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Online ISSN 1727-3781

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Date Submitted

17 March 2023

Date Revised

14 November 2023

Date Accepted

14 November 2023

Date Published

19 February 2024

Editor Prof H Chitimira

Journal Editor

Prof C Rautenbach

How to cite this contribution

Forere MA "The Ramifications of International Law in South Africa: *Blind SA v Minister of Trade, Industry and Competition* (CCT 320/21) [2022] ZACC 33 (21 September 2022)" *PER / PELJ* 2024(27) - DOI http://dx.doi.org/10.17159/1727-3781/2024/v27i0a15810

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DOI
http://dx.doi.org/10.17159/1727-3781/2024/v27i0a15810

Abstract

This work is centred on the judgment of the Constitutional Court in *Blind SA v The Minister of Trade* (CCT 320/21) [2022] ZACC 33 (21 September 2022), and the issues raised by this judgement. The main concern for this contribution is the overreliance on a non-ratified treaty – the Marrakesh Treaty –, which calls for the assessment of the place of international law in South Africa. The paper finds that while the issues raised in the Blind SA case – the rights of people with disability – are legitimate, the manner in which they were raised went beyond the prescripts of the Constitution.

Keywords

Blind SA; *Copyright Act*; Copyright Amendment Bill; international law; *Marrakesh Treaty*; accessible format copy; adaptation; reproduction

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1 Introduction

This article is not about the challenges that people with disability face and the importance of the *Marrakesh Treaty* thereto.[1] Equally, it is not about how member states have improved on the *Marrakesh Treaty* by providing for and implementing exceptions that go beyond the *Marrakesh Treaty*.[2] Equally, it does not undermine the humanitarian and social development goal of the *Marrakesh Treaty* as embedded in human rights, nor does it ignore the binding nature of the *Convention on the Rights of Persons with Disability* (CRPD) together with its doctrine of reasonable accommodation espoused in Article 30 of CRPD.[3] In fact, the author aligns with the spirit of the *Marrakesh Treaty* to enable people with disability to be treated in the same way as people without such disability by making copies of protected works accessible. This contribution is about the manner of implementation of the *Marrakesh Treaty* in South Africa, which usurps the role of the legislature by applying a treaty that is not ratified, irrespective of the state's intention to ratify such a treaty and the Court's power to read-in legislative text.

The importance of international law in dealing with issues that affect humankind cannot be overstated. To this end, international law has become a yardstick for modern legislatures in shaping their laws against the backdrop of minimum standards embodied in the *Charter of the United Nations* and other international treaties.[4] It is for this reason that constitutions of the world, new and old, reflect international conventions such as the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) among others.[5] Countries have grouped together regionally, continentally, and globally to address issues of common concern such as climate change, human rights and many others.[6] The inability of people with print and visual disability to access literary works became such a common concern globally, culminating in the World Intellectual Property Organisation (WIPO) doing the unthinkable – adopting a multilateral treaty limiting copyrights in literary works, the *Marrakesh Treaty to Facilitate Access to*

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1 *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled* (2013).

2 Ncube, Reid and Oriakhogba 2020 *JWIP* 149.

3 Helfer *et al World Blind Union Guide to the Marrakesh Treaty* 91.

4 Schwelb 1959 *Proceedings of the American Society of International Law* 217.

5 *International Covenant on Civil and Political Rights* (1966) (ICCPR); *International Covenant on Economic, Social and Cultural Rights* (1966) (ICESCR).

6 Beitz 2001 *American Political Science Review* 269; Cottier *et al* 2014 *Archiv des Völkerrechts* 293.

Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled (hereinafter the *Marrakesh Treaty*). I have used the word "unthinkable" because copyrights, and intellectual property in general, have been jealously protected and one could not think that there could be a treaty whose purpose is to create limitations and exceptions to the exclusive rights of owners of literary works. It is for this reason that the Treaty has been lauded as the miracle of Marrakesh. It achieved the unachievable.

Copyrights are protected internationally through the 1886 *Berne Convention* administered by WIPO, the 1994 *Trade Related Aspects of Intellectual Property Rights* (TRIPS) Agreement, administered by the World Trade Organisation (WTO), and the twin internet treaties – 1996 – *WIPO Copyright Treaty* (WCT) and the WIPO *Performances and Phonograms Treaty* (WPPT).[7] Of importance to this work is the *Marrakesh Treaty*, which was adopted in 2013 and entered into force in 2016. South Africa participated positively in the deliberations of the *Marrakesh Treaty* and lauded its adoption.[8] Although South Africa, through the executive arm of government, positively participated in the WIPO meetings that led to the adoption of the *Marrakesh Treaty* as well as the twin treaties, the country has not ratified any of the treaties mentioned above. There is, however, a legislative process that started in 2008 through the Copyright Amendment Bill (hereinafter CAB or the Bill) and the Performers' Protection Bill (PPB).[9] The discussion in this paper is limited to the CAB, particularly version B13D-2017, which was before the Courts to the exclusion of the PPB. Whereas the Memorandum on the Objectives of the Bill mentions that the Bill intends to align the South African law with the rights contained in international treaties such as the *Marrakesh Treaty*, the Bill does not mention the alignment of the copyright laws of South Africa with the relevant treaties in its main objectives. Nevertheless, it is common cause that many provisions of the Bill resemble those of the twin treaties and the *Marrakesh Treaty*. Specific to the *Marrakesh Treaty* are the following sections of the Bill: section 1 dealing with the definitions of certain terms (accessible format copy; persons with disability; authorised entities) and section 19D that creates exceptions to protected works in order to make it possible for people with disability to access such works.

