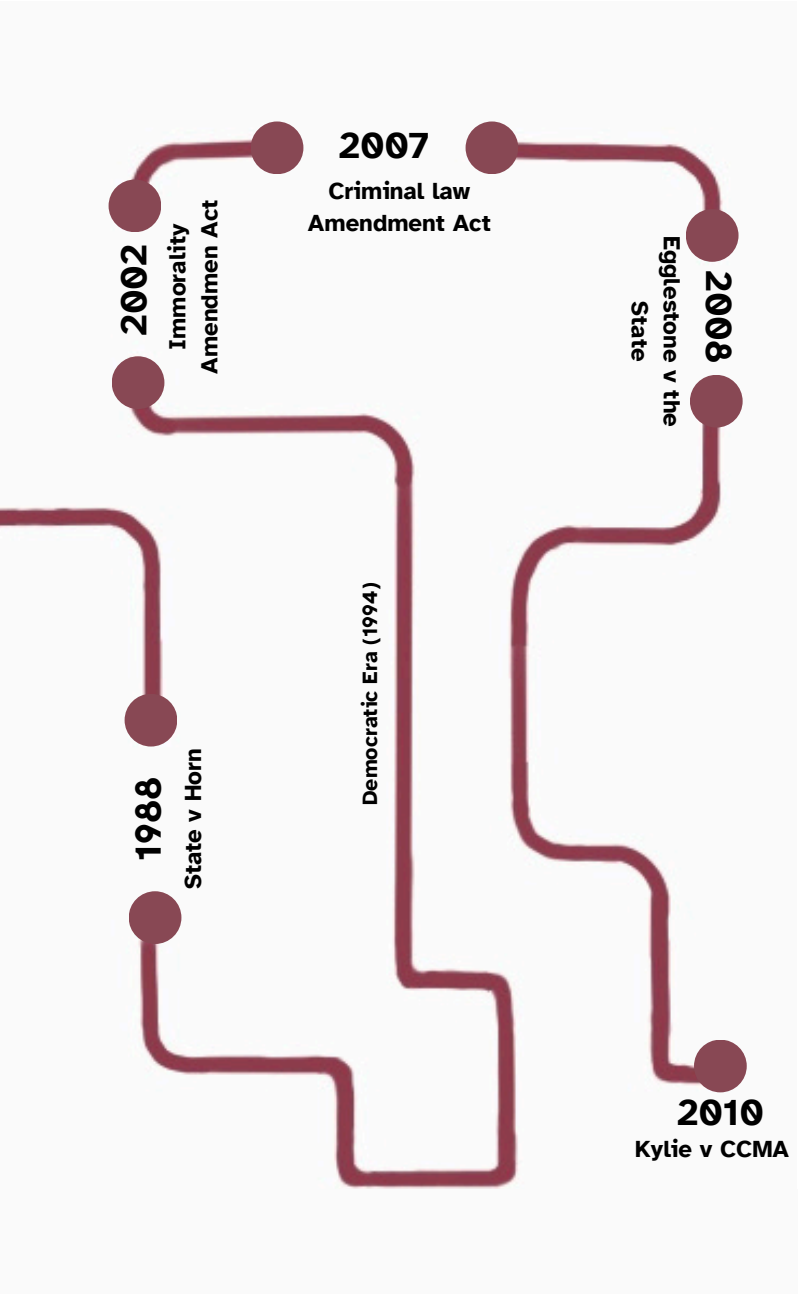
The Immorality Act of 1927 remained in power for almost a decade after the new Apartheid government took hold of the country. The legislation was eventually repealed by the Immorality Act of 1957, later renamed as the Sexual Offences Act of 1957. Despite the fresh coat of paint, at its core it was still the same legislation with the same goal. This Act confirmed the criminalisation of brothels and living off wages earned through sex work.

The conservative Christian views of the Apartheid government were, and still are, well known. Under its regime, sex workers were not only criminal but subhuman. Just one year after the enactment of the new Immorality Act, the court in *R v Sibande* was explicit in its devaluing of sex workers. When addressing the crime of rape, the court stated that raping a sex worker is less serious and warrants a less severe punishment than the raping of a woman of 'good character'. What the court meant by 'good character' was never elaborated on, but it did not need to be. With the morality of the Apartheid government so clearly defined, no one needed clarification on what a woman of 'good character' may look like and why she certainly would not look like a sex worker.

The conservative Christian views of the Apartheid government were, and still are, well known. Under its regime, sex workers were not only criminal but subhuman. Just one year after the enactment of the new Immorality Act of 1957, the court in R v Sibande was explicit in its devaluing of sex workers. When addressing the crime of rape, the court stated that raping a sex worker is less serious and warrants a less severe punishment than the raping of a woman of 'good character'. What the court meant by 'good character' was never elaborated on, but it did not need to be. With the morality of the Apartheid government so clearly defined, no one needed clarification on what a woman of 'good character' may look like and why she certainly would not look like a sex worker.



After the dehumanising comments of the court in *R v Sibande,* three decades passed without much change to the status of sex work in South Africa. The 30 years between 1958 and 1988 were far from smooth sailing. With anti-apartheid activism reaching its peak both domestically and internationally, the Apartheid government seemed to have far more pressing matters on its hands than the policing of sex workers.



As the years ticked closer and closer towards a new democratic era, liberalism seemed to be on the rise throughout the country. The Apartheid government was slowly loosening the reigns and beginning to admit defeat. Peace talks were discussed throughout the country. The way forward was unclear, but it was certain that the *status quo* would not be continued.

During this uptick in liberalism, the first and only judgement expressly allowing for the decriminalisation of sex work in South Africa was posited. In 1988, the court in *State v Horn* interpreted the Immorality Act of 1957 as only intend to target brothel owners and pimps. The court found that the legislation in question did not attach criminal liability to the sex workers themselves.

For a brief moment, it seemed that sex work may have finally been recognised as a legitimate profession. As the country slowly but steadily changed, this change of heart about the status of sex workers seemed to be a natural progression.

Less than 10 months later, the Immorality Amendment Act of 1988 was passed in Parliament. This legislation officially renamed the 1957 Immorality Act to the Sexual Offences Act and expressly attached criminal liability to the sex workers themselves as well as the brothel owners by prohibiting engagement in sexual activities for a reward of any kind.

The amendment was drafted swiftly after the court in *State v Horn* was bold enough to suggest that sex workers may escape criminal liability. The country was hurdling towards liberalism and equality in every other sphere, but the legislature clamped down with an iron first the moment the possibility of any allowance for sex work became reality. Even while that same legislature was in peace talks with anti-apartheid activists, laws damning some of the most vulnerable in society were being perfected.

When South Africa entered the new era of democracy, the amendment came with it. People flooded the streets, the country's cheers could be heard from across the ocean, and still some of its most vulnerable were punished for the crime of trying to make enough money to survive.

THE SAME OLD SOUTH AFRICA (1994-PRESENT)

The Constitutionality of the Criminalisation of Sex Work

The enactment of the 1996 final Constitution started South Africa on an entirely new path, one that valued equality, human dignity and respect above all else. At long last, every South African was considered equal. In the nature of this newfound equality, the newly established Constitutional Court got to work on righting the wrongs of the past. Judges used the newly drafted final Constitution to ensure equality and dignity for all, writing a series of landmark judgements that have shaped South Africa.

In 2002, the constitutionality of the criminalisation of sex work was brought before the Constitutional Court in *S v Jordan*. Though the majority judgement acknowledged that sex workers were an extremely vulnerable minority group, drawing special attention to female sex workers of colour and their likelihood to be victims of acute and complex trauma, the court still ultimately found that the criminalisation of sex work was constitutional.

In its reasoning, the court argued that sex work is inherently linked to violence, child trafficking and drug abuse. Stopping these horrific human rights violations, it reasoned, was justification for the criminalisation of sex work. Despite nearly half a century passing between the court's judgement and the judgement in *R v Sibane*, the judges still looked down upon sex workers and still believed them to be inherently linked to other criminal behaviour. This association has infected the minds of South African society since before the formation of the Union of South Africa, and after S v Jordan, it seemed that the new era of equality and human dignity stopped short before reaching the men and women who we were trying to survive in a country ruined by centuries of colonialism and racist governmental regimes.

The judges were split 6 to 5, with O'Regan j and Sachs j in favour of the decriminalisation of sex work. While their minority judgement has gained more traction since its release than the majority judgement supporting criminalisation, this attention did not and will not amount to any real change. The majority of the Constitutional Court still sided with the long history of villainization of sex workers.

The only concession the majority judgement was willing to make was to accept that the Sexually Offences Act discriminated against sex workers on the grounds of gender for not attaching criminal liability to clients as well as them. The majority thus ordered that the legislation be amended to find clients equally as liable.

This change was made in the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007. In terms of this Amendment Act, clients would finally be arrested alongside the sex workers, but adding the suffering to another does little to change the suffering of the first. While this judgement is widely criticised today, it is still enforced. The criminalisation is still deemed constitutional.

Two Stumbles in the Right Direction

In the years since *S v Jordan*, courts all over the country have been becoming more radical in their support of the transformative ideals in the Constitution. In particular, in the protection of human dignity, equality and respect.

In 2008, the Supreme Court of Appeal in *Egglestone v the State* found a brothel owner to be guilty of rape and in doing so, dismissed the accused's defence of the sex workers consenting to all advances by virtue of being sex workers. The court held that sex workers deserved their rights to dignity and bodily autonomy to be protected and acknowledge their vulnerable place in South African society.

A similar sentiment was seen 2 years later in *Kylie v CCMA* where the court held that the protections of the Labour Relations Act applied to sex workers even though their profession was still criminalised.