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7 *Berne Convention for the Protection of Literary and Artistic Works* (1886) (the *Berne Convention*); *WIPO Copyright Treaty* (1996); *WIPO Performances and Phonograms Treaty* (1966); *Trade-Related Aspects of Intellectual Property Rights Agreement* (1994) (*TRIPS Agreement).*

8 *Blind SA v Ministry of Trade, Industry and Competition* (14996/21) [2021] ZAGPPHC 871 (7 December 2021) (hereafter *Blind SA v Ministry of Trade*) para 8.

9 Copyright Amendment Bill [B13D-2017], the previous versions being [B13B-2017] and [B13-2017]; Performers' Protection Amendment Bill [B24D-2016].

Against the backdrop of the ongoing legislative process, Blind SA approached the courts seeking that the courts declare the *Copyright Act* 98 of 1978 (hereinafter the Act) unconstitutional for violating their constitutional rights. The stated rights included the rights to equality, human dignity and freedom of speech to the extent that the Act is not aligned with the *Marrakesh Treaty*, by not allowing them to convert literary works into formats accessible to them without the consent of the owner of the copyright in those literary works.[10] The case was unopposed and the High Court granted the remedy requested by Blind SA. Since the remedy involved declaring the Act unconstitutional, the case proceeded to the Constitutional Court for confirmation. The case raises many issues, but this paper focusses on those issues relating to the application of international treaties in South Africa with a view to determining whether the courts should have applied the *Marrakesh Treaty* in the way they did.

This paper is arranged in four parts, as follows. The first is an introduction, as above, while the second part provides a summary of the arguments and the reasoning behind the judgements of both courts in the *Blind SA* case. Part examines into the issue arising from the judgement – being the place of international law in South Africa. Part four concludes the discussion.

2 Summary of *Blind SA's* decision

The civil rights organisation, Blind SA, an organisation that represents people living with blindness, approached the courts against the Minister of Trade, Industry and Competition (hereinafter the Minister) and four other respondents,[11] contending that the *Copyright Act* 98 of 1978 was unconstitutional for discriminating against them. The argument was that people living with blindness are confronted with a legal barrier, which involves seeking consent from the copyright owner in order to reformat literary works so that such works can be in formats accessible to them. This is because the Act prohibits changing a format without the consent of the copyright owner.[12]

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10 In terms of the *Copyright Act* 98 of 1978 (the Act), literary work includes, "irrespective of literary quality and in whatever mode or form expressed-
(a) novels, stories and poetical works;
(b) dramatic works, stage directions, cinematograph. film scenarios and broadcasting scripts;
(c) textbooks, treatises, histories, biographies, essays and articles;
(d) encyclopaedias and dictionaries; ·
(e) letters, reports and memoranda;
(f) lectures, addresses and sermons; and
(g) written tables and compilations."

11 The other four respondents by order of citation were: Minister of International Relations and Cooperation; Speaker of the National Assembly; Chairperson of the National Council ofProvinces; and the President of the Republic of South Africa.

12 *Blind SA v Ministry of Trade* para 8.

Specific to the unconstitutionality of the Act, Blind SA argued that the Act discriminated against people with visual and print disability. The charge of such discrimination was based on the fact that the Act limits or prohibits such persons from accessing works that persons without such disability can access and for not making provision for persons with print and visual disability to access such works in a manner contemplated by the *Marrakesh Treaty*. Therefore, the applicant contended that the Act violates their constitutional rights as contained in the Bill of Rights, which includes their right to freedom from all forms of discrimination as espoused in section 9 of the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*). The other rights that were argued to be violated by the Act included the rights to human dignity, basic and further education, freedom of expression, and participation in the cultural life of one's choice. The remedy sought by Blind SA was a declaration of unconstitutionality and the reading-in of section 19D of the CAB.

Three *amicus curae* made submissions in support of the Applicant as follows. In the main was the International Community of Jurists. They mainly argued that the Act must be aligned to the *Marrakesh Treaty*. Further, they argued that the Act violates the CRPD and the ICESCR, both of which concern the protection of the rights to education and participation in cultural activities.[13]

Second was the Media Monitoring Trust, which argued that the *Copyright Act* is inconsistent with South Africa's national *Constitution*, regional and international obligations and emphasised the need to protect the right to freedom of expression and the need to receive and impart knowledge in the digital era.[14] Lastly was ReCreate, whose arguments were not found useful.[15]

The case was unopposed. The High Court read-in section 19D of the CAB and did not find it as judicial overreach to "enact" parts of the Bill that are still going through public consultations.[16] Accordingly, the Court declared the Act unconstitutional pending confirmation by the Constitutional Court; read in section 19D of the CAB, and suspended the declaration of unconstitutionality for 24 months to afford Parliament an opportunity to rectify the unconstitutionality.[17]

Blind SA proceeded to the Constitutional Court for confirmation of the unconstitutionality of Act. In the Constitutional Court proceedings, Professor Owen Dean filed as *amicus curae*, opposing the confirmation of the finding

13 *Blind SA v Ministry of Trade* para 18.
14 *Blind SA v Ministry of Trade* para 22.
15 *Blind SA v Ministry of Trade* para 26.
16 *Blind SA v Ministry of Trade* para 27.
17 *Blind SA v Ministry of Trade* para 31.

of unconstitutionality against the Act, while ReCreate no longer filed as *amicus curae*, perhaps owing to the fact that the High Court had found their submissions not useful.[18] Otherwise, the parties remained the same.

The applicant petitioned the Constitutional Court to declare the Act unconstitutional for discriminating against people with visual and print disability. The allegation of discrimination was based on the fact that the Act limits or prohibits such persons from accessing works that persons without such disability are able to access and the fact that it did not make provision for persons with print and visual disability to access such works in a manner required by the *Marrakesh Treaty*.[19] Professor Dean objected to the reading-in of the proposed section 19D of the CAB, arguing that sections 13 and/or 39 of the Act provide avenues for exceptions to the right of reproduction to allow people with print and visual disability to access literary works.[20] The applicant was of the view that section 13 and/or section 39 limits the regulations to the reproduction exception because Article 4(1)(a) of the *Marrakesh Treaty* makes exceptions beyond reproduction to cover the right of distribution and the right of making available as provided in the WCT.[21] Finally, Professor Dean argued that the proposed section 19D was not self-executing to the extent that certain terms such as "persons with disability" and "accessible format copy" require definitions which are not catered for in the Act or in the proposed section 19D.[22] He further argued that the proposed section 19D fails to comply with the three-step test as required by the *Berne Convention* for provisions that provide for blanket access to accessible format copies.[23] The Applicant argued that definitions can be taken directly from the *Marrakesh Treaty*.[24] On the other hand, while the case was generally unopposed, the Minister of Trade objected to using section 13 of the Act to make regulations. Thus, he pointed out that section 19D goes beyond the *Marrakesh Treaty* as it embodies wider government policy to align the Act with various other international obligations for South Africa.[25] The Minister did not specify what those obligations were other than

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18 Professor Dean is an Emeritus Professor of Intellectual Property at the University of Stellenbosch, who has practised in the field of intellectual property (copyright and trademarks) for over five decades. He has largely shaped IP jurisprudence and is cited by the courts in almost every case on copyright. His expertise cannot be faulted. His bio is available at University of Stellenbosch date unknown https://blogs.sun.ac.za/iplaw/about/staff-members/owen-dean/.

19 *Blind SA v Minister of Trade, Industry and Competition* (CCT 320/21) [2022] ZACC 33 (21 September 2022) (hereafter *Blind SA v Minister of Trade* (CC)) paras 1, 15.

20 *Blind SA v Minister of Trade* (CC) paras 1, 15.

21 *Blind SA v Minister of Trade* (CC) 22.

22 *Blind SA v Minister of Trade* (CC) paras 26 and 34.

23 *Blind SA v Minister of Trade* (CC) para 35.

24 *Blind SA v Minister of Trade* (CC) paras 26-27.

25 The said obligations include the *TRIPs Agreement*, *the Berne Convention*, *the ICESCR,* as well as *Convention on the Rights of Persons with Disabilities* (2006); *Blind SA v Minister of Trade* (CC) para 14.

listing international intellectual property treaties as well as human rights treaties that South Africa is a party to, including CRPD, which are necessary for affording protection to persons living with disability. Further, the Minister objected to the reading-in of section 19D without suspending an order of invalidity as that would usurp the powers of Parliament.