These two judgements could be seen to be a pinprick of light at the end of the tunnel, but none of their statements amount to an endorsement of the decriminalisation of sex work. Courts uphold the rights in the Constitution, they fight to ensure equality across the country, they further the transformative ideals of the Constitution, and at their core, they leave sex workers behind.

AND BACK AGAIN

Sex has been a part of human history since before humans had history. Irrelevant of where someone may stand in the debate, no one can deny that sex workers are not going away.

The original intention of this article was to provide a brief overview of the landmark cases in the history of sex work in South Africa and then to outline the key arguments for its decriminalisation. However, it very quickly became apparent that for as long as sex work has existed, so too have all the reasons for legalisation. The entirety of humankind knows the age-old debates and no one from the other side could be persuaded by arguments they have heard more times than they can count.

There is a reason for that, though. For as long as sex work has existed, sex workers have been abused, disrespected and disregarded. Arguments for the protection of sex workers have been ongoing since the dawn of mankind because sex workers have deserved protection since then. Every man and woman who has ever had to sell themselves to live in the entire history of South Africa has done so with the same fear in their hearts and the same judgement in their loved ones' eyes.

In many ways, South Africa is unrecognisable from the newly independent nation created in 1910, but in many other ways it is much the same. For over one and a half centuries, South Africa has been not only allowing but encouraging the continual abuse of some of its most vulnerable citizens in the name of morality.

Proponents of the continued criminalisation of sex work seem incapable of being pulled down the moral high ground, but the reality is that they are not on the moral high ground to begin with.

Anyone who can support 150 years of grievous human rights violations does not get to call themselves moral.

Scarcity in Abundance

Unpacking Child Resource Poverty

By James Drummond

In a country renowned for its rich natural resources and diverse landscapes, South Africa faces a paradox that deeply impacts its youngest citizens — resource poverty. Despite the nation's wealth in minerals, energy, and fertile land, millions of South African children grow up with limited access to essential resources like clean water, nutritious food, and quality education. This stark contrast between abundance and scarcity underscores the deep-rooted issues of inequality, infrastructure deficits, and historical injustices that perpetuate cycles of poverty among the most vulnerable. Addressing the complexities of resource poverty in children is not only crucial for their well-being but also for building a more equitable and prosperous future for the entire nation.

The Problem Explained

2024 marks thirty years of democracy for South Africa. The country has seen an entire generation come of age, and now it is perhaps time to acknowledge that the persistence of resource poverty among children reveal deep-rooted systematic issues that can no longer be solely attributed to the legacy of Apartheid. While historical injustices laid the groundwork for inequality, it is not imperative to address the current policies, governance, and societal structures that continue to perpetuate these disparities.

So, what is the problem? According to a report on Child Poverty published by Statistics South Africa, 62.5% of South African children aged 0 – 17 years old are considered multidimensionally poor. The Multi-Dimensional Poverty Index measures an individual's overlapping deprivations in three dimensions that are equally weighted, namely: health, education and standard of living. This means that approximately 6 out of 10 children suffer deprivations in more than one dimension. Despite the progress made since the end of Apartheid, 68.3% of Black African children in South Africa continue to be profoundly impacted by multi-dimensional resource poverty, highlighting the urgent need to address ongoing systemic inequalities that disproportionately affect the most vulnerable.

23% of children in South Africa experience extreme food poverty. When one understands that children who experience this level of food poverty are 50% more likely to suffer from life-threatening malnutrition, one realises how alarming the problem is. Although many children are not in such a dire situation, only 8% of households in South Africa have access to all the 22 perceived necessities for a decedent standard of living. This begs the question as to what thousands of children are lacking even if they are not at the risk of severe malnutrition.

The provinces with the highest rates of multidimensional child resource poverty are Limpopo, the Eastern Cape and KwaZulu-Natal. Resource poverty in South Africa disproportionately affects rural provinces, where infrastructure is often underdeveloped, and access to essential services is limited. In these areas, children face significant barriers to basic resources such as clean water, quality education, healthcare, and food security. Unlike urban centres, which generally have better access to public services and economic opportunities, rural communities struggle with higher levels of poverty, unemployment, and isolation. This **rural-urban divide** exacerbates the challenges of resource poverty, leaving children in rural provinces at a distinct disadvantage in terms of their overall well-being and prospects.

What does this mean for the future of South Africa?

Young children in impoverished areas often suffer from malnutrition and stunted growth, which can lead to long-term cognitive and physical impairments. Inadequate access to clean water, sanitation, and healthcare increases the risk of preventable diseases and hampers their ability to thrive. Educationally, resource poverty translates to overcrowded classrooms, insufficient learning materials, and poorly maintained school facilities, leading to lower educational outcomes and limited future opportunities. Resource poverty has a severe impact on education in South Africa. 27% of public schools do not have access to running water, whilst 78% do not have libraries or computers (UNICEF, 2017). We have 395 mud schools in this country, and most of them are no more than cramped and unsafe rooms where learners have no choice but to squat on the floor or crowd around a few textbooks (Garter & Isaacs, 2012). Those who have greater access to resources usually do better academically than those who do not have access to necessary resources.

The compounded effects of these challenges can perpetuate a cycle of poverty, making it difficult for these children to break free from the constraints of their circumstances and achieve a better quality of life.

To tackle child resource poverty in South Africa effectively, a multifaceted approach is needed. First, we must enhance social safety nets like child support grants and school feeding programs to provide immediate relief to families facing food and basic needs shortages. Alongside this, investing in rural infrastructure and improving educational facilities, including repairing and building schools, will create better learning environments for children.

Expanding healthcare services and nutrition programs is crucial to addressing malnutrition and health issues. Collaborations between government, non-profits, and community groups can drive effective, localized solutions and ensure resources reach those in need. Finally, addressing the root causes of poverty—such as economic inequality and unemployment—through targeted policy reforms and economic development will help break the cycle of poverty and create lasting improvements in children's lives.

The way forward

While the full alleviation of child resource poverty is a goal which must clearly fall squarely within the government's prerogative, that is not to say that every day South Africans cannot create positive impacts.
Thuthukani is a non-profit company founded by UCT law students who had seen the reality of child resource poverty and could not stand idly by. Thuthukani aims to raise funds for children in the Masiphumelele township who would be unable to attend school due to overcrowding and under-resourced government schools. Thuthukani raises money throughout the year to fund the following year's education in full, including school supplies, school uniforms and lunches. Without this intervention, these children would be unable to attend school for the year, and in many cases, would also go through the year with no guaranteed meal every day, either.

Masiphumelele may just be one of hundreds of townships all filled with children unable to obtain the education the Constitution promises, but assisting even one student to have access to the basic rights they are promised cannot be overlooked. It may not change the entirety of South Africa, but it will completely change their world.

The charity will be ready to take donations and volunteers soon! If you are interested in getting involved, follow @altumsonaturuct on Instagram for updates.

Social Justice & Lifelong Learning

The Synergistic Impact of UCT Law Clinic's Community-Based Legal Programmes.

Yellavarne Moodley has been the director of the UCT's law clinic for 10 years. The clinic stands at an intriguing crossroads, where legal challenges cross with opportunities for educational enrichment and civic engagement. Moodley asserts that the work encompasses more than just access to legal representation. 'Social justice involves ensuring respect for everyone's human rights and dignity.' She explains, highlighting the importance of exposing students to different social realities. 'Many of our students may not have previously encountered the pressing social issues that exist in our country'.

Through engagement in community service, the clinic aims to deepen students' understanding of these challenges and cultivate a sense of collective responsibility. Moodley observes that such experiences often lead individuals to return to their careers with a renewed dedication to making a positive impact. The hope is that this initial exposure to the realities faced by many will resonate throughout their professional lives, encouraging sustained engagement long after they have departed from UCT.

The clinic also plays a critical role in South Africa's lower courts, particularly Magistrates' Courts, where the majority of South Africans experience justice. Moodley emphasises that while not all cases reach the courtroom, many do, and by operating in these courts, the clinic provides essential legal assistance on the ground. 'Clients are actively involved from the beginning by providing instructions or mandates, reflecting the clinic's commitment to participatory lawyering'.

In terms of comm-unities, Moodley notes that while the clinic does not have the financial capacity for class action lawsuits, it focuses on urgent community issues, such as eviction cases threatening basic rights like housing. Additionally, the clinic periodically conducts workshops and collaborates with community groups to enhance legal knowledge and strengthen rights, underscoring its dedication to providing accessible legal support and fostering community resilience.

The clinic is not only based on UCT's campus. 'We have recently established a fourth clinic, bringing our total to four,' says Moodley. In addition to these clinics, 'we also see some clients at our offices, where people can phone in for an appointment and be seen by our candidate attorneys.' The two original clinics, Athlone and Retreat, have been integral for nearly two decades, operating within public libraries, reflecting longstanding partnerships. The third clinic, situated at the Ocean View Library, serves a geographically isolated area that remains under-served due to historical spatial segregation. The newest addition, located in Hout Bay, aims to support indigent communities such as Hangberg and Imizamo Yethu. Moodley says the Hout Bay office is 'still in its infancy, and we need to get the word out there.'

The law clinic is available to the broader community, including those in need within the general public. The clinic is not primarily designed to assist students, with Moodley explaining that 'many students have come in need, but despite appearing to be on a student budget, a significant percentage benefit from family support or NSFAS allowances. Students, due to their access to tertiary education, are generally considered part of a privileged group, and if we did not impose income limits, we would end up serving students rather than the truly disadvantaged.'

The clinic's record is impressive, with Moodley reporting that over the last decade they have trained 'at least 10 candidate attorneys, have served 8,703 clients, trained just under 700 students in clinical legal education, opened 4,538 cases and closed 4,201, with 337 still pending.' The estimated annual cost to fund client matters for the years 2022 to 2023 was approximately R150,000.00, which had been financed through dwindling sources of funding. Moodley calls the clinic's job 'challenging but meaningful work, that we hope students have appreciated'.