Relying on Article 3 of the *Marrakesh Treaty*, the Constitutional Court found that Blind SA has standing before it as the organisation falls within the class of persons in the definition of "beneficiary persons".[26] Moving onto the merits, the Constitutional Court held that the requirement of authorisation from the copyright owner in order for people with print and visual disability to have access to accessible format copies of literary works is an unfair discrimination on the ground of disability and is contrary to section 9(3) of the *Constitution*,[27] the right to dignity contrary to section 10 of the *Constitution*,[28] and the freedom to receive and impart information contrary to section 16(1)(a) of the *Constitution*, the right of people with disability to basic education and to further education as provided for in section 29 of the *Constitution*, and the right to cultural life as espoused under section 30 of the *Constitution*.[29]

On the issue of whether section 13 can be interpreted as giving the Minister the power to make regulations as put forward by Professor Dean, the Constitutional Court found that the proper interpretation of section 13 rests on drawing a difference between reproduction and adaptation and finding what is required by reproduction.[30] To this end the Court held that it is hard to draw distinctions between reproduction and adaptation,[31] and upheld the applicant's submission that some accessible format copies go beyond reproduction and require adaptation;[32] consequently, section 13 fails to cure such constitutional infirmity because it is limited to reproductions.[33] Having found the unconstitutionality of sections 6 and 7 read with 23 of the Act in their application to persons with print and visual disability,[34] the Court proceeded to make a ruling on the appropriate remedy and the submissions made by the applicant in terms of section 172 of the *Constitution*. The Court found that the finding of unconstitutionality and the remedy thereof must be measured against the *Constitution,* not the *Marrakesh Treaty*.[35] In respect of the remedy, the court read-in the new section 13A in the Act, as informed

26 *Blind SA v Minister of Trade* (CC) para 47.
27 *Blind SA v Minister of Trade* (CC) paras 66 and 70.
28 *Blind SA v Minister of Trade* (CC) para 71.
29 *Blind SA v Minister of Trade* (CC) paras 72-74.
30 *Blind SA v Minister of Trade* (CC) para 79.
31 *Blind SA v Minister of Trade* (CC) para 83.
32 *Blind SA v Minister of Trade* (CC) paras 83 and 90.
33 *Blind SA v Minister of Trade* (CC) para 89.
34 *Blind SA v Minister of Trade* (CC) para 97.
35 *Blind SA v Minister of Trade* (CC) para 94.

by section 19D of the Bill but it limited it to literary works and artistic works forming part of such literary works. The Court then adopted definitions from the *Marrakesh Treaty* relating to accessible format copy and beneficiary person.[36]

3 Application of international law in South Africa

This part of this note demonstrates how the *Marrakesh Treaty*, a treaty not yet ratified by South Africa, was used to limit the copyright in the literary works, thereby making a compelling case for assessing the role of international law in South Africa, given how heavily the case relied on the *Marrakesh Treaty*. Of course, one is cognisant of the fact that South Africa has an intention to ratify the *Marrakesh Treaty* as expressed in the Memorandum of the Objectives of the Bill, but the fact is that the *Marrakesh Treaty* is not yet law in South Africa.

3.1 Evidence that the Blind SA decision was based largely on the Marrakesh Treaty *and less on the* Constitution

As summarised above, one will recall that the order sought in the High Court was to declare the Act unconstitutional because the Act

> does not include provisions designed to ensure that persons with visual and print disabilities are able to access works under copyright in the manner contemplated by the Marrakesh Treaty to Facilitate Access to published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled ("the Marrakesh VIP Treaty");[37]

The High Court did not question the request grounded in the *Marrakesh Treaty*. Instead, aware that there was an ongoing parliamentary process to implement the *Marrakesh Treaty*, among other things, and was wary of possible judicial overreach in granting the reading-in of a clause that was not yet law.[38] The High Court therefore held that "[a] failure to grant the orders sought in these circumstances will mark a failure of the exercise of judicial function to ensure constitutional supremacy".[39] Accordingly, the order of the constitutional invalidity of the *Copyright Act* was made. It was a blanket order of constitutional invalidity which did not specify which sections of the Act were unconstitutional.

The issue remained the same in the Constitutional Court. Blind SA requested confirmation of the findings of unconstitutionality of the Act on the

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36 *Blind SA v Minister of Trade* (CC) para 106.

37 *Blind SA v Minister of Trade* para 12.

38 In fact, the High Court found that there were no substantive reasons for Parliament to not have enacted the Copyright Amendment Bill (*Blind SA v Minister of Trade* para 27) yet there were very strong calls from South Africans to have the Bill rejected and redrafted. With this statement, the High Court ignored the constitutional requirement of engaging in public consultation.