FOLLOWING COMMANDS

AN ATTEMPT AT DEFENDING JOHN AUSTIN'S THEORY OF LAW IN THE 21ST CENTURY

By Thurston Geswindt

> *"John Austin is considered by many to be the creator of the school of analytical jurisprudence, as well as, more specifically, the approach to law known as "legal positivism" Austin's particular command theory has been subject to pervasive criticism, but its simplicity gives it an evocative power that continues to attract adherents."*
>
> — Stanford Encyclopaedia of Philosophy.

In the study of jurisprudence, few scholars have been as influential and ahead of their time as Austin. His seminal work, 'The Province of Jurisprudence Determined' (1832), has laid the foundation for legal positivism (LP) — a school of jurisprudential thought which has shaped the debate as to what the nature of law is or more specifically 'what law *is*' for nearly two centuries, and has offered the basis upon which later scholars such as H.L.A Hart have developed their own theories of law. In his book 'Legality,' Scott Shapiro argues that the fundamental question analytical jurisprudence must address is: 'What is the nature of law?' Shapiro contends that this inquiry consists of two interconnected parts. The first part seeks to determine what distinguishes law from other forms of social rules or norms. Stated otherwise, 'what makes law, *law* and not something else'. Once this is established, the second part of the inquiry explores the necessary implications of something being classified as law. According to Shapiro, Austin's theory would answer the first question by asserting that law is a command issued by a sovereign, backed by the threat of sanctions.

For the sake of clarity, Austin's theory, often referred to as the 'command theory', posits that law is the command of a sovereign — who is habitually obeyed and who habitually obeys no one else in return — backed by a threat of sanctions. Austin's formulation of what the law is presents a simplified, yet rigorous approach to understanding legal systems, reducing them to no more than a set of commands issued by a determinate authority His theory addresses the importance of sovereign power in the creation and enforcement of the law, suggesting that without a clear sovereign, the concept of law becomes untenable. This approach, while elegant and lauded for its simplicity, has been the subject of substantial criticism over the years, particularly by H.L.A Hart in 'The Concept of Law'. Despite the critiques, I believe there is merit in revisiting Austin's theory, not only to attempt to defend its foundational propositions, but also to explore its relevance in contemporary legal systems.

A command issued by a sovereign

The first point of Austin's theory that requires examination is the notion of law as a command issued by a sovereign. The emphasis on the sovereign's command as

the basis of law has been criticised for being overly simplistic and failing to account for the complexities of modern legal systems and the changing face of sovereignty, as moving away from residing in a sole monarch towards being vested in the state through the *trias politica* like in modern constitutional democracies. Critics of Austin argue that this model reduces law to mere orders, disregarding the nuanced roles that principles, rights, and judicial decisions play in modern legal systems. Moreover, the theory has been critiqued for its inability to accommodate the concept of laws that are not directly enforced by a sovereign, such as customary laws or international laws, which operate independently of a centralised sovereign authority.

Yet, it is crucial to recognise that Austin's theory was a product of its time, formulated during the early 19th century when the structures of power and governance were vastly different from today. The centralisation of power in the hands of a monarch was more command-centric, and Austin's focus on sovereignty as the cornerstone of law reflected that reality. In defending Austin, one might argue that his theory should be understood as a foundational model, not an exhaustive explanation of all legal phenomena. It provides but a mere starting point for understanding the role of authority in law, which remains relevant even as we recognise the limitations of his model in capturing the full complexity of a modern legal system.

The moral dimensions of law

Another significant criticism of Austin's theory is its failure to account for the normative aspects of law. LP, which Austin's theory embodies, is often contrasted with natural law theories that posit an intrinsic connection between law and morality. Critics would argue that, by reducing law to the commands of a sovereign, Austin neglects the moral dimensions of law, which are crucial for its legitimacy and acceptance by the bulk of society. This criticism, however, may overlook the context in which Austin developed his theory. Austin was primarily concerned with distinguishing law *as it is* (descriptive) from law *as it ought to be* (normative), a distinction that remains a vital contribution to LP.

In Austin's defence, it is essential to appreciate the value of this distinction. By focusing on what law *as it is*, Austin's theory allows us to analyse legal systems without conflating them with moral judgements or theorising. Austin's theory, therefore, should not be dismissed for its lack of moral considerations; rather, it should be recognised for what it contributes to the positivist tradition — a rigorous, descriptive account of law that sets the stage for further exploration of its normative aspects.

Austin's theory in the 21ST century

One might argue that the most significant challenge to Austin's theory comes from the evolution of legal systems themselves. In the 21ST century, legal systems have become more complex, with multiple sources of law, including statutes, regulations, case law, and international treaties, in operation in a particular legal system. The concept of sovereignty has also evolved, especially with the rise of supranational entities like the European Union (EU), where legal authority is shared and not concentrated in a single sovereign. Critics usually argue that Austin's theory, with its emphasis on a single sovereign, is ill-equipped to handle this complexity. However, a nuanced defence of Austin might suggest that while his

theory does in fact not address these developments, it can be adapted, reformulated, or adjusted to fit into a contemporary context.

For instance, the idea of sovereignty in Austin's theory could be reconceptualised to account for the diffusion of power in modern legal systems. Sovereignty need not be seen as residing in a single entity but could be distributed across various political and social institutions that collectively exercise authority. If we take South Africa's constitutional democracy, the sovereign is not a single ruler but rather a collective entity (the South African government) comprising the legislature, the executive, and the judiciary. The laws passed by the legislature, subordinate legislation issued by the executive, and development of the common and customary law by the judiciary, are, in my view, commands in the Austinian sense, as they require compliance from the governed and are enforced through legal sanctions for non-compliance. For example, laws on taxation, the criminal law, and regulatory statutes, function as commands that impose obligations (or duties) on individuals and entities, backed by a threat of sanction for failure to comply. However, it would be ignorant to suggest that this applies to all laws. As H.L.A Hart has pointed out, the command-theory fails to account for power-conferring rules that are not commands by a sovereign backed by a threat of sanction, and where nullity can never be a sanction (in the Austinian sense). But this reconceptualisation allows us to retain the core of Austin's command theory while acknowledging the realities of modern governance and power relations in society.

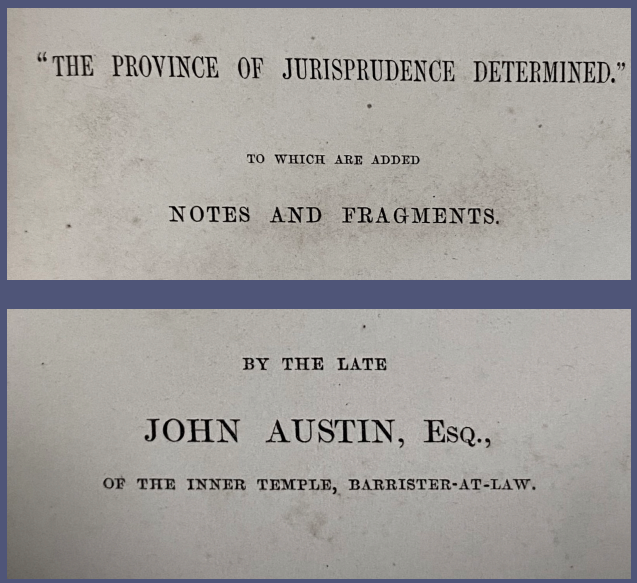
Additionally, Austin's focus on sanctions as a defining feature of law remains relevant. Even in complex legal systems, the enforceability of laws through sanctions is a crucial aspect that cannot be ignored. Laws without sanctions are effectively reduced to mere advice or moral guidelines rather than true legal obligations. The emphasis on enforceability in Austin's theory highlights the coercive power that distinguishes legal norms from other social norms. Modern legal systems encompass several forms of laws, from statutes to city by-laws, and international agreements, each with varying mechanisms for enforcement. However, at the core of these systems lies the principle that laws must be backed by the potential for enforcement — whether through fines, imprisonment, or other forms of coercion — if they are to be effective and maintain their status as law. Without such sanctions, laws would arguably lose their binding force and their ability to regulate behaviour in society.

For instance, in criminal law, the role of sanctions is clear and direct. Criminal statutes — such as the Criminal Procedure Act and the Criminal Law Amendment Act — are typically enforced by the state, and violations result in penalties such as imprisonment, fines, or community service. These sanctions are not merely symbolic; they are the mechanisms by which the state asserts its authority and ensures compliance with the law. In this sense, Austin's theory accurately captures the essence of criminal law as a set of commands issued by the sovereign, which are enforced through the threat of punishment. The idea that law is inextricably linked to sanctions remains a crucial insight, demonstrating the enduring applicability of Austin's theory in the 21st century.

Moreover, even in areas of law where the connection between sovereign command and sanction is less direct, the principle still holds. Consider regulatory laws (or statutes), where sanctions may take the form of fines or the revocation of license for non-compliance with regulations. While the nature of the sanctions may differ from those in criminal law, their role in ensuring the enforceability of the law is fundamentally the same. Regulations that are not backed by enforceable sanctions risk being ignored or violated, thus undermining the binding force of the regulations. Thus, the relevance of Austin's focus on sanctions extends beyond the narrow scope of criminal law

to encompass the broader regulatory functions of modern legal systems.

Additionally, the rise of international law presents a complex challenge to Austin's theory, particularly in terms of the enforcement of sanctions. Unlike South African domestic law, international law lacks a centralised sovereign authority capable of enforcing sanctions uniformly. However, even in this domain, the concept of sanctions remains relevant. International law relies on mechanisms such as economic sanctions, diplomatic pressure, and, in some cases, military intervention to enforce compliance. While these sanctions may be implemented by a collective of states rather than a single sovereign, the principle that law requires enforceability to be effective still applies. Thus, Austin's focus on sanctions continues to offer a good observation into the functioning of international legal systems, even if the enforcement mechanisms differ from those found in domestic laws.