39 *Blind SA v Minister of Trade* para 27.

basis that the Act did not contain provisions designed to ensure that persons with visual and print disability were able to access works in the manner contemplated by the *Marrakesh Treaty*. In responding to Professor Dean's submission that section 13 could be used or interpreted in such a way as to allow the Minister to make regulations to cater for the required format shifting exception instead of seeking a declaration of unconstitutionality, Blind SA brought another issue. Thus, the organisation argued that section 13 is limited to reproduction rights only, thereby falling short of Article 4(1)(a) of the *Marrakesh Treaty*, which requires exceptions to reproduction rights, distribution and the making available rights.[40] Further, responding to another objection from Professor Dean to the reading-in of section 19D of the Bill because terms such as "accessible format copy" and "persons with disability" are not defined, Blind SA argued that resort can be had to the *Marrakesh Treaty* for definitions of these terms especially in the light of section 233 of the *Constitution*, which requires courts to adopt interpretations that are consistent with international law.[41]

At the outset, there are two issues that should have rendered this case objectionable *in limine* had the case been defended. First is that the request to declare the *Copyright Act* unconstitutional should have been dismissed by both courts to the extent that the issues did not refer to specific sections of the Act that should be declared unconstitutional, and failure to mention specific sections made the submissions to be vague. Aware of this material defect in the case, the Constitutional Court, on its own account, rectified the claims by indicating that it was actually sections 6 and 7 that were facing claims of unconstitutionality.[42] Secondly, the case presented by Blind SA was based on non-compliance with the *Marrakesh Treaty*, as indicated above, and this should have been dismissed on the basis that the case does not disclose any cause of action as the *Marrakesh Treaty* is not law in South Africa – or is it? Whereas the High Court does not seem to have taken cognisance of this hurdle, the Constitutional Court on the other did, as shown in the passage quoted below, especially the second ground on which the Constitutional Court found the order sought by Blind SA to be too wide:

> The proposed order is too wide and, in some respects, imprecise. It is too wide for four principal reasons. First, it references all works under copyright. The case that Blind SA has made out concerns literary works, and, to an extent, artistic works that may form part of a literary work. Second, it would declare that the omissions of the Copyright Act fail to measure up to what the Marrakesh Treaty requires to enable persons with visual and print disabilities to have access to published works. The Marrakesh Treaty is not the standard against which inconsistency for the purposes of section 172(1)(a) is measured. Third, the proposed order stipulates for the declaration of invalidity of the Copyright Act, without identifying the provisions of the Copyright Act

40 *Blind SA v Minister of Trade* (CC) paras 21, 22.
41 *Blind SA v Minister of Trade* (CC) para 28.
42 *Blind SA v Minister of Trade* (CC) paras 48 and 97.

> that are inconsistent with the Constitution … As to the imprecision of the proposed order, it does not define what is meant by persons with visual and print disabilities; and it references what "access to works under copyright" means by invoking the Marrakesh Treaty.[43]

Based on this statement, the Constitutional Court framed its finding of unconstitutionality in respect of sections 6 and 7 of the Act for limiting the constitutional rights of persons with print and visual disability from accessing accessible format copies of literary and artistic works. Despite the quotation above, the arguments in court were, however, heavily grounded on compliance with the *Marrakesh Treaty*. For example, in establishing standing before the Constitutional Court on this matter Blind SA said:

> The application is brought in the public interest and on behalf of persons with visual and print disabilities. This class of persons is taken to fall within the definition of "a beneficiary person" in Article 3 of the Marrakesh Treaty.[44]

Further, when considering whether section 13 of the Act can be interpreted broadly to allow the Minister to make regulations that can allow reproduction exception for format shifting with a view to an avert declaration of unconstitutionality, the Constitutional Court found that section 13 was inadequate as format shifting goes beyond reproduction. In arriving at this conclusion, the Constitutional Court said:

> What this means, as the final sentence of Article 4(1)(a) of the Marrakesh Treaty provides is that "[t]he limitation or exception provided in national law should permit changes needed to make the work accessible in the alternative format". The exposition of the examples described above indicates that this cannot, with any measure of certainty, invariably take place by way of reproducing literary works (with their inclusion of artistic works), no matter how generously that term is reasonably interpreted.[45]

Based on the above, the Constitutional Court found that section 13 is not capable of broader interpretation to give effect to the final sentence of Article 4(1)(a) of the *Marrakesh Treaty*.

Having found that sections 6 and 7 of the Act are unconstitutional and being confronted with the fact that there is no definition in our law of the term "beneficiary person", the Constitutional Court reproduced Article 3 of the *Marrakesh Treaty*, which defines "beneficiary person".[46] In reproducing the said Article 3, the Court said:

> Furthermore, Blind SA has used the phrase "persons with visual and print disabilities" to mean a "beneficiary person" as defined in Article 3 of the Marrakesh Treaty. The adoption of that definition is useful, but it should be reflected in the order for the sake of clarity.[47]

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43 *Blind SA v Minister of Trade* (CC) para 94 and 95.
44 *Blind SA v Minister of Trade* (CC) para 47.
45 *Blind SA v Minister of Trade* (CC) para 89.
46 *Blind SA v Minister of Trade* (CC) paras 97 and 98.
47 *Blind SA v Minister of Trade* (CC) para 97.

Considering the above, there is no doubt that the case was heavily reliant on the *Marrakesh Treaty* even though the final verdict was based on the *Constitution*. The approach adopted by the Constitutional Court calls into question the place of international law in South Africa and in particular the place of treaty law in South Africa.

3.2 Does the Constitution *allow the Blind SA approach to rely on international law?*

This section of this note charts the provisions in the *Constitution* that refer to international law, and thereafter we will assess whether the *Constitution* allows the approach adopted by the courts. In this instance, does the *Constitution* allow the use of the *Marrakesh Treaty*, an unratified treaty, as a yardstick. Below are the provisions of the *Constitution* that refer to international law:

Non retrospective application of acts or omission under international law

Section 35(3) of the *Constitution* prohibits the retro-effect application of crimes or omissions under both national and international law that were not crimes during the time of their commission or omission. This is a common provision in many countries, and it simply protects individuals from being targeted by either national or international systems using criminal legislation with retro-effect.

Compliance of national law including the Constitution *to international law*

There are two prominent provisions in the *Constitution* as follows: Section 39(1)(b) of the *Constitution* enjoins the courts to consider international law when interpreting the Bill of Rights, while section 233 requires courts to interpret any legislation consistent with international law. These are key provisions in which South Africa shows its reception of international law. They suggest that interpretations not upholding international law can be regarded as not compliant with the *Constitution*. These provisions are an embodiment of the highest degree of deference to international law. They are highly unique provisions by any standard, especially because states and national courts claim the supremacy of national law.[48] They have far-reaching consequences, given the breadth of international law, as shall be shown below. On the other hand, we are seeing a new era in which South Africa looks internally, as is the case with many countries – the rise of nationalism[49] – to the extent that investment treaties mostly with developed countries such as Switzerland and Germany were not renewed and a national statute – the *Protection of Investment Act* 22 of 2015 (hereinafter *Protection of Investment Act*) – was passed to replace the investment

48 Palombino *Duelling for Supremacy* 1-5
49 Bieber 2018 *Ethnopolitics* 519.

treaties.[50] The *Protection of Investment Act* does not incorporate one of the key provisions that has been the hallmark of international commerce – the most favoured nation (MFN) clause. The MFN clause has been linked to the minimum treatment of aliens required by customary international law and also embodies equality of treatment between two aliens.[51] It therefore remains to be seen how the courts will interpret the *Protection of Investment Act* where South Africa gives preference to investors from one state over those of the other, considering section 233 of the *Constitution* including the precedence set in *Blind SA*.

Security services and state of emergency to uphold international law

Countries are very protective of their security services and would not want to subject the operations of their security services to outside scrutiny in any shape or form. Nevertheless, South Africa adopted a unique transparency standard for her security services. To this end, section 199(5) of the *Constitution* requires that "[t]he security services must act, and must teach and require their members to act, in accordance with the *Constitution* and the law, including customary international law and international agreements binding on the Republic". Further, section 200(2) provides that "[t]he primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the *Constitution* and the principles of international law regulating the use of force". These provisions showcase unprecedented deference of the regulation of security services to international law. Further, section 37(4) requires the country to uphold its international obligations applying to a state of emergency. These provisions ensure that the South African security services cannot in any way be used by the executive to act in any manner that is not sanctioned by international law, as was the case with the apartheid government, which used the security services to violate the rights of black people[52] – the Sharpeville massacre being an example.[53]

Application of international law

Chapter 14 of the *Constitution* deals with international law, particularly international agreements. To this end, section 231 vests the responsibility for negotiating and concluding international treaties in the executive. For an international agreement to be binding, it must be approved by resolution in the National Assembly and the National Council of Provinces (NCOP), unless it is an agreement of a technical or administrative nature or one which

50 Memorandum of Objects of the *Protection of Investment Act* 22 of 2015.

51 Cole 2011 *Mich J Int'l L* 540.

52 Human Rights Watch 1991 https://www.hrw.org/reports/1991/southafrica1/4.htm; Phillips and Nathan 1991 *Social Justice* 105.

53 SA History date unknown https://www.sahistory.org.za/article/sharpeville-massacre-21-march-1960.

does not require accession or ratification. Once ratified or acceded to, treaties must be enacted into law and follow the national law-making process. This means that South Africa does not follow the monist approach to the application of international law. More specifically, the *Marrakesh Treaty* is not self-executing at the national level, especially for countries that follow a dualist approach,[54] and South Africa is one of them. Certain provision in the *Marrakesh Treaty* such as Articles 4.3 and 12 clearly indicate that even those that practise monism will have to adopt national legislation to include further exceptions, should they decide to have further exceptions. Further, states would have to ensure that any further exceptions that they adopt at the national level are compliant with the three-step test and other international obligations binding on the country in question, and this shows that the *Marrakesh Treaty* is not self-executing even for monist countries.