"THE PROVINCE OF JURISPRUDENCE DETERMINED."

TO WHICH ARE ADDED

NOTES AND FRAGMENTS.

BY THE LATE

JOHN AUSTIN, Esq.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

Thus, by acknowledging the command theory's strengths in certain areas of law, we can better appreciate its continued relevance, rather than dismissing it wholesale due to its limitations.

In considering the relevance of Austin's theory in the 21st century, it is also important to reflect on the broader implications of his LP. Austin's work laid the groundwork for later developments in legal philosophy and theory, particularly the work of H.L.A Hart, who sought to refine and expand upon Austin's ideas. Hart's concept of the 'rule of recognition', for instance, can be seen as an attempt to address some of the shortcomings in Austin's theory, particularly regarding the complexity of modern legal systems. However, even as Hart criticised and built upon Austin's work, he acknowledged the importance of Austin's contributions to the field of jurisprudence.

While Austin's theory may seem overly simplistic considering the complexities introduced by modern legal systems, it remains a foundational model that provides a glimpse into the nature of law and the role of authority and power in enforcement of laws. By adapting and expanding upon Austin's ideas, we can continue to find relevance in his theory, particularly in areas where the connection between law and sovereign authority remains strong. Rather than dismissing Austin's theory as outdated, we should view it as a critical building block in the evolving development of jurisprudential thought.

Are we **human?**

Critiquing the hypocrisy of the Universal Declaration of Human Rights.

By Roomaan Leach

The Universal Declaration of Human Rights, ostensibly a beacon of hope emerging from the ashes of World War II, promised a new dawn for humanity — yet the Wretched of the Earth found themselves still shrouded in darkness.

1948 laid bare a stark hypocrisy. The Belgian Congo (now the Democratic Republic of Congo) remained under colonial occupation — its resources plundered for the benefit of Western interests. Across Africa, from Algeria to Zimbabwe, millions were still living under the dominion of European imperialists. Across the ocean was the Indian subcontinent, freshly cleaved into two and still grappling with the ramifications of famine and British imperialist policy. Palestine, too, had her fate rewritten without the consent of her people. The UN Partition Plan of 1948 paved the way for the creation of the state of “israel” (the occupation of Palestine) — a state born from catastrophic dispossession and colonial policies.

These glaring omissions can not be dismissed as mere ‘products of their time’ (as much of historic racism often is), for 3 years earlier a group of radical thinkers and activists met and drafted the Pan-African Congress’s Declaration to the Colonial Workers, Farmers, and Intellectuals. This Assembly, the Fifth Pan-African Congress (PAC), brought together visionaries from across the African diaspora and colonized world, who laid the groundwork for a far more radical and inclusive reimagining of global power structures and human dignity. The declaration opened with an unabashed condemnation of imperialism and heralded ‘the right of *all* peoples to govern themselves.’ Its vision was one where all of us could be free from ‘political and territorial domination’ by affirming the right of Colonial subjects to self-determination. What the oppressed have always known, and what the PAC made evident in their declaration, is that our rights will always be secondary to the whims of our oppressors, not simply because they had power and we did not, but because, as Fanon puts it, there is a distinction between those considered human, and those considered sub-human. Far from being an unfortunate oversight, this hypocrisy was the deliberate product of Western powers' determination to preserve their colonial empires and imperialist privileges/power.

The 5th Pan-African Congress was significant even beyond the declaration itself. In attendance were many future leaders who would go on to change the course of their newly independent nations. Kwame Nkrumah, who would go on to become the first president of Ghana; Jomo Kenyatta who governed Kenya first as its Prime Minister and then President; and Hastings Banda, the first President of Malawi, were all present at this pivotal gathering. At the time, however, they were much like us —students and activists, who dreamed of a better world. Their presence at the Congress highlights a crucial point — that the ideas and principles articulated in the declaration were not mere postulations or theories, but blueprints for action. It also brings to the fore something we should all remember. We, as burgeoning lawyers from the Global South have not only the right, but the *responsibility* to forge paths that diverge from the paths dictated to us by international law, just as our intellectual ancestors did.

The best way for us to fully understand the inherent violence to the Universal Declaration of Human Rights (‘UDHR’ or ‘Universal Declaration') is to understand and engage with Achille Mbembe's theory of Necropolitics. Necropolitics is a sociopolitical theory which explores how social and political power is used to dictate how some people might be allowed to live and how others must die. Essentially it refers to the capacity to foster or disallow life up to the point of death whilst the through the systemic governance of people's lives unto a specific end — the manifestation of power in regards to the regulation of human life at the population level. This theory is of course much more in-depth and well-interrogated within the humanities, but for our purposes this explanation suffices. Mbembe builds on these ideas by introducing necropolitics as a framework for understanding *sovereignty*, particularly in the context of extreme violence and oppression. This ideology has been widely applied by scholars who seek to examine how powerful stakeholders — say governments or legal structures such as the United Nations — create hierarchies of human rights that determine who is expendable. Beyond expendability, it also helps us understand how and why the deaths of certain populations are rendered permissible, and sometimes even invisible, to the public psyche.

When we apply the lens of necropolitics to an analysis of the Universal Declaration and the Pan-African Declaration, a stark contrast emerges that elucidates the power dynamics at play within the international legal order. The UDHR, supposedly universal, emerges directly from Western liberal tradition which fails to recognise the duty it holds towards formerly colonized nations.[1] This allows for continued dehumanization, extractivism and subordination at the hands of imperial powers. It allows the repercussions of necropolitics to flourish unchecked. We see this in the continued genocide and occupation of Palestine, in the genocost[2] of the DRC, in the war-torn cities of Sudan and the daily economic and political strife experienced throughout the Global South. The Pan-African Declaration, by directly challenging imperialism and demanding genuine self determination, contests this necropolitical order that allows some nations to determine who lives, and who dies. The UDHR's silence in the face of colonialism is, itself, a form of necropolitical bargaining that determined which suffering mattered. For lawyers of the Global South, an understanding of this concept is crucial because not only does it reveal the underlying power dynamics that shape international law, it also provides a framework for us to approach the legal and political systems that continue to perpetuate these deadly inequalities with a critical lens.

The chasm between universalist human rights rhetoric and the realities of the Global South have never been more evident than they are in the contemporary. As we approach October 7th 2024, we are confronted with the one-year anniversary of the genocide in Palestine. Despite South Africa's efforts to pursue justice, the International Court of Justice's (ICJ) lack of enforcement powers, combined with the veto authority held by the five permanent members (who will always vote in their own economic interests), has rendered the mechanisms of international law largely ineffective, resulting in little more than empty platitudes. This failure of international law to protect the most vulnerable among us is not an anomaly. It is a core feature of a system rooted in colonial power structures. From the ongoing exploitation of natural resources in the DRC over the past 500 years, to the economic control exerted through international investment treaties, we repeatedly see the Global South's right to self-determination — a principle passionately advocated for in the Pan-African Declaration — being challenged and violated. Neocolonialism, disguised as economic development and upheld by international law, continues to constrain the Global South's ability to pursue its own interests, thereby perpetuating longstanding cycles of dependency and exploitation.

[1] We are, in this instance, comparing the UDHR and the much more radical Pan-African Declaration and in that there can be no question of its west-leaning liberal ideology. Debates as to the 58 states who affirmed the UDHR are secondary.

[2] A combination of Genocide and Cost used by activists to explain the economic root of the genocide in the DRC.

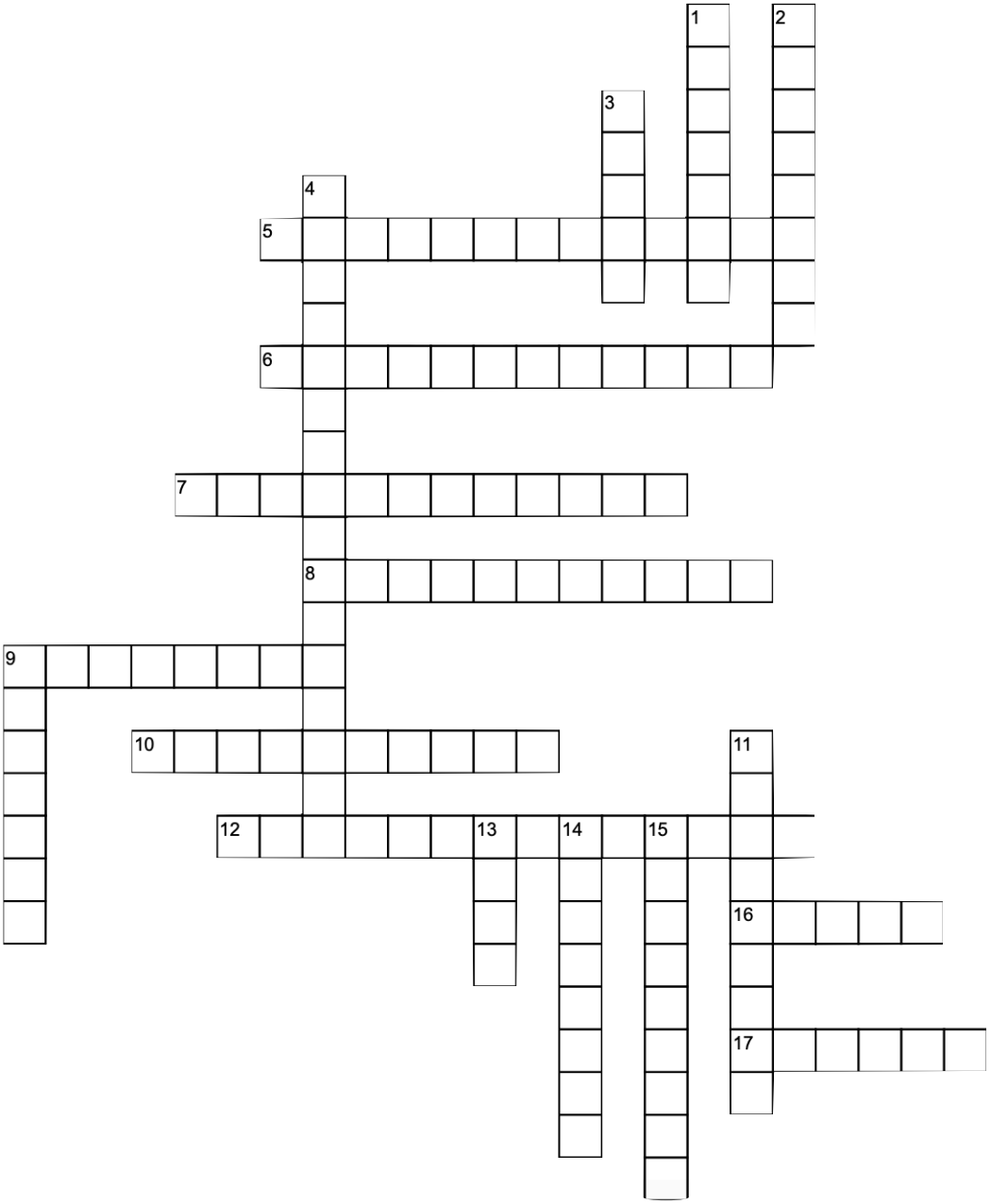
In light of these persistent injustices the imperative to explore alternative legal frameworks which better serve the Global South. Third World Approaches to International Law (TWAIL) provides such an avenue. TWAIL scholars argue that a fundamental reimagining of international law that centers the perspective of the formerly colonized is necessary if we wish to decolonise the eurocentric underpinnings of international law. By engaging with TWAIL, incorporating insights from necropolitics, and drawing inspiration from radical visions such as the Pan-African declaration, we can develop a framework for international law that challenges us to critically examine who is truly represented by the term 'human' in the Universal Declaration of Human Rights. This approach is not merely academic; it has profound contemporary relevance as we grapple with ongoing global inequalities, the climate crisis, and persistent forms of neo-colonialism. As we reflect on the UDHR's legacy, historian Samuel Moyn's words ring painfully true: the Universal Declaration of Human Rights 'was less the annunciation of a new age than a funeral wreath laid on the grave of wartime hopes. The world looked up for a moment. Then it resumed its postwar agendas.' Indeed, the UDHR was but a footnote in a discussion about balancing power in the postwar period.

While the Universal Declaration sidestepped the realities of imperialism, the Pan-African Congress placed anti-colonial struggle at the very center of their conception of rights and justice. This earlier vision, though overshadowed on the world stage, proved prophetic in its understanding of the true challenges facing the postwar world.

The legacy of the Fifth Pan-African Congress, embodied in leaders like Nkrumah, Kenyatta, and Banda, reminds us that challenging unjust international norms is not just a theoretical exercise, but a practical necessity. As future lawyers of the Global South, you inherit this tradition of critical engagement with international law. Your role is not just to interpret the law as it stands, but to actively shape it, ensuring that it truly serves the interests of all nations and peoples, not just the powerful few.

To quote and take the words of Keguro Macharia further, I do not have the patience to 'insist that I am somewhere in its footnotes and marginalia. I am the addressee of the Pan-African Declaration, as are all those on the side of freedom.' It is now our task to carry that vision forward, using the law as a tool for justice, equity, and genuine self-determination.

CROSSWORD



ACROSS

5. A legal remedy available to an owner who seeks the return of their property (2 words).
6. The SCA is located in this city.
7. Appointed by a court to manage the finances, property, or estate of a person with diminished mental capacity (2 words).
8. The only province with three local seats of the High Court (2 words).
9. The largest residential university in South Africa.
10. Unity or agreement based on mutual support and shared interests and goals.
12. Appointed by a court to represent a person with diminished mental capacity (3 words).
16. The number of judges required for a quorum in the Constitutional Court.
17. The name of a coin and a national park.

DOWN

1. Legal proceedings with only one party (2 words).
2. The web of trade routes between Africa, Asia and Europe (2 words).
3. The action of making something law.
4. The UCT building formerly named the “School of Humanities Building” was renamed after this anti-apartheid activist known for his contributions to language policy and planning in South Africa (2 words).
9. Synonym for “proportional” (2 words).
11. This person founded the Black Consciousness Movement (2 words).
13. The abbreviation that is of French origin, meaning “respond, if you please”.
14. A person’s permanent country of residence.
15. An order issued by a court that either prohibits or compels a party’s conduct.

‘YOU ARE A CITIZEN, A RESIDENT’

A REPLY TO OZZY AROMIN’S ‘PAPERS, PLEASE?’

By Thurston Geswindt[1]

August 2024

I. INTRODUCTION

Aromin recently made a noteworthy contribution to the latest edition of Altum Sonatur.[2] I discovered their article titled ‘Papers, Please?’, while browsing the magazine online. It immediately caught my attention, as it delved into the laws of international citizenship and nationality — an area of particular interest to me, given my own complex relationship with the European Union (EU) and especially the Dutch citizenship regime. I must commend Aromin for introducing a unique line of argument and illuminating several nuanced and, in my opinion, often overlooked aspects of the nationality law debate.

However, I felt compelled to write this response because, despite the article’s ambitious central thesis and generally well-supported arguments, certain points left me unconvinced. Some arguments, in my view, contained internal inconsistencies, were overly theoretical, and at times, failed to consider the perspectives of ordinary people who directly engage with the impugned citizenship regimes. Additionally, certain points seemed to present a conflated view of the current South African nationality law.

At the outset, I wish to clarify that my intention in writing this reply is not to disprove Aromin’s piece but to contribute, in good faith, to the ongoing discourse. I intend my reply to feed into the debate and perspectives within this area of law and policy and ensure that this area remains a robust, rigorous, and contentious space, all while upholding academic integrity and academic freedom.

I will organise my response into three distinct parts. In the first part, I will address the conceptual distinctions concerning the nature of citizenship and the underlying principles that govern its determination. The second part will examine the relationship between formerly colonised peoples and citizenship regimes that seek to integrate them into migration, residence, and citizenship acquisition processes within the former colonising power’s territory. The final part will conclude by summarising the salient points discussed in this response.

II. THE CONCEPTUAL DISTINCTIONS IN CITIZENSHIP

Aromin starts their piece by setting out the principles utilised by European countries to ascertain whether a child born in a particular territory meets the criteria for citizenship in that territory. I will restate those principles here, but the definitions I provide are slightly different to the ones used by Aromin in their article. The principles are that of *ius soli* — which provides that citizenship is acquired by birth within a particular state, regardless of parental citizenship. This would mean, for instance, that a child born in Canada automatically becomes a Canadian citizen regardless of whether one or both of their parents were Canadian citizens or held permanent residency status in Canada at

[1] LLB Student *University of Cape Town*.

[2] O Aromin, ‘Papers Please?’ *Altum Sonatur*, Vol. 15, May 2024, pp 14-15.

the time of their birth. The other principle is that of *ius sanguinis*, which holds that a person wherever so born in a particular state is a citizen of that state, *if and only if*, at the time of his or her birth, one or both of his or her parents were a citizen of that state or held permanent residency in that state. Keeping with the previous example, this would mean that a child born to a Canadian citizen(s) or to a holder(s) of Canadian permanent residency may be eligible for Canadian citizenship automatically at the time of their birth. In the Netherlands, a child automatically becomes a Dutch citizen at the time of their birth if one or both of their parents hold Dutch citizenship at that time.

Aromin uses the conceptual distinctions between *ius soli* and *ius sanguinis* to argue that in South Africa, in terms of the *ius sanguinis* principle, it would be a *sufficient condition* for a child born in this country to automatically acquire South African citizenship by virtue of one or both of their parents holding permanent residency in South Africa at the time of their birth. I found this argument flawed to the extent that, on my understanding of this country's citizenship regime, a child born to a holder of South African permanent residency will only acquire citizenship, *inter alia*, upon reaching the age of majority. In other words, a child born in South Africa to a permanent resident(s) is *not* automatically considered a citizen of this country at the time of their birth. The child may only apply by way of a formal application to the Department of Home Affairs for citizenship at the age of eighteen. Other than having attained majority, the child needs to meet certain other, *necessary conditions*, to become a citizen, such as that their birth must have been formerly registered, and they must have lived in South Africa since birth until becoming a major (or until their eighteenth birthday). What I am trying to get at is that citizenship does not vest automatically at the time of birth, as Aromin seems to suggest for a child born to a South African permanent residency holder(s), but instead, that the ability for that child so born to acquire citizenship would be a suspensive condition contingent upon that child reaching the age of majority, amongst other things.

Proceeding on this premise, Aromin, in my view, tried to toy around with the idea that South Africa follows both the *ius sanguinis* principle as well as the *ius soli* principle. They posit that, 'South Africa, for instance, primarily follows the *ius sanguinis* [sic.] system, but slightly veers towards the direction of *ius soli* [sic.].' In my opinion, South Africa subscribes to neither of these principles. I say this because a child born in South Africa does not automatically acquire citizenship regardless of their parent's citizenship status, because being born in South Africa is not a *sufficient condition* to acquire South African citizenship without more. Therefore, it cannot be said that South Africa adopts the *ius sanguinis* principle. On the other hand, if we consider the definition that I have provided for the *ius soli* principle — ordinarily — a child born to one or two parents who are permanent residency holders of a particular state, automatically receives citizenship of that state in which their parents hold permanent residency. However, this is not the case in South Africa, for the reason I have pointed out above. In this country, a child born to one or two parents who hold South African permanent residency, only acquires citizenship at the time they reach the age of majority, among other things, not automatically as the time of birth, as the *ius soli* principle would ordinarily hold. The legislation governing South Africa's citizenship regime has thus altered the operation of the *ius soli* principle to make it the case that merely being born in South Africa to a permanent residency holder(s) would not be a *sufficient condition* for automatically or *ex lege* or by implication receiving citizenship without more.