Section 232 of Chapter 14 further recognises customary international law as law and as binding unless it is inconsistent with the *Constitution*. The formulation of section 232 subjects the validity of customary international law in South Africa to conformity with the South African *Constitution*. This formulation is not correct, as customary international law is binding on all states and its validity cannot be subjected to compliance with national law unless the State has been a persistent objector to a particular rule of the customary law in question. Professors Dugard and Coutsoudis provide a useful analysis of the South African courts' pre-constitution conflicted approach to the implementation of customary international law, which shows a number of decisions in which national law was given primacy over customary international law, and another where a customary international rule was given primacy.[55] It is the latter approach, which positions customary international law rule as a higher rule, a peremptory rule that should not be subordinated to national constitutions, which I advance here as the correct position.

It is important to this work that the provisions mentioned above (sections 37(4), 39(1)(b), 199 (5), 200(2), and 233) suggest the direct applicability of sources of international law other than treaties, yet the *Marrakesh Treaty* was given direct applicability, which is a cause for concern. Also, while a treaty that has been signed by South Africa but not domesticated can be used as an interpretive source, it cannot be enforced as it is not binding, but courts can interpret legislation in line with that treaty.[56] Meanwhile

54 Ncube, Reid and Oriakhogba 2020 *JWIP* 149.

55 Dugard and Coutsoudis "The Place of International Law" 63.

56 Dugard and Coutsoudis "The Place of International Law" 63; *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2015 1 SA 315 (CC) para 24.

Marrakesh is not even such a kind of treaty as South Africa has neither signed it nor acceded to it.

Nevertheless, the running theme in the provisions cited above is on the application of international law in South Africa. Nowhere in the *Constitution* is international law, an umbrella term for many branches of the law, defined. So, what is or are the international law or sources of international law that the South African courts must give effect to as required by sections 233 and 39(1)(b)? To this end we are guided by Article 38 of the *Statute of International Court of Justice* (*ICJ Statute*), which provides the hierarchy of sources of international law that any court faced with the task of applying international law to a dispute before it must adhere to. The *ICJ Statute* is an integral part of the *United Nations Charter*, and binding on members of the United Nations, to which South Africa is a party. Accordingly, Article 38 of the *ICJ Statute* provides as follows:[57]

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b international custom, as evidence of a general practice accepted as law;
>
> c the general principles of law recognized by civilized nations;
>
> d subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Therefore, since international law comprises of treaties, customary international law and general principles of law as primary sources, and the judicial decisions and teachings of highly qualified publicists as a secondary source of international law, South African courts must consider not only treaties that the country has ratified as well as customary international law but also general principles of law. The Constitutional Court is aware that in South Africa reliance on international law includes reliance on non-binding international law such as the general principles of law.[58] However, this certainly excludes non-binding treaties – otherwise the South African executive and Parliament would have been stripped of the power to decide which treaties to be parties to and how to implement them. Yet even with the general principles of international law, there has been debate elsewhere as to whether this refers to substantive norms or rules of interpretation such as *res judicata*, *lis alibi pendens*,[59] and this controversy has not been addressed by the Court's indicating where South Africa stands in respect of

57 *Statute of the International Court of Justice* (1949).
58 *S v Makwanyane* 1995 3 SA 391 (CC) 413.
59 Pauwelyn *Conflict of Norms in Public International Law* 380.

the general principles of international law. Nevertheless, even with the breadth of international law as provided for under Article 38 of the *ICJ Statute*, the reliance on the *Marrakesh Treaty* by both the High Court and the Constitutional Court is a judicial overreach, as treaties are applicable only after ratification and after domestication through the national law-making process. The *Marrakesh Treaty* has not been ratified; it is currently following the legislative process ahead of its accession and hence application in South Africa. The fact that Parliament has taken as long as this to pass the CAB does not result in the delegation of the Executive's power to accede to the *Marrakesh Treaty* and Parliament's law-making powers to the courts. Today, the judicial overreach in *Blind SA* affects copyright, a field that centres chiefly on relations between business and members of the public; however, tomorrow this judicial overreach would tie the hands of the Executive/Parliament and limit the country's sovereignty. Of course, there is a temptation to justify the court's overreach on the basis that the said section 19D is not contentious. However, the case is an illustration of the problems associated with section 19D, where the court had to provide guidance on whether format shifting should apply to reproduction only or should extend to adaptation rights and whether section 19D is compliant with the famous three-step test provided for in the *Berne Convention* and the *TRIPS Agreement*. Also, even assuming that section 19D is non-contentious, the courts cannot assume the legislative role. It is only when a Bill has been signed by the President that it becomes law and can be applied by the courts. Of course, one is cognisant of the powers of the courts to read-in legislative text.

South Africa's openness to international law is attributed to the dark history that the country is emerging from and has less to do with the level of democracy and respect for human rights that South Africa enjoys today.[60] In fact, studies have shown that states that emerge from conflict rely heavily on international law in their constitutions when they go through a process of reform.[61] On the other hand, states that have enjoyed histories of stability, democracy and respect for human rights do not have similar provisions. For instance, Norway, a country ranking top on a hypothetical scale of how democratic a state can be, has few provisions in its *Constitution* relating to international law, and none of them subject Norwegian laws to the scrutiny of international law. As a member to international organisations to which countries have granted sovereignty in order to enable these international organisations to function, Norway has a clause that allows international organisations to exercise powers that ordinarily vest in the Norwegian authorities.[62] It has a clause on the responsibility of authorities to ensure

60 Dugard 1997 *EJIL* 77.
61 Vereshchetin1996 *EJIL* 29.
62 *Constitution of Norway*, 1814 (as revised in 2018) art 93.

respect for human rights, but the implementation of specific provisions of treaties are to be determined by law,[63] which suggests that the application of treaties is not automatic in Norway. Likewise, the *Constitution of Canada* contains only one clause in which international law is mentioned, and this provision is similar to section 39(5) of the South African *Constitution*, which prohibits the retroactive application of acts or omissions that were not offences under Canadian or international law or that were criminal according to the general principles of law recognised by the community of nations.[64] Botswana makes no reference to international law at all in its *Constitution*,[65] while Mauritius has only one provision, section 15(3)(b) on freedom of movement,[66] which requires that actions must be judged against international law.

The over-zealous approach to international law adopted in the *Constitution* can reflect a country that comes from a history of defiance of international norms which wishes to ensure that such disregard of the laws of humanity does not repeat itself. It is therefore doubtful that a democratic South Africa today would want to defer so much to international law as was done in the *Blind SA* decision. In fact, democratic South Africa is today retreating from some of the decisions that were taken upon obtaining democracy in regard to the conclusion of international investment treaties. This is because the said international investment treaties gave rise to unpalatable results, one of them being interference in South Africa's ability to implement issues of national interest such as the empowerment of historically disadvantaged people. Another notable reconsideration was an attempt to withdraw from the International Criminal Court, which was overturned by the High Court on the grounds of unconstitutionality.[67] Whether these actions are right or wrong is not the focus of this paper, the idea here being to show that the politically stable South Africa today seems to want autonomy from international law and the institutions thereof and wants to reclaim her sovereignty.

4 Conclusion

Regarding the first issue, the application of international law in South Africa, the paper has found an array of provisions in the *Constitution* that require the direct application of international law, in particular sections 39 and 233 of the *Constitution*. While section 39 requires courts to consider international law when interpreting the Bill of Rights, section 233 mandates courts to

63 *Constitution of Norway*, 1814 (as revised in 2018) art 110.c.
64 *Constitution of Canada*, 1867 (as revised in 2011) s 11.g.
65 *Constitution of Botswana*, 1966.
66 *Constitution of Mauritius*,1968 (as revised in 2016).
67 *Democratic Alliance v Minister of International Relations and Cooperation* 2017 3 SA 212 (GP).

adopt a meaning that is consistent with international law when interpreting any law. The paper avers that even given this broad reception of international law, the courts cannot override the mandate of the Executive to ratify treaties and for Parliament to domesticate treaties as required by section 231. Despite the requirement that treaties can be applicable as law only once ratified and domesticated, the Constitutional Court applied the *Marrakesh Treaty* as though it had been ratified and domesticated. Although the Constitutional Court said it had made the finding of unconstitutionality based on the provisions of the *Constitution*, this work has shown that the case was about the *Marrakesh Treaty*. Thus, the issues before the Court, the judgement of the Court (the reasons given) as well as the remedy provided were based on the *Marrakesh Treaty* not the *Constitution*. This paper concludes that by hearing a case that alleged the violation of the *Marrakesh Treaty* and making findings and deciding on a remedy based on the *Marrakesh Treaty*, as explicitly shown above, and referring to the *Constitution* only when handing down the verdict, the courts went beyond their scope – judicial overreach. This conclusion is drawn in cognisance of the statement made by the Constitutional Court in paragraphs 102 to 105, where the Court addressed the issue of overreach.

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List of Abbreviations

CAB	Copyright Amendment Bill
CRPD	Convention on the Rights of Persons with Disabilities (2006)
ICCPR	International Covenant on Civil and Political Rights (1966)
ICESCR	International Covenant on Economic, Social and Cultural Rights (1966)
ICJ	International Court of Justice
EJIL	European Journal of International Law
JWIP	Journal of World Intellectual Property
MFN	Most Favoured Nation
Mich J Int'l L	Michigan Journal of International Law
NCOP	National Council of Provinces
PPB	Performers' Protection Bill
TRIPS	Trade-Related Aspects of Intellectual Property Rights
WCT	WIPO Copyright Treaty (1996)
WIPO	World Intellectual Property Organisation
WPPT	WIPO Phonograms and Performances Treaty (1996)
WTO	World Trade Organisation