In my view, an altered principle can no longer be said to be the original principle, and must be taken for what it is. Imagine that you have a classic chocolate chip cookie recipe that calls for butter, sugar, eggs, flour, and chocolate chips. This is your original principle. Now, if you decide to replace the butter with applesauce to make it healthier, the resulting cookies will taste

different. While they might still be delicious, they are no longer the original chocolate chip cookies. Instead, they are now 'applesauce chocolate chip cookies' and should be recognised as such. In the same way, when a principle is altered, it becomes something new and should be acknowledged for what it has become, rather than being considered the original principle. Therefore, in my opinion, South Africa does not subscribe to either principle, and instead, has formulated a new principle which is arguably unphased by the principles aforementioned in favour of furthering its constitutional prerogative underpinned by the values of human dignity, equality, and freedom. To ensure absolute clarity, I should stress that I am exclusively considering the case of children born to a permanent residency holder(s). While it is a *sufficient condition* for a child born to one or two South African citizens to obtain citizenship automatically at birth, this does not extend to children born to a permanent residency holder(s). Therefore, I am doubtful whether the principles of *ius soli* or *ius sanguinis* are relevant in determining the citizenship status of children so born to a permanent resident(s) in South Africa.

III. THE COLONIAL PATH TO CITIZENSHIP

N In Aromin's next point, and the bulk of their piece, they introduce this notion of an emerging third path to citizenship — one of 'possessing a citizenship of a former colony'. To illustrate Aromin's argument in my own words, a former citizen (and/or their descendants) of a previously colonised state could potentially be eligible for the citizenship of the former colonising power. A hypothetical example might involve a former citizen of the former Dutch colony of Suriname, or their descendants, being eligible for Dutch citizenship (in continental the Netherlands) after gaining independence from the Netherlands.

Aromin presents Spain and Portugal as examples, both of which have granted the people of their former colonies an expedited process for obtaining Spanish and Portuguese citizenship, respectively. The Spanish citizenship regime, according to Aromin, provides that citizens of former Spanish colonies only need to reside in Spain for two years in order to acquire Spanish citizenship and are exempt from the usual ten-year requirement for third-country nationals. I should probably explain what I mean by 'third-country nationals'. Well, in a situation in which two states are concerned — for instance, the Netherlands and France — a third-country national would be any person who is not a national of either state; or in the context of the EU, nationals of states who are not member states of the EU are considered to be third-country nationals. If I take Aromin's example, a national from neither Spain nor any former Spanish colony is considered to be a third-country national for the purposes of this reply.

By examining the case of Spain, Aromin seeks to understand why citizens from former Spanish colonies receive preferential treatment when acquiring Spanish citizenship compared to third-country nationals. Aromin arrives at several conclusions, the most notable being that Spain and Portugal, through the implementation of an attractive citizenship regime for individuals from their former colonies, are subtly continuing the colonial project and perpetuating a form of neo-colonialism. I hope this accurately reflects Aromin's argument. According to Aromin, Spain 'entices the descendants of its former subjects to live there — to work there, contribute to its economy, and assimilate into continental Spain.' It seems that Aromin is suggesting — and possibly critiquing — that Spain is using its relaxed citizenship policies and incentives to subtly recruit citizens of former Spanish colonies, or their descendants, to contribute to Spain's economy, culture, and society, now in a direct manner as opposed to indirectly during the colonial era.

I wish to present three points that I believe Aromin has overlooked in arriving at the conclusion mentioned above. These points serve as iustifications for why the path to Spanish citizenship may not be appealing to former citizens of Spanish colonies.

First, Aromin's conclusion fails to account for the significance of personal autonomy and volition in the decision to move to, reside in, and acquire citizenship in Spain. People generally have the freedom to choose where they wish to live and which citizenship to pursue, including those from formerly colonised nations who may opt to settle in the country that once ruled them. While it is conceivable that Spain might have ulterior motives in offering an accessible citizenship regime to citizens of its former colonies, the decision to accept this offer rests entirely on the individual's free will. Spain's role could be seen as making an open invitation, but it does not compel anyone to accept it. Individuals who choose to take up this offer do so on their own terms, even if they encounter administrative or financial barriers in the process. That said, the allure of Spanish citizenship may not be particularly strong, especially for former citizens of Spanish colonies, though I acknowledge that this perspective is subjective.

Secondly, Aromin's analysis does not fully recognise the role of assimilation during colonial rule. Colonised populations were often coerced into adopting the culture, traditions, and social practices of the colonising power, including following laws imposed upon them. Given that colonial domination usually extended over long periods, it is unrealistic to assume that these populations did not assimilate to some degree. This assimilation could have persisted across generations, making it understandable why, after gaining independence, some individuals or their descendants might choose to move to Spain and pursue citizenship there. They may feel a cultural connection to Spain, perceiving the Spanish way of life as their own. Consequently, they might not view their presence in Spain as contributing anything novel in terms of culture or language, especially if they already speak Spanish. The fear of losing their cultural identity through decolonisation might also motivate them to seek Spanish citizenship.

Lastly, it is important to consider that life in former colonies is often far from ideal after independence. High levels of crime, corruption, unemployment, and political instability can drive people to seek a better life in their former coloniser's territory. Some colonising powers may recognise these challenges and offer pathways to citizenship, not necessarily to further a colonial agenda, but perhaps in a spirit of humanity, even if their motives can be debated. For example, the United Kingdom (UK) has historically provided a pathway for Hong Kong residents to move to the UK, a policy rooted in their colonial relationship. The British Nationality Act of 1948 allowed Hong Kong-born residents to relocate to the UK without restrictions, and this was further expanded in 2021, providing a lifeline in the face of political unrest and economic challenges. This example suggests that the UK's motives might not be purely self-serving, but rather a recognition of the difficulties faced by residents in former colonies. And I believe the same to be true for Spain vis-à-vis its former colonies.

Aromin further raises an important concern regarding Spain's characterisation of its citizenship regime for individuals from former Spanish colonies as a 'naturalisation process'. Despite this label, these individuals only need to reside in Spain for two years to qualify for citizenship. Aromin questions how this can be considered 'naturalisation' in the traditional sense. What I believe Aromin may be hinting at is that naturalisation typically involves a significant period during which the individual contributes to the economy, either through work or study, and assimilates into the cultural and societal norms of the country. I would ordinarily concur with Aromin's point if we were discussing standard naturalisation processes without considering the relaxed requirements specific to citizens and their descendants of former Spanish colonies. It's important to recognise that these individuals are either descendants of former Spanish colony citizens or directly from former Spanish colonies. Requiring them to undergo a prolonged naturalisation process would be nonsensical or illogical because they or their ancestors have already made substantial contributions to Spain's economy, albeit indirectly during the colonial project. This is

obviously true if we assume that Spain stood to benefit from its former colonies. Furthermore, these individuals are likely already culturally assimilated, with shared cultural traits, fluency in Spanish, and familiarity with Spanish law. Compared to third-country nationals, they are arguably more 'naturalised' already, thus warranting a shortened naturalisation period.

If Aromin's argument suggests that this two-tiered system constitutes unfair differentiation, I would respectfully disagree. Nearly all citizenship regimes across Europe differentiate between various groups, offering different pathways to citizenship based on specific criteria beyond those discussed here.

On a different point, regarding Aromin's reference to Portugal's citizenship regime, I find the argument well-reasoned and generally coherent. However, there is a lack of clarity in the discussion of Portugal's approach. Aromin notes that after Portugal withdrew from its colonies, it was presumed that individuals would assume the citizenship of their newly independent countries. Yet, they also mention the enactment of Decree Law no. 308-A/75, which allowed for the acquisition or retention of Portuguese citizenship. It seems contradictory that those who did not meet the law's requirements were rendered stateless. Would they not have automatically acquired the citizenship of the new independent country?

IV. CONCLUSION

It is important to acknowledge the intricate and often contentious nature of citizenship and nationality laws, especially in the context of former colonial powers and their ex-colonies. Aromin's article provides a thought-provoking analysis of how Spain and Portugal's citizenship regimes may perpetuate neo-colonial pursuits by offering arguably preferential treatment to citizens of former colonies. While Aromin's arguments are compelling, they also raise critical questions about the complex relationship between historical legacies, personal autonomy, and the practical realities faced by individuals navigating these regimes.

My response has aimed to highlight some of the more nuanced considerations that Aromin's analysis may have overlooked, particularly the role of individual choice, the deep-seated cultural assimilation resulting from colonial rule, and the challenging conditions in post-colonial states that might drive people to seek a better life in former colonising countries. These factors suggest that the motivations behind both the citizenship regimes of Spain and Portugal and the decisions of individuals to pursue such citizenship are multifaceted and cannot be reduced solely to the perpetuation of a colonial project.

Ultimately, this reply highlighted the need for continued debate within the area of nationality law. It is crucial to approach these issues with a balanced perspective, recognising the complexities involved while remaining critical of the ways in which historical power structures continue to shape modern legal and social realities. Aromin's contribution to this dialogue is significant, and it is through such rigorous exchange that we can strive for a deeper understanding of the implications of citizenship policies and regimes both on this continent and in Europe.

‘I KNOW PLACES’

A REJOINDER TO GESWINDT'S REJOINDER

By Ozzy Aromin[1]

September 2024

I. INTRODUCTION

It is a great opportunity to participate in discourse regarding a topic one is deeply interested in. It is far greater when doing so with a colleague.

In May of 2024, a piece I had written regarding colonial components in Spanish and Portuguese nationality regimes was published in *Altum Sonatur*. [2] This article sets out by positing my central thesis; that Citizenship Regimes today contain a neocolonial component — the antithesis to decoloniality. In it, I posit that South Africa’s contemporary regime uses both *ius soli* and *ius sanguinis*; essentially, that these principles are used in tandem. Of course, my intention in doing so was to ‘start from home’, and to set out key legal principles in discourses regarding Nationality Law. After laying the foundation, I argue that, in between these two principles, a third *ius* — with a colonial history — is evident, specifically within the regimes of certain European countries. My first example is Spain. The second is Portugal. Geswindt responded to this piece, rebutting many of my discussion’s shortcomings. Of course, I am grateful for the opportunity that Geswindt’s response brings.[3] This rejoinder (to Geswindt’s rejoinder) seeks to discuss their arguments, which challenged many of my positions in many nuanced ways. Moreover, it is my attempt, too, to contribute *bona fide* to the ongoing discourse regarding citizenship regimes.

II. ‘CALL IT WHAT YOU WANT?’

(a) Defining the principles

My first premise is that South Africa takes a blended approach in between *ius soli* and *ius sanguinis*. *Ius soli* is ‘right by soil’, which confers nationality on an individual by virtue of being born within the territory of a country.[4] *Ius sanguinis* is ‘right by blood’, and also the point of contention between my view and Geswindt’s view. Geswindt posits that in applying *ius sanguinis*

> a person wherever so born in a particular state is a citizen of that state, if and only if, at the time of his or her birth, one or both of his or her parents were a citizen of that state or held permanent residency in that state.[5]

I disagree. My issue with this position is specifically the notion that citizenship by virtue of one’s permanent residency falls under the *ius sanguinis* category of determining citizenship. *Ius sanguinis* is the principle in which an individual’s nationality is determined by the nationality (my emphasis) of their parents. It has its conceptions in the 1799 French Constitution,

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[1] LLB Student *University of Cape Town*. I am grateful to Zahra Ally for several proofreads, edits, and words of advice for the initial draft of this article. Current mistakes and errors remain my own.

[2] O Aromin, ‘Papers Please?’ *Altum Sonatur,* Vol. 15, May 2024, pp 14-15.

[3] T Geswindt, ‘You are a citizen, a resident’ *Altum Sonatur,* Vol. 16, October 2024 pp 24-28.

[4] For instance, the United States.

[5] *Op cit* note 3.

which, *inter alia,* restricted French Citizenship to those who were born to French parents.[6] Hence, I find the conception of *ius sanguinis* difficult to reconcile with Geswindt's conception. At its bare, foundational level, *ius sanguinis* focuses on the nationality of one's parents.[7] The residency status of one's parents is irrelevant.

(b) Do we follow these principles?

Geswindt is of the view that 'South Africa subscribes neither of these principles.'[8] Geswindt argues that it is a new principle. I disagree. Hence, in my argument, I posit that South Africa *primarily* follows the *ius sanguinis* principle, and 'slightly veers towards *ius soli*.'[9] My intention with this was to classify the position that South Africa follows — its citizenship law taxonomy, in the wider context of other citizenship regimes. My position is so, because '[a]ny person who is born in or outside the Republic, one of his or her parents, at the time of his or her birth, being a South African citizen, shall be a South African citizen by birth.'[10] I place emphasis on the phrase 'born in or outside the Republic', along with the condition that one's parents are South African citizens. The phrase 'born in or outside the Republic' affirms the fact that one's place of birth is irrelevant. The bread and butter of this section is the fact that South African citizenship is conferred by virtue of one's parents' citizenship — South African citizenship. Hence, at its core, South African Citizenship (acquired by birth) primarily follows the *ius sagnuinis* principle which takes into account the nationality of one's parents, irrespective of where one was born.

(c) Modifying ius soli

Now, within my premise, I also contend that South African Citizenship adopts a modified *ius soli* principle in determination of individuals born in the Republic to South African permanent residents. Geswindt argues that this very modification of the *ius soli* principle results in the fact that it is no longer *ius soli.* I agree.

It is no longer a sole form of the principle, but the principle itself, tailored with a certain *added* condition; Geswindt's assertion that South Africa does not follow *ius soli* or *ius sanguinis* fails to account for the ways in which these principles are applied in South African law. Hence, I write that it '*slightly* (my emphasis) veers towards *ius soli*.' I must concede that the original It is no longer a sole form of the principle, but the principle itself, tailored with a certain *added* condition; Geswindt's assertion that South Africa does not follow *ius soli* or *ius sanguinis* fails to account for the ways in which these principles are applied in South African law. Hence, I write that it '*slightly* (my emphasis) veers towards *ius soli*.' I must concede that the original relevant legislation confers citizenship to such persons, provided that 'he or she has lived in the Republic from the date of his or her birth to the date of becoming a major' and 'his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act.'[11] However, a recent Limpopo High Court judgment affirmed the opposite, ruling that a person 'born in or out of wedlock on or after October 6, 1995 [is a South African citizen by birth] if one of his or her parents is either a South African citizen or a permanent resident.' [12]

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[6] Constitution de l'an VIII. Also see C Perelló, 'Race and nation. On *ius sanguinis* and the origins of a racist national perspective' (2018), *Fundamina* (Pretoria) vol 24 n 2.

[7] *See* The EUDO Glossary on Citizenship and Nationality (2015).

[8] *Op cit* note 3.

[9] *Op cit* note 2.

[10] South African Citizenship Act 88 of 1995, s 2(1)(*b*).

[11] *Ibid* s 2(3).

[12] *Muzore and Another v Minister of Home Affairs and Another* (4013/2021) [2023] ZALMPPHC 81 (1 September 2023) para 20.

In practical application, it seems the approach is also quite different. The Western Cape Government website reads 'if you were born in South Africa…and one of your parents…held a South African permanent residence permit at the time of your birth…and your birth was registered within 30 days — you automatically qualify for South African Citizenship.'[13] In using a personal anecdote, as far as I am aware, this *is* the current view; many of my friends, born to foreign parents with permanent residency status, are South African Citizens, who carry the 'Smart ID Cards' which were obtained after turning sixteen. But of course, this is a legal discussion, and mine and Geswindt's point of contention may point out a conflict between what the 'black letter' law is, and its judicial and practical application. Hence, my view on the matter remains unchanged. After all, this specific rule cannot be classified as one which follows *ius sanguinis*. It is not the nationality of the parents that we look at, but the place where the individual is born, *just* with an added condition (ergo, the 'modification') that the individual's parents must have permanent residency rights in South Africa.

(d) A 'Blank Space?'

I am hesitant to agree that the added condition, in itself, results in South Africa's position no longer utilising the *ius soli* principle. Geswindt argues that it is a 'new principle arguably unpersuaded by the principles aforementioned in favour of its constitutional prerogative and requirement to uphold dignity, equality and freedom.' I argue that it is *nothing new*, as mentioned above. Even so, the modified *ius soli* could fit in with the contention that it upholds dignity, equality and freedom.

Geswindt uses an analogy of a recipe to chocolate chip cookies. In following the original recipe, one would successfully make chocolate chip cookies. In replacing the butter (from the original recipe) with applesauce, one would not make chocolate chip cookies, but applesauce chocolate chip cookies. To play more with this analogy, South Africa does, indeed, have 'applesauce chocolate chip cookies'. At its very core, the cookies are still 'chocolate chip' (with this component being *ius soli*). An added bonus is a complementary ingredient: the applesauce (the addition of a condition in our South African standpoint). My question to Geswindt is, is it then truly something new and entirely different?

III. THE CASE WITH SPAIN

As Geswindt has pointed out, the pièce de resistance of my article was discussing neocolonial components in the nationality regimes of Spain and Portugal. Spain's Citizenship Regime provides that citizens of Ibero-American countries, as well as the Philippines, Equatorial Guinea, Andorra and Portugal must reside within Spain for two years to qualify for Spanish Citizenship through naturalisation.[14] This is opposed to the ten year requirement for countries that do not fall under *Articulo* 22. This 80% reduction for those listed countries is my topic of interest, specifically considering that they were all formerly part of the Spanish Colonial Empire, and I argue that Spain retains a colonial grasp. Geswindt has pointed out many ways in which my argument fell short. I must concede that, due to word count limits, I was restrained in how fully I could flesh out my arguments. Geswindt points out that I overlooked three key things in my argument, namely: (1) free will and volition; (2) the role of assimilation; and (3) life in former colonies.

(a) Free will and volition, and life in former colonies

Geswint points out that in stating that Spain's relaxation of naturalisation requirements 'entices

[13] Western Cape Government 'Immigration and Citizenship' https://www.westerncape.gov.za/general-publication/immigration-and-citizenship#:~:text=You%20can%20acquire%20South%20African,operation%20on%201%20January%202013, accessed on 9 August 2024.

[14] Código Civil (Real Decreto de 24 de julio de 1889), Art 22.

the descendants of its former subjects to live there — to work there, contribute to its economy, and assimilate into continental Spain', I fail to 'account for the significance of personal autonomy and volition in the decision to move to, reside in, and acquire citizenship in Spain.' I will address both issues (1) and (3) in this subsection, as they contradict each other. My issue with this, is that Geswindt, in mentioning free will and volition, overlooks the systemic factors and historical power dynamics that limit genuine autonomy in a post-colonial country. Indeed, emigration is a choice, but *that* choice has its nuances. Emigration to a country which colonised you, is even more so nuanced. It is crucial to acknowledge that colonial legacies have constructed a view of inferiority upon the Global South, done through 'discursive processes of othering and colonisation of culture.'[15] The Global North is constructed and framed as 'superior' and modern, whilst the Global South is constructed and framed as inferior.[16] This very fixture on the Global Arena shifts the role of 'volition' in terms of an individual choosing which country they wish to emigrate to. This fact cannot be overlooked.

This overlooking, however, is seemingly addressed in mentioning that life in former colonies may be a weighing factor in why an individual would emigrate. So my question then becomes: why is life then *so* in the former colonies? In their argument, Geswindt overlooks the financial resources of Spain in comparison to the Philippines. Of course, much of these resources can be traced to Spain's imperial enterprise — the *encomienda* (or forced indigenous labour system) and Spain's monopoly on trade. In fact, Geswindt mentions it in a different point, stating that 'it would be unjust because [the Filipino people's] ancestors have already made substantial contributions to Spain's economy, albeit indirectly during the colonial project'. These very substantial contributions place Spain's economy and development within a completely different bracket to that of the Philippines — a disproportion that clearly creates a visible distinction in one's life in a former colony. It is through the colonial project itself, attributable to Spain, that poses a hindrance to development; 300 years of colonial rule left behind infrastructure that was never truly created for the benefit of Filipinos, and life in former *colonies* must be a contributing factor.

Hence, the decision to emigrate cannot be summed up to free will and volition. There are factors that will always entice, and will always compel. In this instance, these factors can be summed up to the colonial enterprise left behind by Spain — the very colonial enterprise that lays the foundation for much of its socio-economic status, and current *relatively* higher standard of living. Within this, I am hesitant to agree that the relaxed naturalisation requirements are a reparative measure *alone*. They cannot be. Historically, much of Spain's colonies were ruled through indigenous labour systems. This is not to say that this is happening *currently*. However, it echoes some historical sentiments; hence, I state that it 'entices the descendants of its former subjects to live there — to work there, contribute to its economy and assimilate into continental Spain.' In weighing up many of the factors above and below, I cannot help but opine that it is a direct incentive to motivate the descendants of colonial subjects into contributing to Spain, rather than reparative measures.

'Reparations' refer to the 'making amends for a wrong or harm done by providing…assistance to the wronged party.'[17] Two types of formally defined reparations, relevant to our discussion, are restitution and rehabilitation. Restitution involves the restoration of the original situation of the victim prior to the occurrence of gross

[15] E Consterdine, 'Unpacking the immigration hierarchy: postcolonial imaginaries of labour migrants,' (2023) *Journal of Ethnic and Migration Studies*, p 3839.

[16] *Ibid*.

[17] Oxford English Dictionary *https://www.oed.com/dictionary/reparation_n?tl=true*, accessed on 11 September 2024.

violations of international human rights law or serious violations of international humanitarian law, involving, *inter alia*, the restoration of citizenship.[18] Rehabilitation involves legal and social services.[19] Interestingly, regarding restitution, 'restoration of citizenship' is followed by the 'return to one's place of residence' and 'restoration of liberty.'[20] It is clear that Article 19 requires the restoration of the citizenship of the country in which colonialism arguably occurred, rather than a pathway to citizenship of the country which colonised. Indeed, the provision of Spanish Citizenship may fall under rehabilitation, involving legal services, such as an easier pathway to citizenship. However, this form of rehabilitation is inadequate, as it does not benefit Filipinos in the Philippines at large. Rather, as mentioned before, it, after taking into account aspects that may affect 'free will and volition', benefits only certain descendants.

(b) 'They are already assimilated'

Geswindt's argument assumes that cultural and linguistic assimilation during colonial rule equates to voluntary and beneficial integration, overlooking the forced and often oppressive and offensive nature of such assimilation. Indeed, they acknowledge that colonised populations were 'coerced' into adopting cultural and traditional values, however this cannot be conflated as 'perceiving the Spanish way of life as their own.' In doing so, Geswindt does not differentiate between individuals with Spanish heritage, individuals with indigenous heritage, and individuals with both. In doing so, they fail to account for the loss of identity that may have been suffered throughout colonial history. This is not assimilation, nor a form of being 'more "naturalised" already.' Rather, this is *erasure*. In fact, *mestizos*[21] comprise only 2.1% of the total population.[22] Within this number, only 4 952 *identified* as Spanish in the 2020 census.[23] Make no mistake — many Filipinos do have 'Spanish-sounding' surnames, which was a policy imposed by the colonial power; Filipinos were to take a select few surnames, with most being Spanish, and a few being Native, for census purposes.[24] In terms of the Spanish language, it does not enjoy recognition as a National Language. In 2020, there were only 400 000 speakers with *at least proficient knowledge,* accounting for under 0.5% of the total population.[25] Indeed, remnants of tradition, culture, and certain linguistic influences persist in the Philippines. However, it would be quite the over-generalisation to state that Filipinos emigrate to Spain because they are already assimilated to the culture, because that is clearly not the case. Geswindt points out that a motivation for emigrating to Spain might be the 'fear of losing their cultural identity through decolonisation.' However, the very imposition of such colonial-rooted traditions saw the erasure of indigenous Filipino values and traditions — for instance, the replacement of indigenous cultures, traditions and religions, with Christianity. I certainly do not think (nor hope)

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[18] United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005), Art 19. An obvious limitation to utilising this source to provide for definitions of formally classified types of reparations, is that the guidelines are tailored towards violations of International Human Rights Law and International Humanitarian Law, rather than directly addressing reparative measures of colonialism. However, regardless, the definitions provided remain relevant in this discussion.

[19] *Ibid* Art 20.

[20] *Ibid* Art 19.

[21] Literally meaning 'mixed race' in Spanish, in this context refers to Filipinos with both native and foreign ancestries.

[22] Philippine Statistics Authority 'Ethnicity in the Philippines '2020 Census of Population and Housing' *psa.gov.ph*, accessed on 3 September 2024.

[23] *Ibid*.

[24] 'Catàlogo alfabético de apellidos' was the document in which Filipinos could choose their surnames. Pre colonial (indigenous) names were also kept, however a large portion of the choices were Spanish.

[25] S Gómez Armas, 'El español resiste en Filipinas' (19 May 2021) *COOLT https://www.coolt.com/ideas/espanol-resiste-en-filipinas_24_102.html*, accessed on 3 September 2024.

that it is the loss of Spanish aspects of a Filipino's cultural identity that is mourned.

IV. THE CASE WITH PORTUGAL

In addressing another unclear point, Geswindt points out that it is contradictory that '[Portuguese citizens living in African colonies] were rendered stateless', and asks, 'would they not have automatically acquired the citizenship of the new independent country?' I wish to clarify that they were rendered stateless when they did not acquire the citizenship of either Portugal or, in this example, Angola. Decree-law no. 308-A/75 assumed that 'persons born or *domiciled'* in an overseas territory turned independent would acquire the citizenship of the new state and deprived them of Portuguese Citizenship *ex lege*.'[26] The case I wish to present would comprise a gap between both this Portuguese Decree, and the Nationality Law of Angola during its early independence periods. The Nationality Law, from 1975, provided that those born in the territory, *inter alia*, were provided with Angolan Nationality. The issue then comes with individuals who were born in Portugal but were domiciled in Angola. The Decree Law provides that, since these individuals are domiciled in an overseas territory (Angola), they would lose their Portuguese Citizenship *ex lege*. However, since they were also not born in Angola, they did not qualify for Angolan Nationality. There were no provisions for the automatic acquisition of any nationality in this regard, hence, leaving individuals in such cases stateless — the post-colonial *lacuna* that I write is problematic.

V. CONCLUSION

Citizenship and Nationality are important components of any individual's identity. So are the laws surrounding them. The first discussion entails South Africa's view on nationality, determining the ways in which *ius soli* and *ius sanguinis* are utilised — and coalesce — when determining when and how an individual is a South African Citizen. The second discussion discusses how colonialism and neo-colonialism still are inlaid in areas of legal Citizenship. My response to Geswindt seeks to tackle many points of their argument, but also to facilitate an ongoing debate in this area of study. Two such examples were Portugal and Spain — a smaller part of the wider canvas of various European legal regimes — which undoubtedly require further research and literature. In this, I respond to their three-prong argument regarding Spain, and single point of contention regarding Portugal. Lastly, I truly am grateful for the opportunity that Geswindt's rejoinder provided, to facilitate further discussion in the sphere of Citizenship and Nationality Laws, and to discuss points that require further analysis.

[26] P Jerónimo 'Report on Citizenship Law: Angola' (April 2019) European University Institute, Robert Schuman Centre for Advanced Legal Studies.

HIDDEN STRUGGLES

from the voices of Kramer

Age discrimination. My dad is in his sixties and struggling to get a decent job.

Rohyinga Genocide in Myanmar.

Depression. Nobody knows and sometimes I don't want them to.

Poverty when you are surrounded by opulence.

Making new friends as an adult lol.

Don't wait around for others to ask you to do things. Be the one who asks!

The general lack of boundaries in the student body. Trauma-dumping; unsolicited projection; use of stressful academic periods as opportunities for spreading rumours; and over-dramatising literally everything. Let's promote therapy, going outside, and more therapy LMAO.

The general pressure of this Faculty. As much as everyone is kind & supportive the pressure is still very high! Especially, regarding articles and applying to law firms and people being signed. It can get to you very quickly.

What keeps me sane is that what is meant for you will came your way when it's your time. In the mean time keep clapping for others!

Being around people daily. It's a struggle. Social distancing for the win.

Being a foreign student and studying law at a South African university. You can't enter legal practice and your options are just very limited. UCT should do better educating us about our options.

Exercise.

The loss of a pet :(

What we need to sacrifice not only to do this degree but TO DO WELL in it. Being in the law faculty and also finding time to be there for the people in our personal lives and also finding time to enjoy our hobbies is hard. Relationships and mental health suffer.

Moving out. I miss my parents.

My toxic-ass family. ❤

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